



COMPETITION COMMISSION OF INDIA

Case No. 10 of 2018

Bharat Sanchar Nigam Limited (BSNL)

P-10, New CIT Road,
5th Floor, Telephone Kendra,
Kolkata – 700073, West Bengal

Informant

And

M/s Indus Towers Limited

Godrej Waterside, 8th Floor,
Tower-1, Unite- 801, Plot No. 5,
Block DP, Sector- 5, Saltlake City,
Kolkata- 700091, West Bengal

Opposite Party

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Present

For the Informant:

Mr. Dipankar Chowdhry, DE/IP Lease/CMTS/CTD, BSNL
Ms. Leena Tuteja, Advocate

For Opposite Party :

Mr. Samir Gandhi, Advocate
Ms. Aditi Gopalakrishnan, Advocate
Ms. Shreya Singh, Advocate
Mr. Neeraj Manchanda, Authorised Representative



Order under Section 26(2) of Competition Act, 2002

1. The present information has been filed by Bharat Sanchar Nigam Limited (“**Informant/BSNL**”) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the “**Act**”) against M/s Indus Towers Limited (hereinafter, the “**Opposite Party/ITL**”), alleging contravention of the provisions of Section 4 of the Act.

2. Brief facts and allegations in the present case are summarised as under:
 - a. The Informant *i.e.*, BSNL is stated to be a public sector undertaking engaged in the business of providing telecom services, *inter-alia*, cellular mobile telephone services, across India except the metro service areas of Delhi and Mumbai.

 - b. The Opposite Party *i.e.*, ITL is a private company incorporated under the provisions of the Companies Act, 1956 and is engaged in the business of providing passive infrastructure to Telecom Service Providers (“**TSPs**”), BPOs, *etc.*, on a sharing basis and is a licensed infrastructure provider of Department of Telecommunication, Government of India.

 - c. It has been submitted that the Informant requires sites for expanding its mobile network for the purpose of operating and providing continuous and uninterrupted services to its customers in the Kolkata Telecom District. On 09.09.2008, the Informant entered into an Infrastructure Sharing Agreement (“**Infrastructure Sharing Agreement**”) with the Opposite Party. Under the said Agreement, the Opposite Party agreed to provide access to its passive infrastructure to the Informant on mutually agreed terms. The Opposite Party, being a Licensed Infrastructure Provider was under an obligation to treat all the TSPs equally and provide equal access to IP sites to all TSPs.

 - d. It has been averred that the Informant had been requesting the Opposite Party to provide feasible sites to it since 2016. Allegedly, despite the Infrastructure Sharing Agreement and obligation of the Opposite Party under the guidelines



issued by the Telecom Regulatory Authority of India (“**TRAI**”), the Opposite Party has acted in violation of such guidelines by refusing to provide feasible sites to the Informant.

- e. The Informant has alleged that the Opposite Party is a dominant infrastructure provider in Kolkata Telecom District, owning around 2588 sites. It has been pointed out that competitors of the Informant *i.e.*, Airtel, Vodafone and Idea, who are the major telecom operators in Kolkata are the investors/ promoters/ shareholders of the Opposite Party. Out of 2588 sites owned by the Opposite Party, it has allowed the Informant to share only 6 sites (0.4%). On the other hand, the Opposite Party has allowed to share 1831 sites to Airtel (68.5%), 1981 sites to Vodafone (84.9%) and 1619 sites to Idea (68.5%).
- f. The Informant has submitted that it brought its issues before the Opposite Party and a meeting took place between them on 12.04.2016, to discuss various issues including payment, acceptance of fixed hourly consumption methodology and acquiring of new sites by the Informant. It has been alleged that even after the said meeting, the Opposite Party showed its reluctance to resolve the issues raised by the Informant. After the said meeting, the Informant succumbed to the illegal demands raised by the Opposite Party such as the rental pass through and an Addendum was prepared to the Infrastructure Sharing Agreement incorporating the said terms and conditions. However, the Opposite Party did not execute the said Addendum to the Infrastructure Sharing Agreement. Allegedly, such conduct evidences *mala-fide* intent and ulterior motives of the Opposite Party to restrict the mobile network of the Informant in Kolkata Telecom District.
- g. The Informant has submitted that subsequently, an e-mail dated 04.08.2016, was sent by it to the Opposite Party containing several issues including a request for acquiring new sites. Thereafter, *vide* e-mail dated 12.08.2016, the Opposite Party replied to the said e-mail sent by the Informant, mentioning the issues such as rental pass through and energy billing model. The Opposite Party also shared 157 sites in Kolkata for feasibility check. Further, on 29.11.2017, a meeting was convened for the discussion of energy billing model revision of the



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Informant filed the response on Affidavit, in terms of the directions dated 24.07.2018. On 14.09.2018, the Opposite Party filed its response to the Information and additional information filed by the Informant. Thereafter, pursuant to the adjournment requests made by the Opposite Party, the preliminary conference was held on 23.10.2018. Further, Informant was given liberty to file additional documents by 26.10.2018 and the Opposite Party was granted time till 30.10.2018 to file its documents, if any.

5. The Commission has given a careful consideration to the information filed by the Informant and subsequent information filed by way of Affidavits, responses filed by the Opposite Party, oral submissions of the parties during the preliminary conference held on 23.10.2018 and other information available on record.
6. The Commission notes that the Informant has alleged contravention of the provisions of Section 4 of the Act. To analyse the case under Section 4 of the Act, the first requirement is to delineate the relevant market as per Section 2 (r) of the Act. The next step is to assess the dominance of Opposite Party in the defined relevant market as per the factors enumerated under Section 19 (4) of the Act. Once the dominance is established, the final step is to analyse the allegations pertaining to abuse of dominance.
7. In relation to the relevant market, Opposite Party has stated that the relevant market in the present case ought to be defined as *“the market for provision of passive infrastructure services through telecom services in India”* as the competitive conditions for supply of passive infrastructure are uniform across India. The Informant, however, has not delineated the relevant market in information.
8. The Commission notes that Telecom Infrastructure in India is primarily divided into two broad categories: (i) active infrastructure which includes spectrum, switches, microwave equipment, *etc.* and, (ii) passive infrastructure which, *inter-alia*, constitutes telecom towers along with the facilities for power back-up. Passive infrastructure can be provided on a sharing basis to the different telecom operators in the same circle. With regard to the telecom towers, two categories of entities are allowed to create such infrastructure namely, IP-I registration holders and TSPs. While IP-I registrant is allowed to provide infrastructure throughout India, the TSP's can provide such infrastructure in the State of their license.



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9. The Commission notes that the Informant is allegedly aggrieved by the conduct of the Opposite Party in denying access to its telecom sites (passive infrastructure) which was required to be shared in terms of the Infrastructure Sharing Agreement. The Informant is apparently a consumer of services relating to usage of passive infrastructure. The Commission notes that passive infrastructure may not be regarded as interchangeable or substitutable with active infrastructure, rather the two are used as complementary products. Accordingly, the two (i.e. active and passive infrastructure) constitute separate markets. Therefore, the relevant product market could be delineated as “*market for provision of passive infrastructure services to telecom service providers*”.
10. As regards the relevant geographic market, the Commission notes that the instant case pertains to Kolkata region. The Commission observes that the Department of Telecommunications has divided the country into 22 telecom circles. As the demand for passive infrastructure from telecom operators may vary from circle to circle, each of the circle could be considered as a separate relevant geographic market. Further, Kolkata has been identified as a separate circle by Department of Telecommunications. Thus, the relevant geographic market may be defined at a level of each telecom circle as “*Kolkata Circle*”. Accordingly, the Commission is of the *prima facie* view that the relevant market in the present case is the “*market for provision of passive infrastructure services to telecom service providers in Kolkata Circle*”.
11. With regard to the dominant position of the Opposite Party, the Commission notes that the underlying principle for assessing dominance of an enterprise is linked to the market power enjoyed by it. An enterprise is regarded as dominant if it enjoys/possesses a position of strength in the relevant market, which enables it to operate independently of competitive forces prevailing in the relevant market; or affect its competitors or consumers or the relevant market in its favour.
12. The Informant has stated that the Opposite Party enjoys dominant position in Kolkata Telecom District as it owns around 2588 sites. In order to substantiate the allegations of dominant position of the Opposite Party, the Informant has submitted that market share of the Opposite Party in terms of total number of infra sharing to TSPs, as per



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information available on the official website of TERM, during the period 2016-2018, is in the range of 60.06 percent to 63.80 percent in the Kolkata circle. The other players operating in the relevant market are American Tower Corporation (ATC), GTL Infrastructure Ltd. and Reliance, with a market share in the range of 15-17 percent, 5-10 percent and 10 percent, respectively. The Opposite Party, on the other hand, has submitted that it is not in a dominant position in the relevant market defined by it. Reliance was placed upon the Commission's order dated 29.06.2018 passed in Combination Registration No. C-2018-05-568) to contend that there are over 700 IP-I service providers registered with DoT thereby indicating that there is no significant legal or regulatory barrier to enter into the business of providing infrastructure services.

13. Though market share is not the conclusive indicator of dominance, it acts as a potent screening criteria to ascertain competitive strength of the market players. Given the relative competitive strength of the Opposite Party as compared to other competitors in terms of their respective market shares, the Commission is *prima facie* satisfied that the Opposite Party holds a dominant position in the relevant market.
14. As the Opposite Party, *prima facie*, enjoys dominant position in the relevant market, allegations of the Informant pertaining to abuse of dominant position merit examination by the Commission.
15. In the present matter, the Informant is primarily aggrieved because of the alleged denial of access to the telecom sites operated by the Opposite Party. In its emails to the Opposite Party (*e.g.* email dated 04.08.2016), the Informant has mentioned new sites. However, *vide* Affidavit dated 02.08.2018, the Informant clarified that his grievance relates to denial of existing sites of the Opposite Party and not new sites.
16. As per the Informant, the Opposite Party, being a licensed Infrastructure Provider from the Department of Telecom, is supposed to provide non-discriminatory access to all licensed TSPs, which has been allegedly denied to the Informant, in violation of the basic principles governing the license. However, admittedly, the Informant has not approached TRAI for redressal of its grievances.



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17. The Informant has also alleged that the Opposite Party has not signed the Addendum to the Infrastructure Sharing Agreement, which provides for rent to be paid to the landlord for the use of site, while the, other Infrastructure Providers have signed similar agreements with the Informant.
18. The Informant, in its submissions dated 26.10.2018 has submitted that a meeting was held with the Opposite Party on 10.08.2016 regarding various issues and thereafter the Opposite Party stated in the email dated 12.08.2016 that it is sharing a list of 140 sites with the Informant, though list of 157 sites was attached. In response to the said email, the Informant responded *vide* email dated 31.08.2016 seeking name of the contact person and contact numbers for site survey of 157 sites. The Opposite Party was again requested in a meeting to share sites on 17.03.2017. As an outcome of the said meeting, the Informant shared a list of 172 sites *vide* email dated 18.03.2017. In response, the Opposite Party sent an email dated 05.04.2017 stating that pass through addendum is to be signed at corporate level and the Opposite Party is working on the feasibility report for 172 sites. The Informant has also referred to an email dated 04.09.2017 to state that it again approached the Opposite Party to resolve the disputes such as non-signing of rental pass through agreement, non-acceptance of Fixed Hourly Energy Consumption (FHEC) Models, but the Opposite Party did not respond to the said email.
19. The Opposite Party, in its submissions as well as during the preliminary conference, stated that it never refused to provide access to telecom towers to the Informant. As per Infrastructure Sharing Agreement, the Opposite Party can only provide feasible sites to the Informant for their network operations when an actual and valid service request is raised on it and is accepted after commercial and technical analysis. The said request is required to be made through its online portal in the prescribed format through a site application form so that certain necessary and standardised information can be sought from the customer.
20. It has been submitted that the Informant failed to place such valid request on the Opposite Party outlining *inter-alia* specific location(s), co-ordinates of the telecom towers and exact passive telecom infrastructure requirements, despite the Opposite



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Party sharing its list of tower sites (and separately login Ids and other details) with the Informant.

21. Further, as regards Informant's email dated 31.08.2016, the Opposite Party has stated that it has already conducted a "technical feasibility" test prior to giving the proposal for feasible sites and no further survey is contemplated under the Infrastructure Sharing Agreement and that the demand of the Informant to provide contact details of the concerned persons to conduct survey is not relevant to the current request. The Informant had placed request for six operational towers in 2010 and was well aware of the process to be followed in making site requests. Further, the minutes of meeting dated 12.04.2016 and email dated 12.08.2016 to the information do not record any refusal on part of the Opposite Party in providing new feasible sites and instead record discussions between the parties on various contractual issues.

22. As per the Opposite Party, the Informant's addendum which, *inter-alia*, incorporates the issues pertaining to FHEC methodology for energy billing are in complete contrast to the specific contractual terms in the Infrastructure Sharing Agreement, which specifically provides for calculation of power and fuel re-imburements on actual basis. As far as the issue of due payments is concerned, the bills raised by the Opposite Party have been incorrectly reconciled by the Informant based on the FHEC Methodology and continue to remain unpaid. Thus, the Opposite Party did not sign the said Addendum. With respect to the issue pertaining to Opposite Party failing to send their team for joint load measurement, it has been averred that since the billing methodology was contrary to the Infrastructure Sharing Agreement, there was no consensus for sending the teams for site inspection. Further, as per the Opposite Party, no disputes have been raised by the Informant in rest of the 21 circles. In terms of clause 24 of the Infrastructure Sharing Agreement, the parties were bound to refer their contractual disputes, if any, to an arbitral tribunal under the Arbitration and Reconciliation Act, 1996.

23. The Commission has considered the rival submissions of the Parties on the alleged denial of access to sites by the Opposite Party to the Informant and the documents placed on record. Based on the material available on record, the Commission



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observes that analysed the main issue relates to denial of access by the Opposite Party to telecom sites sought by the Informant.

24. In support of the alleged conduct under Section 4 of the Act against the Opposite Party, the Informant has, *inter-alia*, relied upon the minutes of the meeting dated 12.04.2016. However, the Commission notes that the minutes of meeting dated 12.04.2016 do not bring out in any manner that the Informant has been denied access to new sites. Rather, the record of discussion of the said minutes of meeting, as reproduced below, indicates that the Opposite Party agreed to give new sites to the Informant as per its terms and conditions:

“INDUS only agree to give the New sites to BSNL as per 1st EOI rate with extra rent and reimbursement of Power & Fuel charges will be receive as per actual basis.”(sic)

25. From the e-mail dated 12.08.2016, sent by the Opposite Party to the Informant, it appears that the Opposite Party was agreeable to sharing of sites, subject to fulfilment of commercial terms and conditions and site feasibility, which as per the Opposite Party were not fulfilled by the Informant. The Commission also takes note of the contentions of the Opposite Party that the Informant did not provide the required information in the prescribed form and neither did it utilise the *ismartcube* online facility to place site request and service ordered. It has been brought to the notice of the Commission that it has already conducted a ‘technical feasibility’ test prior to giving the proposal for feasible sites and no further survey is contemplated under the Infrastructure Sharing Agreement as requested by the Informant. The Commission also notes that the Informant had earlier placed a request for six operational towers in 2010, which goes on to show that the Informant was aware of the process which is required to be followed in making site requests. Further, from the information on record, as produced by the parties in connection with the same, it appears that sites for which access is pending, there are certain ongoing issues with regard to the procedure involved for providing access to the sites, billing methodology, terms of addendum to the Infrastructure Sharing Agreement, disputes relating to payment on account of certain invoices, *etc.* Thus, the Commission finds that there were



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unresolved issues between the parties, which were germane for provision of services as sought by the Informant.

26. In view of the totality of facts and evidence on record, the Commission is of the considered view that the allegation of the Informant levelled against the Opposite Party, with regard to denial of access to sites, remains unsubstantiated. In result thereof, no case within the provisions of Section 4 of the Act has been made out. Accordingly, the matter is ordered to be closed herewith in terms of the provisions of Section 26(2) of the Act.

27. The Secretary is directed to inform the Parties, accordingly.

Sd/-
(Sudhir Mital)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Dated: 09.11.2018