



**COMPETITION COMMISSION OF INDIA**

**Case No. 19 of 2017**

**In Re:**

**Informant**

**Clear Media (India) Private Limited**  
204 Shah and Nahar Industrial Estate,  
Off Dr. E Moses Road,  
Worli, Mumbai – 400018,  
Maharashtra.

**And**

**Prasar Bharti**  
Directorate General, All India Radio  
AIR Resource,  
Room No. 301, 3<sup>rd</sup> 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. Augustine Peter**  
**Member**

**Mr. U. C. Nahta**  
**Member**

**Mr. Justice G. P. Mittal**  
**Member**



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

1. The information in the present case has been filed by Clear Media (India) Private Limited (hereinafter, the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, the "**Act**") against Prasar Bharti (hereinafter, '**OP-1**') and Ministry of Information and Broadcasting (hereinafter, '**OP-2**') alleging contravention of the provisions of Sections 3 and 4 of the Act.
2. The Informant is stated to be engaged in the business of providing Frequency Modulation (FM) Radio Broadcasting Services to public in various cities across the country. OP-1 is a Government of India entity that provides infrastructure facility to FM radio broadcasters. OP-2 is the Ministry of Information and Broadcasting, which is the nodal Ministry responsible for formulating guidelines/ regulations and also issuing policies and licenses for operation of FM radio broadcasters, such as the Informant.
3. It is submitted that the Policy Guidelines of OP-2 on expansion of FM radio broadcasting services mandate, without exception, that all private FM radio broadcasters have to co-locate their transmission facilities with existing infrastructure of OP-1. The Grant of Permission Agreement (hereinafter, '**GOPA**') entered into between the Government of India and the FM radio broadcaster through which the latter is permitted to maintain and operate FM radio broadcasting channel(s) also stipulates adherence to the said policy requirement. Accordingly, the Informant entered into to an agreement with OP-1 on 7<sup>th</sup> February, 2006 for use of its Common Transmission Infrastructure (hereinafter, '**CTI**') located at HPT, Kingsway Camp, Delhi. It is stated by the Informant that the CTI was co-financed by the Informant and was constructed by Broadcast Engineering Consultants India Ltd. (hereinafter, '**BECIL**'), which is a company controlled by OP-2.
4. It is further stated that since the said CTI collapsed on 30<sup>th</sup> May, 2014, the Informant had to execute another agreement with OP-1 for use of its Interim



Transmission Infrastructure (hereinafter, 'ITI') located at Mall Road, New Delhi on an interim basis *i.e.* till such time the permanent CTI is erected again and operationalised. However, OP-1, inspite of such destruction of the Kingsway Camp infrastructure and relocation of the Informant, issued a provisional invoice dated 14<sup>th</sup> August, 2014 calling upon the Informant to pay advance license fee for the same.

5. The Informant claims that OP-1 and OP-2 enjoy monopolistic position in the relevant market for providing infrastructure facilities and licenses to FM radio broadcasters. Brief details of the chain of events leading to the filing of the information are as follows:

<b>Date</b>	<b>Event</b>
07.02.2006	The Informant entered into an agreement with OP-1 for use of CTI located at Kingsway Camp, Delhi.
30.05.2014	CTI tower used by the Informant located at Kingsway Camp collapsed resulting in the Informant not able to use the same.
10.06.2014	The Informant vacated the Kingsway Camp premises. However, the common equipment used by all broadcasters still remained at the same site as the Informant did not have the right to remove any asset that was not solely under its control.
30.06.2014	The Informant and OP-1 executed another agreement for use of ITI located at Mall Road, New Delhi on an interim basis <i>i.e.</i> till such time the permanent CTI is erected and operationalised.
01.07.2014	The Informant sent a letter to OP-1 stating that it had vacated the Kingsway Camp premises.



- 14.08.2014 OP-1 issued a provisional invoice, in advance, towards license fee for use of the CTI, which was destroyed.
- 28.08.2014 The Informant sent a letter to OP-1 reiterating that since the agreement for use of CTI at Kingsway Camp stood terminated and since the CTI premises had been vacated by the Informant, it is not liable to pay any further license fee for use of the CTI.
- 25.02.2015 OP-1 responded to the above letter of the Informant and called upon it to pay the advance license fee even though CTI had been destroyed and was not being used by the Informant.
- 31.03.2015 CTI Agreement dated 07.02.2006 came to an end in any case with the termination of GOPA for Phase-II.
- 28.08.2015 In pursuance of the agreement dated 07.02.2006, OP-1 issued an invoice calling upon the Informant to pay the license fee for the period commencing from 21.08.2015 to 20.08.2016.
- 16.11.2015 Informant sent a letter reiterating its stand that the CTI agreement dated 07.02.2006 stood terminated from 10.06.2014.
- 02.05.2016 Informant and OP-2 entered into a GOPA on 02.05.2016 for migration of the Informant from Phase II to Phase-III FM radio broadcasting regime.
- 12.08.2016 OP-1 issued an invoice and called upon the Informant to pay advance license fee for the ITI for the period commencing from 10.06.2016 to 09.06.2017.



- 11.09.2016 The Informant objected to the above invoice dated 12.08.2016. The Informant apprised OP-1 about the fact that the license fee sought to be levied by OP-1 was not in accordance with the provisions of the agreement dated 30<sup>th</sup> June, 2014 for use of ITI.
- 22.08.2016 OP-2 issued an advisory calling upon the private FM radio broadcasters to execute an agreement with OP-1 for sharing of CTI for Phase-III FM radio broadcasting regime.
- 5.10.2016 OP-1 responded to the letter dated 11.09.2016 of the Informant stating that the invoice dated 12.08.2016 regarding license fee for ITI infrastructure was raised in accordance with the rates published on the website of OP-2.
- 13.10.2016 OP-1 called upon the Informant to enter into an agreement for sharing of CTI for Phase-III regime.
- 24.01.2017 OP-1 once again called upon the Informant to execute the agreement for sharing of CTI for Phase-III regime.
- 30.01.2017 The Informant notified OP-1 of the various disputes it had in relation to the license fee sought by OP-1 and certain other issues.
- 06.02.2017 The Informant sought appointment from OP-1 to resolve their disputes/ differences in relation to the services provided by OP-1.
- 06.02.2017 The Informant paid to OP-1 the advance license fee for use of ITI for the period commencing from 10.06.2016 to 09.06.2017.



07.02.2017 The Informant expressed its willingness to execute an agreement for use of the new CTI once the same is ready and operational.

6. Based on the above, the Informant has alleged that the Opposite Parties are abusing their dominant position by indulging in the following conducts: (a) coercing the Informant to enter into an agreement with OP-1 for use of the new CTI even though the same is yet to be erected; (b) seeking license fee in excess of what has been set out in the agreement for use of ITI at Mall Road; (c) not coming forward to negotiate reasonable terms and conditions under the new CTI agreement; and (d) demanding license fee from the Informant for use of CTI at Kingsway camp even after the same has collapsed.

7. In addition to the above, the Informant has alleged that OP-1 sought to impose unfair terms and conditions in the draft agreement for use of new CTI (hereinafter, '**New CTI Agreement**'). Brief details of the objections are as follows:

7.1. *Term of the New CTI Agreement (Clause 2.1)*: The clause provides that New CTI Agreement will be in force for 15 years from the date of its execution. The Informant has submitted that the agreement needs to be co-terminus with GOPA as the Informant would need the infrastructure facility only during the currency of GOPA. Similarly, given past experience, the New CTI Agreement should terminate if the CTI infrastructure collapses or is otherwise destroyed.

7.2. *Annual increase in license fee (Clause 3.2.2)*: The clause stipulates that license fee for use of open space, covered space, tower aperture and other miscellaneous facilities at the CTI premises shall be increased every year by 5 percent on the last license fee paid. It is argued that there is no basis for OP-1 to seek an annual increase in the license fee by 5 percent. The fee is not in accordance with the report of the Ministry



of Finance on the Fixation of Rentals to be charged by OP-1 under FM Phase III regime.

- 7.3. *Interest on unpaid license fee (Clause 3.3)*: This provision stipulates that licensee shall make timely payment of license fee within 15 days of it becoming due and the licensee shall be liable to pay interest at the rate of 18 percent per annum on the unpaid license fee. It is contended that the interest rate of 18 percent per annum is unjustifiable since none of the prior agreements *i.e.* GOPA and agreements for use of CTI or ITI had such a high interest charge. The maximum interest rate charged was 10 to 11 percent.
- 7.4. *Refundable security deposit (Clause 4.1)*: As per this clause, at the time of execution of the New CTI Agreement, the licensee shall pay to the licensor an interest free refundable security deposit equivalent to the amount of license fee payable for the first year. The Informant submits that there is no basis for such demand. The New CTI Agreement cannot impose any obligation to pay security deposit when the infrastructure is not ready for use.
- 7.5. *Licensor's right to use CTI without paying any charges and liability of licensee to make good damage to CTI (Clause 6.1)*: This clause provides that the licensee shall not have objection to the licensor (OP-1) running broadcasting services by using CTI without paying any charges including taxes for such use. Further, any damage caused to the facilities/ infrastructure of the licensor shall be made good by the licensee at its own cost. It is stated that by virtue of these provisions, the Informant is also made to bear the cost of the licensor (OP-1) towards transmission of its own radio broadcast channels without sharing the cost for installation/ maintenance of the same. In other words the FM radio channels of OP-1 are entitled to use CTI without paying any charges for using the same.



- 7.6. *Lock-in period for CTI equipment (Clause 7.1):* The provision stipulates that all CTI equipment will have a lock-in period, which shall commence from the date of execution of the agreement and remain valid for 15 years from the date of operationalisation. It is submitted that such lock-in period is arbitrary and unjustified since the equipment would be locked-in beyond the term of GOPA, which would come to an end by 2030.
- 7.7. *Disallowing use of CTI in cases of technical necessity (Clause 7.4):* Pursuant to this clause, the licensor can disallow the licensee from using the licensed infrastructure in the event of an urgent and technical necessity. The licensor is not liable to pay any penalty for any such non-provision. The licensee shall continue to pay annual license fee for the period during which it is not allowed to use the licensed infrastructure. Here again, the Informant argues that there is no basis for OP-1 to demand license fee for the period during which the licensee is disallowed to use CTI especially when the disallowance is not for any fault of the licensee. The clause does not place any compulsion to even provide a reasonable notice to the Informant in case of such discontinuance.
- 7.8. *Liability for non-removal of equipment of licensee (Clause 7.7):* Under this provision, the licensee shall be liable to pay damages quantified at the rate of five times the annual rent per sq. mtr. on pro-rata basis in the event the licensee does not remove its equipment from the site upon termination of the agreement. It is stated that the said provision is vague and onerous. The licensees cannot be held liable if they are not permitted to remove the equipment as OP-1 also uses the CTI and offers broadcasting services.
- 7.9. *Termination of the agreement (Clause 12):* The clause lists various instances under which the agreement could be terminated. The Informant suggests that a clarification needs to be inserted to the effect





that the agreement shall automatically come to end in the event of destruction of CTI as well. Further, the license fee shall not be demanded in such a case.

8. The Commission considered the information in its ordinary meeting held on 22<sup>nd</sup> June, 2017. The Commission has given a careful consideration to the information and the material available on record.
9. At the outset, the Commission notes that OP-2 is a department of the Government, *inter-alia*, responsible for framing regulations/ policies/ guidelines for operation of FM radio broadcasters. The impugned conduct of OP-2 is related to its policy making functions and does not involve any economic activity. Accordingly, no case of contravention is established against OP-2.
10. Coming to the allegations against OP-1, the Commission notes that contravention of the provisions of both Section 3 and Section 4 of the Act has been alleged against OP-1. However, a holistic appreciation of the facts presented in the information do not suggest any bilateral or multilateral conduct that merits examination under Section 3 of the Act. Accordingly, no *prima facie* case of contravention of Section 3 of the Act is made out against OP-1. Since the facts and allegations presented in the information largely relate to the purported unfair conduct of OP-1, the case merits examination under Section 4 of the Act. For the purpose of analysing a case under Section 4 of the Act, it is necessary to first assess whether OP-1 enjoys a position of strength required to operate independently of the market forces in the relevant market. Only when such a position is found to be enjoyed by OP-1, it will be imperative to examine whether the impugned conduct of OP-1 amounts to an abuse or not within the meaning of the Act.
11. As a backdrop, before delineating the tentative relevant market, the Commission observes that FM radio broadcasting is one of the important mediums to transmit information, education and entertainment. During the



Ninth Five Year Plan, the Government adopted a policy for improving the variety of content and the 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 Phase I Policy was launched in 1999-2000, after which 21 private FM radio channels became operational in 12 cities. Subsequently, FM Phase II Policy was issued on 13<sup>th</sup> July, 2005 leading to operation of around 243 FM radio channels in 86 cities as per press release dated 14<sup>th</sup> August 2015 of OP-2. Thereafter, FM Phase-III Policy was issued on 25<sup>th</sup> July, 2011 which envisaged further extension of FM radio broadcasting services to a total of 294 cities with 839 radio channels. After consultation with Telecom Regulatory Authority of India (TRAI), the Government had also issued an order dated 21<sup>st</sup> January, 2015 for finalising the policy for migration of existing Phase-II licensees to Phase-III regime.

12. The Commission notes that FM radio broadcasters require transmission infrastructure to offer their services. It has been submitted that the extant Policy Guidelines and GOPA mandate, without exception, all the private FM radio operators to co-locate their facilities with existing infrastructure of OP-1. This means that the infrastructure services provided by OP-1 to private FM radio channel operators are unique and no other organisation can provide the same, which makes the transmission infrastructural services offered by OP-1 non-substitutable. Thus, the relevant product market in the instant matter appears to be the market for *“provision of infrastructural facilities for FM radio broadcasting”*. As regards the relevant geographic market, the Commission notes that Clause 5.1 of GOPA mandates that *“It is mandatory for the Permission Holder to co-locate transmission facilities on existing Common Transmission Infrastructure Tower in a city”* (emphasis added). Since the CTI and the requirements of private FM radio broadcasters are city specific, each city appears to be a separate and distinct relevant market. The allegations in the instant case relate to CTI at Delhi. Thus, the geographic territory of *‘Delhi’* appears to be the relevant geographic market. Accordingly, the relevant market in



the instant case is the market for “*provision of infrastructural facilities for FM radio broadcasting in Delhi*”.

13. With regard to the dominant position, it would be relevant to look into Clause 18 of the FM Phase III policy, which is reproduced as under:

**18. Co-location:**

18.1 *It will be mandatory for all Phase-III operators to co-locate transmission facilities in all the cities, irrespective of the fact as to whether the infrastructure of Prasar Bharati is available or not.*

18.2 *In cities where it is a vacant channel of Phase-II or an additional channel is proposed and CTI has been created by BECIL, Co-location at the site already chosen and utilization of CTI already created by BECIL will be mandatory.*

18.3 *In other cities where Prasar Bharti Infrastructure is available, co-location shall be on such existing facilities of Prasar Bharti on terms and conditions to be prescribed separately, on the existing PB towers. The successful bidders will have a choice to form a consortium and set up required CTI for that city. They will mutually decide infrastructure sharing methodology, commercial revenue sharing mode, service level agreement and methodology for upkeep of such infrastructure.*

18.4 *If suitable infrastructure of Prasar Bharti is not available, successful bidders will have a choice to form a consortium and set up required land & tower infrastructure (LTI) and (CTI) for co-location of all transmitters identified for that city. They will mutually decide infrastructure sharing methodology, commercial revenue sharing mode, service level agreement and methodology for upkeep of such infrastructure....*

(emphasis added)

14. As may be seen, the extant policy mandates that all the private FM radio broadcasters have to co-locate their transmission infrastructure on the existing facilities of OP-1. Further, as per the terms of GOPA also, it is mandatory for the permission holder/ FM radio broadcaster to co-locate transmission facilities on the existing CTI. In view of these regulatory and contractual requirements, the private FM radio broadcasters do not have any other option if OP-1 has land and transmission infrastructure in a given city. Since OP-1 has



infrastructural facilities in Delhi, the FM radio broadcasters in Delhi have no option but to co-locate their transmission facilities on the existing CTI of OP-1. Thus, OP-1 enjoys dominant position in the relevant market for provision of infrastructural facilities for FM radio broadcasting in Delhi.

15. Coming to the alleged abuses, the Commission notes that as per the information, the CTI located at Kingsway Camp collapsed on 30<sup>th</sup> May, 2014. As a result, the Informant had to move out of the said premises on 10<sup>th</sup> June, 2014 and had executed an agreement (ITI Agreement) with OP-1 on 30<sup>th</sup> June, 2014 to avail the interim infrastructural facilities from OP-1 located at Mall Road, Delhi. This facility of OP-1 at Mall Road is stated to be an interim arrangement *i.e.* for use till the time the new CTI was erected and operationalized. As per the ITI agreement dated 30<sup>th</sup> June, 2014, the Informant had to pay a sum of Rs. 29,09,338/- as licence fee per annum for use of ITI. However, OP-1 raised invoice dated 14<sup>th</sup> August, 2014 on the Informant for a sum of Rs. 21,99,762/- as license fee for use of CTI at Kingsway Camp. The billing period of this invoice was from 21<sup>st</sup> August, 2014 to 20<sup>th</sup> August, 2015. The Informant had sent a letter dated 28<sup>th</sup> August, 2014 stating that the CTI agreement dated 7<sup>th</sup> February, 2006 stands terminated pursuant to it vacating the CTI premises on 10<sup>th</sup> June, 2014. In response, OP-1, *vide* its letter dated 25<sup>th</sup> February, 2015, contended that CTI agreement dated 7<sup>th</sup> February, 2006 has not been terminated due to non-compliance of certain conditions by the Informant *i.e.* removal of the super structure. Subsequently, OP-1 raised another invoice dated 28<sup>th</sup> August, 2015 on the Informant for a sum of Rs. 24,55,057/- as license fee for the purported use of CTI at Kingsway Camp. The billing period in this invoice was from 21<sup>st</sup> August, 2015 to 20<sup>th</sup> August, 2016. From the aforesaid facts, the Commission notes that OP-1 has asked for license fee for two years from the Informant for use of CTI located at Kingsway Camp despite the same having collapsed on 30<sup>th</sup> May, 2014. *Prima-facie*, such behaviour of OP-1 without providing any service appears to be abuse of dominant position, in contravention of Section 4(2)(a)(ii) of the Act. This is more so when OP-1 itself has arranged for ITI for use by FM Broadcasters including the Informant and collected license fee for the use of ITI as well.



16. As regards the allegation of unfair terms under the New CTI Agreement, the Commission notes that similar allegations are already being investigated by the DG in Case No. 29 of 2016. In the said case, the Commission was *prima facie* satisfied that the terms and conditions of the draft CTI agreement were one-sided and heavily tilted in favour of OP-1. In addition, the Commission notes that the New CTI Agreement seeks the Licensee/ Informant to bear some of the cost of operation of the Radio FM channels operated by the Licensor/OP-1. The relevant clause of the New CTI Agreement is reproduced as under:

**6. OBLIGATIONS OF THE LICENSEE**

**6.1 The Licensee shall:**

- a (i) not object in any manner to the Licensor which is running its broadcasting services (Including IGNOU) by using CTI and the Licensor shall not pay any charges for usage of the same including initial costs and recurring costs wherever RF chain of Licensor is required to be combined.*
- (ii) Keep provisions, while creating CTI, to meet the future requirements of Licensor for increasing the power of its FM transmitter(s) and/or adding a new channel/ transmitter using CTI chain, at no cost to Licensor, including the initial and recurring costs...*

The Commission is *prima facie* convinced that the impugned terms of the New CTI Agreement are also discriminatory in so far as the same require the private FM radio broadcasters to bear the CTI cost of the radio channels operated by OP-1. Thus, the Commission is *prima facie* convinced that the alleged terms and conditions of the New CTI Agreement are in contravention of the provisions of Section 4(2)(a)(i) of the Act.

17. Accordingly, the Commission deems it fit to order an investigation in the present case. Since the allegations in the instant matter are substantially similar and/or connected with the issues in the earlier matter already being investigated by the DG in Case No. 29 of 2016, in exercise of the powers conferred under *proviso* to Section 26 (1) of the Act read with Regulation 27 of the Competition Commission of India (General) Regulations, 2009, the Commission clubs the



present case with Case No. 29 of 2016. The DG shall file a consolidated investigation report in both the above-mentioned cases.

18. The Secretary is directed to send a copy of this order to the DG, along-with a copy of the information.

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

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

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

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

**Sd/-**  
**(Justice G. P. Mittal)**  
**Member**

Place: New Delhi  
Date 06/09/2017