



COMPETITION COMMISSION OF INDIA

Case No. 29 of 2016

In re:

Next Radio Limited

(Through its Company Secretary Ms. Deepal Khandelwal),
156, D.J. Dadajee Road, Behind Everest Building,
Tardeo, Mumbai-400034

Informant

And

Prasar Bharti,

Directorate General, All India Radio,
AIR Resource, Room No. 301,
3rd Floor, Akashvani Bhawan,
Parliament Street, New Delhi - 110001

Opposite Party No. 1

Ministry of Information and Broadcasting,

Government of India, Shastri Bhawan,
New Delhi-110001

Opposite Party No. 2

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member



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Order under Section 26(1) of the Competition Act, 2002

1. The information in the present matter has been filed by Next Radio through its Company Secretary Ms Deepal Khandelwal (the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (the '**Act**') against Prasar Bharti ('**OP 1**') and the Ministry of Information and Broadcasting, Government of India ('**OP 2**') (hereinafter, collectively referred to as '**OPs**') alleging contravention of the provisions of Sections 3 and 4 of the Act.
2. The Informant is a company incorporated under the erstwhile Companies Act, 1956 (now, the Companies Act, 2013) and is *inter alia* engaged in the business of Frequency Modulation (FM) Radio broadcasting services in various cities across India. OP 1 is a Government of India entity providing infrastructure facilities to the Radio and FM operators. OP 2 is the nodal Ministry for Information and Broadcasting of the Government of India responsible for formulating guidelines, regulations and policies and also issuing licenses to the Radio and FM broadcasters in India.
3. As per the information, under the FM Radio Policy for Phase II and the terms and conditions provided therein, a license Agreement was executed between OP 1 and the Informant on 20.02.2006 for sharing of the infrastructure facilities of OP 1 for the various stations/location/cities of the Informant on payment of a license fee. Thereafter, OP 2 *vide* its office order dated 25.07.2011 notified the guidelines for FM Radio Broadcasting Policy for Phase III which was subsequently modified on 21.01.2015. As per the Informant, these policies were made for broadcasting of FM radio services through private licensees.
4. It is stated in the information that OP 2 issued a Letter of Intent (LOI) dated 24.09.2015 providing an offer to the Informant for migrating its existing licenses in six cities (Delhi, Chennai, Ahmedabad, Pune, Kolkata and Bangalore) from FM Radio Policy for Phase II to Phase III for a period of 15 years with an option to execute agreements with OP 1 and other agencies



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on requirement basis and mandatory execution of grant of permission agreement with OP 2. Accordingly, the Informant executed a grant of permission agreement with OP 2 on payment of necessary migration fee for migration of its existing licenses in six cities in India.

5. It is stated that OP 1, based on the migration policy of OP 2, made available a draft agreement on the website of OP 2 for the license fee payable by the licensed FM Radio broadcasters to OP 1 for the use of licensed infrastructure annually upon migration from FM Radio Policy for Phase II to FM Radio Policy for Phase III. The Informant *vide* its letter dated 05.11.2015 requested OP 1 to reconsider certain clauses of the draft agreement and raised concern over the increase in the license fee as it will put additional financial burden on its business. The Informant had informed OP 1 that it shall sign the agreements once the issues raised by it are resolved. The Informant also stated that the agreements executed with OP 1 in respect to the aforesaid six cities are valid and subsisting and it will execute fresh agreements upon expiry of the existing agreements.
6. It is stated that OP 1, *vide* its letter dated 12.11.2015, refused to reconsider the aforesaid request of the Informant regarding the issue of increase in the license fee in the draft agreement. Also, OP 1 did not acknowledge the validity of the existing agreements executed by the Informant with OP 1. As per the Informant, OP 1 raised the license fee in the draft agreement in an arbitrary manner even without affording any opportunity of hearing to it thereby abusing its dominant position and violating the principles of natural justice. OP 1 again sent a letter dated 18.11.2015 and called upon the Informant to execute new agreements for infrastructure sharing under FM Phase III and to complete the necessary requirements to avoid any complications. Thereafter, few letters were exchanged between the parties but no settlement could be arrived at. Feeling aggrieved by the arbitrary increase in the license fee and imposition of unreasonable terms in the aforesaid draft agreement by the OPs, the Informant filed a Writ Petition (Civil) No. 1074/2016 before the Hon'ble High Court of Delhi.



7. The Informant has stated that OP 1 and OP 2 enjoy a monopolistic position in the market of providing infrastructure facilities and licenses to the Radio and FM operators. It is alleged that OP 1 and OP 2 are abusing their dominant position and are attempting to thrust upon the Informant an increased financial burden in the form of revised license fee for sharing and use of licensed infrastructure through the aforesaid draft agreement in contravention of the provisions of Section 4 of the Act. It is averred that the Informant, having no bargaining power, has been compelled to follow the dictates of OP 1 and OP 2.
8. As per the Informant, the following clauses of the draft agreement are anti-competitive in contravention of the provisions of the Act:
- (i) **Clause 3.2.3 (i):** The license fees for the open space, covered space and other miscellaneous facilities shall increase @ 5% every year on the last license fee paid whereas, as per the existing agreement the license fee is increased by 10% after two years.
 - (ii) **Clause 3.2.3 (ii):** The increase in the license fee for the tower aperture has been doubled to @ 5% every year on the last license fee paid.
 - (iii) **Clause 3.3:** In the event of a default in the payment, the rate of interest to be paid is 18% whereas, as per the existing agreement the interest payable in such event is @ SBI PLR +2% p.a.
 - (iv) **Clause 6.1(a)(ii):** Licensee shall keep provisions while creating common transmission infrastructure (CTI) to meet future requirements of licensor (to increase power of its FM transmitter or adding a new channel) at no cost to licensor, including initial and recurring costs.



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- (v) **Clause 6(m):** Liability of licensee to pay taxes, present or future, as may be levied by the municipality on account of any infrastructure constructed for the purposes of CTI within the premises of OP 1.
- (vi) **Clause 7.4:** In the event of emergent or technical necessity, the licensor shall have the right to disallow the licensee from using the licensed infrastructure, after providing prior notice wherever possible. However, the clause absolves the licensor from paying any penalty/ damages to the licensee due to such non-provision and further stipulates that the licensee shall continue to pay the license fees even for the period it does not use the infrastructure.
- (vii) **Clause 12.3:** The right to terminate the agreement has been revised to six months' notice or payment of three months license fee whereas, as per the existing license it is three months' notice or payment of three months' license fee.
- (viii) **Clause 14:** The authority to nominate the sole arbitrator lies with OP 1.
9. Based on the above averments, the Informant *inter alia* has prayed the Commission to initiate an enquiry against the OPs for their aforesaid anti-competitive conduct and hold them guilty under the provisions of Sections 3 and 4 of the Act.
10. The Commission has perused the information and heard the parties through a preliminary conference on 18th August, 2016. The Commission has also considered the written submissions filed by the Informant and the OPs in support of their contention. The Commission observes that the Informant is mainly aggrieved by the alleged unilateral and arbitrary terms contained in the aforesaid draft agreement of OPs for migration from FM Radio Policy for Phase II to FM Radio Policy for Phase III in violation of the provisions of Sections 3 and 4 of the Act.



11. The Informant has contended that OP 1 is an enterprise for the purpose of Section 2(h) of the Act as leasing of infrastructure facilities to the private radio stations cannot be considered as a sovereign function. It is submitted that OP 1 is in a dominant position in the relevant market of 'services for use of infrastructure, tower, open spaces and common facilities for operation of private FM radio stations by private FM radio companies'. The Informant has averred that, in comparison to the existing agreement, there is a 300% increase in the license fee payable for the common facilities in the draft agreement and this increase in the license fee is arbitrarily determined by the OPs without any consultation/ approval from the office of the Chief Advisor (Cost), Ministry of Finance. It is submitted that the Informant has made substantial investment towards setting up of radio broadcasting business and currently it is under a huge financial stress. It is stated that the license fee proposed by the OPs in the draft agreement is not justified as there is already a provision for an increase in the license fee in the existing agreement and by doing so OPs are trying to gain unjust enrichment at the cost of the Informant.

12. In their written submission, the OPs have submitted that the allegation of abuse of dominance by OP 1 is manifestly incorrect as it is not determining the rate of license fee in question. It is submitted that the Government of India approves the said fees after extensive examination and consultation with the Chief Adviser (Cost), Department of Expenditure, Ministry of Finance and after taking inputs from all concerned. It is submitted that the Informant was granted FM licence to use of airwaves by the Government of India as part of its sovereign functions which is coupled with conditions of public trust and maximisation of public interest, not maximisation of private profit. It is submitted that the FM Radio Policy of the Government of India has two primary objectives *i.e.* to provide transmission infrastructure to the FM radio broadcasters and to provide a level playing field to all broadcasters because it would be very difficult for FM radio broadcasters to purchase



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land and erect a transmission tower thereon or to erect a transmission tower on an existing building. As per the OPs, the cost involved in creating the aforesaid infrastructural facilities would have created entry barrier for the FM radio broadcasters.

13. It is submitted that co-location of transmission infrastructure on OP 1's lands and towers will not only reduce the costs but also ensure a level playing field amongst the broadcasters in each city and it is beneficial for them. Because, all broadcasters will broadcast from the same location, access the same transmission infrastructure have the same power will incur the same broadcasting costs. It is further submitted that the policy of mandating co-location is based on the recommendation of the Telecom Regulatory Authority of India (TRAI). The OPs have denied the allegations that the rate of license fee determined in the draft agreement for the use of OP 1's infrastructure under FM Radio Policy for Phase III are excessive, unreasonable and an instance of abuse of dominant position by OPs. It is submitted that the increase in license fee for licensee under FM Radio Policy for Phase III is marginal and nominal as compared to FM Radio Policy for Phase II and by no stretch of imagination it can be termed as unreasonable. It is also submitted that migration to FM Radio Policy for Phase III from Phase II confers substantial benefits to the Informants and other FM Radio operators such as networking, right to carry news, right to retain existing frequency *etc.* Based on the above contentions, the OPs have submitted that the allegations of the Informant do not raise any competition concerns in terms of the provisions of either Section 3 or 4 of the Act.
14. Before dwelling on the issue of the alleged violation of the provisions of Sections 3 and 4 of the Act in the matter, the Commission deems it appropriate first to determine the issue whether OP 1 and OP 2 can be covered under the definition of 'enterprise' in terms of the provisions of Section 2(h) of the Act or not. The Commission observes that OP 1 is an enterprise as it is engaged in the services of providing infrastructure



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facilities to FM radio broadcasters on the basis of payment of a license fee which is a commercial activity that squarely fall under the definition of 'enterprise' in terms of Section 2(h) of the Act. As far as the function of OP 2 is concerned, the Commission observes that it is a nodal Ministry for Information and Broadcasting of the Government of India and is *inter alia* engaged in the formulation of guidelines, regulations and policies for those matter incidental and ancillary to the information and broadcasting sector in India. These activities, when considered holistically, cannot be said to be commercial in nature and hence, does not fall under the definition of 'enterprise' as defined under Section 2(h) of the Act.

15. It may be noted that Section 3 of the Act deals with prohibition of anti-competitive agreement. As per Section 3(1), no enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition (AAEC) in India. Section 3(3) and 3(4) read with Section 3(1) of the Act proscribe horizontal and vertical anti-competitive agreements respectively. For the applicability of Section 3(3) of the Act, it is necessary that the parties are engaged in identical or similar trade of goods or provision of services *i.e.* parties must be operating at horizontal level. However, in the present case, OP 1 is a service provider and OP 2 is the nodal Ministry of the Government of India responsible for formulating guidelines and policies. Seemingly, they are not engaged in identical or similar trade of goods or provision of services. Hence, the allegations of Informant do not fall foul of Section 3(3) of the Act. With regard to the alleged vertical anti-competitive agreement between OPs, the Commission observes that the alleged conduct of OPs cannot be examined in terms of the provisions of Section 3(4) of the Act because OP 2 is not enterprise. Moreover, OP 1 and OP 2 are not operating at different stages or levels of the same production chain in respect of provision of services. Based on the above, the Commission is of the view that no *prima facie* case



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of contravention of any of the provisions of Section 3(3) or 3(4) of the Act is made out against the OPs in the instant matter.

16. With regard to the allegations of abuse of dominant position by OPs, it may be noted that, as per the scheme of the Act, the position of dominance of an 'enterprise' is to be seen in the context of a relevant market within which such enterprise is alleged to be abusing its dominant position. Since OP 2 is not an enterprise, for the reason recorded under para 14 above, its alleged conduct cannot be examined in terms of Section 4 of the Act. However, the activities of OP 1 is squarely covered under the definition of 'enterprise' as per Section 2(h) of the Act hence, the alleged abusive conduct can be examined in terms of the provisions of Section 4 of the Act. To examine the allegations of abuse of dominance by OP 1, it is essential to first determine the relevant market and then to examine whether it is in a dominant position in that relevant market or not.

17. Since the allegations of the Informant relate to the provision of infrastructure facilities for the operation of FM radio stations, to understand the nuances of the said market, it is germane to discuss the contours of FM radio broadcasting scenario in India. It may be noted that owing to its wide coverage, terminal portability and affordability radio broadcasting has been the main source of entertainment, information and education amongst a large section of population in India. Presently, radio broadcast is aired/transmitted in Short Wave (SW), Medium Wave (MW) and Frequency Modulation (FM) in analogue mode. All India Radio (AIR), the public broadcaster functions under control and supervision of OP 1, has a network comprising of 237 stations with 380 transmitters (149 MW transmitter, 54 SW transmitter & 177 FM transmitter), which provide radio coverage to 99.14 % of the population and reaches 91.79% area of the country. However, FM coverage of AIR transmitters is only 37% of the territory of India. In digital radio transmission, AIR is running a test transmission based on DRM (Digital Radio Mondiale) technology since 2009.



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18. It is observed that FM Radio broadcasting, due to its versatility, is considered as a better medium to provide information, education and entertainment. During Ninth Five Year Plan, the Government of India adopted a policy for improving the variety of content and quality of radio broadcasting. The thrust areas for radio broadcasting were on improvement of program content, providing wider choice of programs, improving broadcast quality and enhancing technical features. With this vision, FM Radio Policy Phase I was launched in 1999-2000, under which 21 private FM channels became operational in 12 cities in India. Then, the Government of India introduced Phase II FM Radio Policy on 13th July, 2005 under which 243 FM channels became operational in 86 cities. Due to exponential growth of FM radio industry and demand for further expansion to cover cities with population of more than one lakh through private participation, Government of India notified FM Phase III policy guidelines on 25th July, 2011 extending FM radio services to about 227 new cities/towns, with a total of 839 new FM radio channels thereby bringing a total of 294 cities under radio FM coverage. Subsequently, the Government of India consulted TRAI to give its recommendations on migration of existing Phase II licensees to Phase III and based on the recommendations of TRAI, the migration policy for the existing Phase II Licensees to Phase III FM Radio Policy was notified by the Government of India.
19. The Commission notes that broadcasting of radio programme through FM radio channels requires infrastructure facilities which is provided by OP 1 to the FM radio channel operators, including the Informant on payment of a license fee and subject to entering into an agreement. As per Section 2 (t) 'relevant product market' *means a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use.* It is noted that the services provided by OP 1 to private radio FM channel operators are unique and no other organisation can provide the same which makes the services offered by OP 1 as non-



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substitutable and non-interchangeable. Thus, the relevant product market in the matter is “*market for provision of infrastructure facilities for FM radio broadcasting*”. The relevant geographic market has been defined under Section 2(s) of the Act as “*a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas*”. The Commission notes that as per clause 5.1 of GOPA executed between OP-2 and the Informant stipulates that ‘*It is mandatory for the permission holder [Informant] to co-locate transmission facilities on existing common transmission infrastructure (CTI) tower in a city*’ [emphasis added]. Further, FM Radio policy for Phase III and GOPA provide that, in a given city, each of the private FM broadcasters has to necessarily co-locate its transmission facilities on the existing infrastructure of OP-1. Thus, if OP-1 has infrastructure facilities in a given city, the private FM broadcasters have no option but to avail the services of OP-1. It also appear that infrastructure requirements from a technical perspective may not be similar across cities and the same is dependent on the demographics of the given location. Thus, the relevant geographic market appears to be the geographic area of the city, where the FM broadcaster wants to offer broadcasting services. Hence, each of the six cities (Delhi, Chennai, Pune, Ahmedabad, Kolkata and Bengaluru) in which the Informant has been offered to operate FM broadcasting services is a separate and distinct geographic market. Accordingly the relevant markets in the instant matter may be considered as “*market for provision of infrastructure facilities for FM radio broadcasting in each of the six cities where the Informant has been offered to operate FM broadcasting services*”.

20. Having delineated the relevant market, the next issue is to determine whether OP 1 is in a dominant position in the relevant markets. In this regard, the Commission observes that OP 1 appears to have infrastructure available in all the six cities where the Informant has been offered to operate



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FM broadcasting services. As noted earlier, if OP-1 has infrastructure facilities in a given city, the private FM broadcasters offering services therein have no option but to co-locate their transmission facilities on the existing infrastructure of OP 1. Thus, the Commission is of the view that OP 1 enjoys dominant position in each of the relevant markets delineated above.

21. The Informant has alleged that various clauses of the draft agreement proposed by OP-1 for Phase III FM Radio Policy are unfair and discriminatory. The Commission has perused the aforesaid draft agreement and is of the view that several clauses of the draft agreement for FM Radio Policy for Phase III *prima facie* appear to be one-sided and heavily tilted in favour of OP 1. Some of such clauses are: (i) increase in license fee (for open space, covered space and other facilities) by 5% per year on the last license fee paid against the existing rate of 10% after two years [clause 3.2.3(i)]; increase in license fee for tower aperture at 5% every year on the last license fees paid against the existing rate of 2.5% [clause 3.2.3(ii)]; in the event of default in payment, the rate of interest to be paid is 18% whereas, as per the existing agreement it is @ SBI PLR +2% p.a. (clause 3.3); licensee has to keep provisions for meeting the future requirements of OP 1 for increasing the power of its own transmitters and/ or adding a new channel/ transmitter using CTI chain [clause 6.1(a)(ii)]; licensee to pay taxes, present or future, as may be levied by the municipality on account of any infrastructure constructed for the purposes of CTI within the premises of OP 1 [clause 6(m)]; OP 1 will have power to disallow the use of licensed infrastructure without paying any penalty/ damages whereas the licensee shall continue to be liable to pay annual license fee to the licensor for the period of non-use (clause 7.4); the authority to nominate the sole arbitrator lies with OP 1 (clause 14) *etc.*
22. The Commission observes that even though these kind of terms and conditions are standard term of contracts that are provided to the counterpart, a dominant player should be more careful with such terms of the



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contract to see that such conditions remain fair, reasonable and justified. The Commission also observes that no opportunity was accorded to the Informant by OP 1 to negotiate the aforesaid terms of the draft agreement. Thus, the Commission is of the view that by imposing the aforesaid one-sided unfair terms and conditions on the Informant and other private FM radio broadcasters through the draft agreement Phase III FM Radio Policy, OP 1 *prima facie* abused its position of dominance in the relevant market in contravention of the provisions of Section 4 of the Act.

23. The Commission notes that the Hon'ble High Court of Delhi had disposed of the Writ Petition (Civil) No. 1074/2016 filed by the Informant on 29.04.2016 after relying on its earlier order in Writ Petition No. 2913/2016 which was filed by *Reliance Broadcast Network Limited against the Prasar Bharti and Anr.* Upon perusal of the said order of the High Court of Delhi, it seems that the Informant has amicably settled the matter with OP 1. However, the Commission is of the opinion that the settlement of parties as per the aforesaid order of the Hon'ble High Court of Delhi would not deter the proceedings before the Commission as the Act does not provide for any settlement between the parties for any alleged anti-competitive activity.
24. Therefore, considering in totality of the information, submissions made by the parties and all other material available on record, the Commission is of the view that there exists a *prima facie* case of contravention of the provisions of Section 4 of the Act by OP 1 in the instant matter and it is a fit case for investigation by the Director General ('DG'). Accordingly, under the provisions of Section 26(1) of the Act, the Commission directs the DG to cause an investigation into the matter and file an investigation report within a period of 60 days from the date of receipt of this order. Further, the Commission directs that during the course of investigation, if involvement of any other party or parties is found, the DG shall investigate the conduct of such other party or parties who may have indulged in the said contravention.



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25. The Commission makes it clear that nothing stated in this order shall tantamount to final expression of opinion on the merits of the case and the DG shall conduct the investigation without being swayed in any manner whatsoever by the observations made herein.
26. The Secretary is directed to send a copy of this order to the DG along with the information and other submissions filed by the parties.

**Sd/-
(Devender Kumar Sikri)
Chairperson**

**Sd/-
(S. L. Bunker)
Member**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

**Sd/-
(U. C. Nahta)
Member**

**New Delhi
Date: 04/07/2017**