



COMPETITION COMMISSION OF INDIA

Case Nos. 29 of 2016 and 19 of 2017

Case No. 29 of 2016

In Re:

Next Radio Limited, Mumbai

And

**Prasar Bharti
Ministry of Information and Broadcasting**

Informant Party (IP)-1

**Opposite Party (OP)- 1
Opposite Party (OP)-2**

With

Case No. 19 of 2017

In Re:

Clear Media (India) Private Limited

And

**Prasar Bharti
Ministry of Information and Broadcasting**

Informant Party (IP)-2

**Opposite Party (OP)- 1
Opposite Party (OP)-2**

CORAM:

**Mr. Ashok Kumar Gupta
Chairperson**

**Ms. Sangeeta Verma
Member**

**Mr. Bhagwant Singh Bishnoi
Member**

Appearances:

For IP-1 & 2: Mr. Abhishek Malhotra, Ms. Atmaja Tripathi, Ms Tanya Gupta, Advocates

For OP-1: Mr. Rajeev Sharma, Mr. Saket Chanra, Ms. Radhalakshmi R, Advocates, Mr. R.K.Khan, GM(E), Mr. Chandrika Prasad, DGM(A &C), Anil Sharma, M(A&C), Mr Sanjeev, MTS, Prasar Bharati

For OP-2: Mr. Thakur Prasad Singh, Advocate, Mr. Yogendra Trehan, Dy. Director, Mr. Gajendra Sharma, Asst. Director, Mr Atin Srivastava, ASO, Ministry of Information and Broadcasting



Order

1. This common order shall dispose of sets of information filed in Case. Nos. 29 of 2016 and 19 of 2017 involving substantially similar issues.

Facts

2. Two separate sets of information, one filed by Next Radio Limited (“**IP-1**”) in Case No. 29 of 2016, and the other by Clear Media (India) Private Limited (“**IP-2**”) in Case No. 19 of 2017, were filed before the Commission under Section 19(1)(a) of the Competition Act, 2002 (“**Act**”), against Prasar Bharti (“**OP-1**”) and Ministry of Information and Broadcasting (“**OP-2**”) (collectively referred to as “**Opposite Parties**”/ “**OPs**”) alleging, *inter alia*, contravention of the provisions of Sections 3 and 4 of the Act, in respect of licensing infrastructure by OPs to FM Broadcasters.
3. IP-1 is a public limited company engaged in private Frequency Modulation (FM) broadcasting under the brand “Radio One” in seven (7) cities, namely, Delhi, Chennai, Mumbai, Kolkata, Pune, Ahmedabad and Bengaluru. It is also engaged in manufacture of television and radio transmitters and apparatus for line telephony and line telegraphy. IP-2 is also a company engaged in business of FM broadcasting services at Delhi.
4. OP-1 which came into existence on 23.11.1997, is a statutory autonomous body established under the Prasar Bharti Act, 1990, and is engaged in radio and television broadcasting as a public service broadcaster in India which owns and possesses certain infrastructure to organise and conduct public broadcasting services. OP-2 is the nodal Ministry of Government of India responsible for formulating guidelines and policies, and inviting bids for allotment of FM radio channels in various cities in India.
5. FM Phase-III Policy, issued on 25.07.2011, was amended by OP-2 *vide* its order dated 21.01.2015. *Inter-alia*, it provided for automatic migration from Phase-II to Phase-III, upon payment of Non-refundable One Time Migration Fee (“**NOTMF**”), and signing of Grant of Permission Agreement (“**GOPA**”) *etc* between private broadcasters and OP-2. As per the FM Phase-III Policy, it was mandatory for all FM broadcasters to co-locate



the transmission facilities on payment of licence fee to OP-1 and/or OP-2, as the case may be, either through OPs' towers or towers constructed by the Broadcast Engineering Consultants India Limited (“**BECIL**”) for OP-2. Accordingly, the IPs were mandated to enter into agreement with the OPs for sharing of transmission infrastructure.

6. Both Case No. 29 of 2016 and Case No. 19 of 2017 concern agreement between the IPs and the OPs in respect of licensing infrastructure provided by the OPs for broadcast of programs through radio FM channels. Since the allegations in both the informations were largely similar against OPs, the Commission while forming its *prima facie* opinion in Case no. 19 of 2017, reiterated the decision in Case No. 29 of 2016 and clubbed Case No. 19 of 2017 with Case No. 29 of 2016.

Allegations in Case No. 29/2016

7. The IP-1 executed GOPA on 10.11.2015 with OP-2 upon payment of necessary migration fee, as notified by OP-2 for migration of its existing licences in six (6) cities in India. In the meantime, a draft agreement (the “**Agreement**”) for the Licence Fee payable by the Licencee FM Radio Broadcasters annually upon migration from FM Phase II to FM Phase III for use of Licenced Infrastructure was made available. The IP-1 *vide* its letter dated 05.11.2015 requested OP-1 to reconsider certain clauses of the draft Agreement and raised concerns over the increase in the licence fee and conveyed that this would put additional financial burden on their business.
8. The IP-1 averred that OP-1 refused to reconsider the increase in the licence fee in the draft Phase III Agreement *vide* letter dated 12.11.2015 in an arbitrary manner without affording any opportunity of hearing to it. Further, IP-1 made various allegations of contravention of Section 3 and 4 of the Act with respect to the various clauses in the draft Phase III agreement to be executed between the IP-1 and the OP-1. These allegations were:
 - (i) **Clause 3.2.3 (i):** The licence fees for the open space, covered space and other miscellaneous facilities shall increase @ 5% every year on the last licence fee



paid whereas, as per the existing agreement the licence fee is increased by 10% after two years.

- (ii) **Clause 3.2.3 (ii):** The increase in the licence fee for the tower aperture has been doubled to @ 5% every year on the last licence 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):** Licencee 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.
- (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 licenced 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 stipulated that the licensee shall continue to pay the licence fee 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 six months licence fee whereas, as per the existing licence it is three months’ notice or payment of three months’ licence fee.
- (viii) **Clause 14:** OP-1 retained the authority to nominate the sole arbitrator under the arbitration clause.



9. The Commission, in its order dated 04.07.2016 passed under 26(1) of the Act, *prima facie* opined that OP-1 abused its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act and directed the Director General (“DG”) to investigate into the matter.

Allegations in Case No. 19/2017

10. IP-2 and OP-2 entered into a GOPA on 02.05.2016 for migration from Phase II to Phase-III FM radio broadcasting which mandated IP-2 to co-locate its facilities with existing infrastructure of OP-1. In this regard, IP-2 alleged contravention of Section 4 of the Act made with respect to several clauses of draft Phase III agreement to be executed between IP-2 and OP-1. The Commission *vide* its order dated 06.09.2017, under Section 26(1), noted that the allegations under Case No. 19 of 2017 were similar to the allegations raised in Case No. 29 of 2016. However, certain allegations of IP-2 were not exactly similar to the allegations made by IP-1, which are as follows:
- (i) OP-1 was demanding licence fee for CTI at Kingsway camp even after it collapsed
 - (ii) OP-1 raised an invoice as per FM Phase-III rates instead of rates agreed as per the terms and conditions of Phase II agreement dated 30.06.2014 for utilization of infrastructure of OP-1 at Mall Road Site.
 - (iii) OP-1 coerced IP-2 to sign the Phase-III agreement for CTI, even though the CTI was not yet ready/complete/operational.

Directions to the DG

11. After perusal of information in Case No. 29 of 2016 and submissions made by the parties and all other material available on record, the Commission *vide* its order dated 04.07.2017, passed under Section 26(1) of the Act, *prima facie* observed that OP-1 is an enterprise engaged in the services of providing infrastructure facilities to FM Radio broadcasters on the basis of payment of a licence fee which is a commercial activity that squarely falls under the definition of an enterprise in terms of Section 2(h) of the Act.
12. In relation to OP-2, the Commission observed as under:-



“14.....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 matters 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.”

13. The Commission, thereafter, analysed the allegations of abuse of dominant position against OP-1, as OP-2 was *prima facie* held not to be an ‘enterprise’ in terms of Section 2(h) of the Act. The Commission, in consideration of the allegations, observed that the clauses of the draft agreement for FM Phase III appeared to be tilted in favor of OP-1 and were one-sided in nature indicating abuse of dominant position. Accordingly, the Commission ordered an investigation into the allegation of inclusion of unfair and discriminatory clauses in the draft agreement under provisions of Section 4 of the Act. Also, the DG was directed to investigate the conduct of such party/ parties who may have indulged in the said contravention.
14. After examining the provisions of Section 3 of the Act, the Commission opined that no *prima facie* case of contravention of any of the provisions of Section 3(3) or 3(4) of the Act was made out against the OPs in Case No. 29 of 2016. The Commission observed that the allegations of the Informant did not fall foul of Section 3(3) of the Act as the OPs were not engaged in identical or similar trade of goods or provision of services. With regard to the alleged vertical anti-competitive agreement between the OPs, the Commission observed that the alleged conduct of the OPs could not be examined in terms of the provisions of Section 3(4) of the Act because OP-2 was not an enterprise.
15. Therefore, considering the Information, submissions made by the parties and other material available on record, the Commission was of the view that there existed a *prima facie* case of contravention of the provisions of Section 4 of the Act by OP-1 in both cases.



16. The Commission after considering the information in Case No. 19 of 2017, in its order dated 06.09.2017 under Section 26 (1) of the Act, reiterated its decision taken in Case No. 29 of 2016 by stating that OP-2 is not an enterprise. Further, considering the substantially similar nature of the issues in both cases, the Commission clubbed Case No. 19 of 2017 with Case No. 29 of 2016, and directed the DG to file a consolidated Investigation Report in both the above mentioned cases.

Investigation by the DG

17. The DG, after receiving directions from the Commission, investigated the matter and after seeking due extensions submitted a consolidated Investigation Report in both the cases on 01.01.2019. For the purpose of Investigation, the DG identified the following issues:

Issue 1: Whether OP-1 and OP-2 are enterprises?

Issue 2: What is the relevant product market and relevant geographic market for the cases under examination?

Issue 3: Whether the OPs are in a dominant position in the delineated relevant market(s)?

Issue 4: Whether the OPs have abused their dominant position in the relevant market and if so, the provisions of the Act contravened?

Issue 5 – If Issue 4 is in affirmative, the persons in charge of and responsible for the conduct of the activities of the OPs concerned.

Whether the OPs are Enterprise

18. In the orders dated 04.07.2017 and 06.09.2017, passed under Section 26(1) of the Act, the Commission observed that OP-1 is an enterprise, but did not consider OP-2 to be an enterprise. However, the DG carried out a comprehensive analysis of the provisions of Section 2(h) and Section 2(u) of the Act and relied upon the ratio laid down in various decisions by Hon'ble Supreme Court, High Court and erstwhile Competition Appellate



Tribunal (“COMPAT”); and concluded that the activities undertaken by OP-2 are in the nature of economic activities, albeit not for profit, which make it an enterprise to the extent of such services rendered by it. The summary of discussions as provided in the Investigation Report on whether OP-1 and OP-2 are enterprise in terms of provisions of the Act is summarised in the ensuing paragraphs.

19. The Investigation Report mentioned that though OP-2 is engaged in the formulation of guidelines, regulations and policies and for matters incidental and ancillary to the information and broadcasting sector in India, yet OP-2 undertakes certain activities which are commercial in nature and are beyond the formulation of guidelines, regulations, policies *etc.*
20. As per Phase II Policy, co-location of facilities was mandatory in respect of 9 cities (Delhi, Chennai, Kolkata, Mumbai, Bangalore, Hyderabad, Jaipur, Pune and Surat). The Investigation, after perusal of invoices raised by BECIL on the Informant found that tower rental is payable to OP-2 and service tax was levied on basic services at the applicable rates. BECIL is a Government of India enterprise under OP-2. Further private broadcasters were to enter into agreements with BECIL and contribute their share of CTI. The share of CTI is a lump sum payment made by the private broadcasters to BECIL. Further, as per the Memorandum of Understanding (MoU) signed between OP-2 and BECIL on 16.06.2009, BECIL was to collect rental from private broadcasters by raising invoice upon them. Out of the rental received, BECIL shall retain a percentage of such rental as maintenance and service charges and deposit the balance amount in the Consolidated Fund of India under intimation to OP-2.
21. In view of above, the investigation concluded that OP-2 *inter alia* earned annual licence fee for its towers, which fell under the domain of economic activity rather than sovereign functions. The investigation, thus, gave a finding that to this extent OP-2 is an enterprise and therefore, its conduct is also liable for further examination by the office of the DG and the Commission.



Whether OPs constitute a Group

22. In the *prima facie* orders under Section 26(1) of the Act in Case No.29/2016 and Case No. 19/2017, the Commission concluded that OP-1 was an enterprise and enjoyed a dominant position in its respective relevant markets. Investigation concluded that not only OP-1 but also OP-2 is an enterprise in terms of the provisions of Section 2(h) of the Act. The DG examined whether OP-1 and OP-2 could be said to constitute a ‘group’ in terms of Clause (b) of the Explanation to Section 5 of the Act.
23. While explaining the provision of Section 4 of the Act, the Investigation Report mentions that if two organisations are functioning directly or indirectly, by a common interest, it could be said to constitute a ‘Group’. It is relevant to ascertain as to who exercises the decision making powers in relation to the laying down of policies which are executed/performed by the organisation and the crucial business activities carried out by the organisation.
24. The DG produced several letters and notings, especially letter dated 18.08.2015 of OP-1 to OP-2, which indicated that OP-2 had actually approved/decided the rentals for provision of services towards Tower, Open space, Covered space and miscellaneous facilities and annual increases thereof both under Phase-II and Phase-III. These rates were later incorporated in the agreement along with other terms and conditions by OP-1. The investigation reached a conclusion that both for Phase II and Phase III, OP-2 was the final authority who took decision on the recommendation of Chief Advisor Cost (CAC), Department of Expenditure and fixed the rates of licence fee for Tower, Open Space, Covered Space and Other Miscellaneous Facilities. Thus, Investigation concluded that both the OPs constituted a group so far as the relevant market is concerned.

Relevant Market:

25. The Commission delineated relevant product market in both the cases as “*market for provision of infrastructure facilities for FM radio broadcasting*”.



26. With regard to the relevant geographic market, the Commission in its order u/s 26(1) of the Act, in Case No.29/2016, noted that each of the six cities (Delhi, Chennai, Pune, Ahmedabad, Kolkata and Bengaluru) in which the IP-1 was offered to operate FM broadcasting services was a separate and distinct geographic market. Whereas, the Commission in its order u/s 26(1) of the Act, in Case No.19/2017, noted that *the geographic territory of 'Delhi' appears to be the relevant geographic market.*
27. In line with the observation of the Commission, investigation also found that OP-1 and OP-2 had prescribed separate licence fee for using its infrastructure. Thus, investigation, for the purpose of delineating the relevant geographic market, considered the areas of operation (cities) of the IPs as relevant geographic market and, accordingly, delineated the same as under:-

For IP-1 “*geographic area of the city where the FM broadcaster has been offered to operate FM broadcasting services i.e. each of the seven cities (Delhi, Chennai, Mumbai, Kolkata, Pune, Ahmedabad and Bengaluru)*”.

For IP-2 “*geographic area of the city where the FM broadcaster has been offered to operate FM broadcasting services i.e. Delhi*”

Analysis of Dominance

28. Under Phase-II Policy, from 2006 to 2015, total of 336 channels in 90 cities across the country were made available for bidding. Moreover, the transmission facilities were to be co-located on existing AIR/DD towers in 81 cities and in respect of the remaining 9 cities (namely Delhi, Chennai, Kolkata, Mumbai, Bangalore, Hyderabad, Jaipur, Pune and Surat) new towers were to be constructed by OP-2, through BECIL.
29. As per the investigation, it was evident that under Phase-II Policy, the private broadcasters were to compulsorily utilise the existing facilities of OP-1 and the facilities



(i.e. tower) were to be developed by OP-2 in 9 cities. Thus, in respect of towers, OPs had 100% market share through their policy interventions.

30. Further, OP-1 provided space for construction of the towers by OP-2 and obtained licence fee from broadcasters for open space, covered space and common facilities for cities delineated as relevant geographical market. Thus, in respect of provision of infrastructure facilities for FM radio broadcasting in each of the cities delineated in the relevant market, OPs had 100% market share through policy interventions.

31. In Phase-III Policy, provision regarding co-location of transmission facilities provided dominance to OP-1. The said para regarding co-location from the policy guidelines on expansion of FM Radio Broadcasting (Phase III) reproduced hereunder:

“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 Bharati Infrastructure is available, co- location shall be on such existing facilities of Prasar Bharati on terms and conditions to be prescribed separately, on the existing PB towers.”

32. Thus, so far as the transmission facilities are concerned, *vide* para 18.1 of the said policy, it had been made mandatory for all Phase-III broadcasters to co-locate the transmission facilities in all the cities on the infrastructure of OPs, irrespective of the fact as to whether OP-1’s infrastructure was available or not.

33. Further, the DG observed that when Phase III policy was introduced, for the first time the private broadcasters were allowed a window of small time period to develop Land and Tower Infrastructure (‘LTI’) and/or CTI but that was permitted with certain riders, which were:



- (a) in the cities where LTI of OP-1 was existing, broadcasters could form a consortium and set up CTI in that city using that LTI;
- (b) in those cities where there was no existing infrastructure of OP-1/BECIL, the permission was applicable on satisfaction of the following conditions:
- (i) all the broadcasters shall have to develop a consortium within three months from the date of issue of last LOI for that city;
 - (ii) failure to do the needful within three months shall make it mandatory to utilize the services of LTI and CTI which shall be developed by BECIL.
34. Thus, according to the DG, the Phase-III policy granted a very restricted option to the broadcasters in the matter of development of provision of services of LTI and/or CTI.
35. However, as per the Telecom Regulatory Authority of India (“**TRAI**”) Consultation Paper No.7/2017 titled “Issues related to Digital Radio Broadcasting in India”, 293 FM radio stations had been made operational in 84 cities by 32 private FM broadcasters as on 31.03.2017. All of these 84 cities existed in Phase-II also where FM radio channels were operational by private broadcasters implying that no new city had been added in Phase-III expansion.
36. According to the DG, considering these facts, it could be stated that by virtue of the provisions of Phase-II and Phase-III Policy, OPs remained the sole service providers in the cities delineated as relevant market. Thus, for the purpose of provision of infrastructure facilities in the cities delineated as relevant market, the OPs could be said to have 100% market share.
37. As regards size and resources of OPs, the DG found that OP-1 earned income from sales/services during 2015-16 to the extent of Rs 999.26 crore which in the previous financial year *i.e.* 2014-15, was Rs.1301.01 crore. Apart from this income, OP-1 received other funds namely, grants/subsidies from OP-2, income from the professional/consultancy services fee, interest from term deposits, *etc.*



38. Thus, OP-1's size and resources were significant as compared to that of private broadcasters and it enjoyed an enviable position of getting grants *etc.* from government and the dominance bestowed upon it by the subsequent FM Policy.
39. OP-2 being a government department, received funds by way of demand for grants. It also earned revenue in the form of migration fee from the private broadcasters who migrated from Phase-II to Phase-III. It was ascertained from its Annual Report for the year 2017-18, that it received revenues from the private broadcasters by way of One Time Entry Fee, Migration Fee and Annual Licence Fee. The total revenue earned by OP-2 since the year 2000 was Rs 5565 crore (approx.).
40. Investigation also analysed other factors mentioned in Section 19(4) of the Act to establish the dominance and concluded that the OPs as a group enjoy position of dominance in the relevant market in each of the geographic locations covered in the instant cases.

Analysis of Abuse of Dominance:

41. Based upon the allegations levelled by the IPs and the detailed examination of the cases, the investigation formulated 14 questions/issues for analysis of the contravention of provisions of Section 4 of the Act by the OPs. Out of the 14 issues framed by the DG, the investigation found that OPs have acted in contravention of the provisions of Section 4 of the Act in respect of the following:

Issue 1: Whether conduct of OPs in not informing the enhanced licence fee and other charges payable by a broadcaster from Phase-II to Phase-III till payment of Non-refundable One Time Migration Fee (NOTMF) can be considered as anti-competitive?

42. As per policy guidelines for FM Radio (Phase-III) issued by OP-2 *vide* its order No. 38014/4/2014-FM, dated 21.01.2015, the DG found that the deadline for exercising automatic migration from Phase-II to Phase-III was 31.03.2015. Further, OP-2 *vide* its



subsequent order No.38014/4/2015-FM dated 24.02.2015 conveyed that the option to migrate from Phase- II to Phase-III was to be furnished to OP-2 before 23.03.2015 for Phase-II operators. Private broadcasters were also required to sign the agreement with OP-1 after paying NOTMF to OP-2.

43. The investigation also found that OP-2 had communicated approval of Competent Authority to OP-1, about the licence fee rates to be charged for sharing of its infrastructure under Phase II policy, vide its communication dated 16.09.2015, bearing File No. 38032/49/2014-FM. Thus, OP-1 became aware of the licence fee to be charged under Phase-III Policy on 16.09.2015.
44. Thereafter, OP-2 *vide* its order dated 24.09.2015 intimated the NOTMF to be paid by the private FM broadcasters who had opted for migration to Phase-III. The last date to withdraw the option to migrate from Phase II to Phase III was 28.09.2015. Accordingly, IP-1 was asked to pay NOTMF by 09.10.2015 (which was later extended to 27.10.2015) and sign the GOPA by 23.10.2015.
45. As IP-1 had exercised its option to migrate in March 2015, it was not aware of the licence fee at the time of exercising its option to automatically migrate to Phase-III, which was approved at a later date *i.e.* on 16.09.2015. However, IP-1 could have exercised its right to withdraw its option to migrate by 28.09.2015 as the deadline to withdraw the application was communicated to it *vide* OP-2's letter dated 24.09.2015.
46. In this regard, the DG found that IP-1 became aware about the increased licence rate of the Phase-III Agreement on 03.11.2015 when the agreement was uploaded on the website of OP-2. However, by that time it had lost the opportunity to withdraw from migrating to Phase III.
47. Against this background, the DG summoned three officials of OP-1, namely, Mr. Rajeev Kapoor, Addn. DG, Shri A.N. Sharma, General Manager (Commercial), Ms. Sukanya Sengupta, E-in-C (Retd.) and asked them to explain non-intimation of enhanced rates to the private broadcasters. The reason cited by these officials was that there is no well-



defined procedure in guidelines issued by OP-2 for this purpose. Further, OP-1 pointed out some discrepancies in OP-2's letter dated 16.09.2015 with regard to rental charges for A+ category cities and took the matter with OP-2 *vide* its letter dated 18.09.2015, followed by subsequent reminders dated 29.09.2015 and 27.10.2015.

48. From the statements of the above mentioned officials, the DG found that in spite of clear instructions of OP-2, OP-1 did not upload the agreement on its website while IP-1 paid NOTMF on 27.10.2015. It can thus be said that the OPs (OP Group) did not make efforts to intimate the enhanced rates to private broadcasters before the deadline for payment of NOTMF.
49. In view of the above, the DG concluded that IP-1 was not in a position to take an informed decision before payment of NOTMF, as the enhanced licence rates came into its knowledge only on 03.11.2015 and by that time it had lost the opportunity to withdraw from migrating to Phase-III.
50. Non-intimation of the enhanced rates to IP-1 despite the fact that OP-1 got approval for the enhanced rates from OP-2 on 16.09.2015 can be said to be unfair, which according to the investigation is the origin out of which the cause of action arose against the OPs. The DG found that the aforesaid conduct of OP Group was in contravention of Section 4(2)(a)(i) of the Act.

Issue 2: Whether the licence fee/rates for LTI, maintenance charges and miscellaneous charges levied by the OPs from the FM Radio broadcasters for the use of infrastructural facilities in Phase III are unreasonable vis-à-vis the rates charged in Phase II?

51. IPs *inter alia* alleged that OPs increased the licence fee in respect of open space and covered space in Phase-III by 5% per annum as compared to 10% increase after every two years in Phase II.



52. In this regard, during the course of preliminary conference before the Commission, OPs *vide* their submission dated 14.09.2016, stated that the said rates (Phase-III) were not fixed by OP-1. These rates were fixed by the Government of India in consultation with Internal Finance Division of the OP-2 and Chief Adviser (Cost), Department of Expenditure. It was submitted that the revision of licence fee at the rate of 5% every year as against 10% every two years would result in an insignificant increase and cannot be said to be arbitrary. In this regard, the report of O/o CAC had also been placed before investigation.
53. From the written submission of OPs, the DG found that rates in Phase-II were approved by OP-2, and the allegation of IP-1 that it did not have the approval of Competent Authority was without any basis. Moreover, the entire process for Phase-II was completed in the year 2005-06, which was prior to the date of coming into effect of the provisions of Section 3 and 4 of the Act.
54. Further, the Investigation Report examined whether the fixation of increased rates (10 %) was due in the year 2015-16 or it would have been due in the year 2016-17.
55. In this regard, OP-1 submitted that Phase II was effective from 2006-07 and 10% enhancement in every 2 years was due in block years (2007-08 & 2008-09), (2009-10 & 2010-11), (2011-12 & 2012-13) & (2013-14 & 2014-15). While proposing rates of open/covered space in 2015, 10% enhancement was made as the same was already due for increase. Thus, it would not be correct to say that rates should have been lesser.
56. However, as noticed by the DG, as the Phase-II was effective from 2006-07, it was logical to hold that the stipulated 10% enhancement in every 2 years was due for the block years (2006-07 & 2007-08), (2008-09 & 2009-10), (2010-11 & 2011-12), (2012-13 & 2013-14) and (2014-15 & 2015-16). In this regard, the DG asked an official from OP-1 to clarify the issue and Mr. A.N. Sharma of OP-1 stated that the rate for Phase- II was approved by OP-2 in the financial year of 2005-06 and this rate was applicable with effect from financial year 2005-06 onwards.



57. The DG, therefore, attempted the following table to understand increase in rates for common facilities since Phase-II by taking initial block as 2015-16 & 2016-17 as stated by OP-1 in support of chosen blocks:

(Amount in Rs)

2005-06	2007-08	2009-10	2011-12	2013-14	2015-16
2006-07	2008-09	2010-11	2012-13	2014-15	2016-17
100000	110000	121000	133100	146410	161051

58. From the above analysis, DG found that OPs adopted an incorrect period of block years since 2006-07 which resulted in incorrect and higher base rate for the open space and covered space. This excessive base rate fixation was higher by 10% for all categories of cities and for both open space and covered space. Thus, it could be said that OPs imposed unfair condition in the agreement for rendering services in the relevant market which was in contravention of the provisions of Section 4(2)(a)(i) of the Act. Moreover, the conduct of OPs on this account led to imposition of unfair price in the matter of calculation of charges for open space and covered space for the entire period of operation of the agreement for Phase-III, which could be said to be contravention of the provisions of Section 4(2)(a)(ii) of the Act.

Issue 3: What shall be the date from which the Licence Fee is chargeable at higher rate for Phase-III?

59. According to the investigation, in view of choosing incorrect block years, excess payment was made by IP-1 for a period of 9 days in 2015-16 and so on for every successive financial year. Thus, OPs were in contravention of provisions of Section 4(2)(a)(ii) of the Act. Further, the DG found that IP-2 was subjected to differential treatment and was charged more for provision of similar facilities at Mall Road site, which OP-1 stated was an exception. It charged Phase-III rates w.e.f. 01.04.2015 from IP-2, while in case of IP-1 it charged Phase-III rates w.e.f 23.03.2016. Thus, on account of charging of higher differential rate of licence fee, the DG found contravention of provisions of Section 4(2)(a)(i) and 4(2)(a)(ii)) of the Act, in case of IP-2.



Issue 4: Whether the liabilities cast upon the broadcasters *vide* clause 7.4 and clause 12.3 of the Phase III Agreement applicable under certain situations/ circumstances are one sided and asymmetric in favour of OP-1 and therefore, can be said to be anti- competitive?

60. The relevant clauses of the Phase II agreement are as under:

“Clause 7.4: That licensor will allow the peaceful and quiet use of the licenced infrastructure to the licensee for the term of this agreement. However, in the event of emergent or technical necessity, the Licensor shall have the right to disallow the use of licenced infrastructure to the Licensee. The Licensor shall inform the Licensee about the emergent and technical necessity in advance, to the extent possible. However, the Licensor shall not be liable to pay any penalty or damages for any such non-provision. The decision of the Licensor in this regard shall be final. The Licensee shall continue to be liable to pay Annual Licence fee to Licensor for the period during which it is not allowed to use LI.”

“Clause 10.3: For termination of this agreement by the Licensee, not arising from breach of terms of this agreement by the Licensor, the Licensee shall either give an advance notice of three months or pay an amount equivalent to three months’ licence fee in lieu of the notice to the Licensor. In the event of failure to deposit the licence fee, the Licensor shall have the right to recover the same from the security deposit amount.”

61. Clause 7.4 mandated that the Licensor (OP-1) to have the right to disallow the use of licenced infrastructure (LI) to the Licensee (FM Broadcasters) without any liability on its part to pay any penalty or damages, while the Licensee (FM Broadcasters) shall continue to be liable to pay annual licence fee to Licensor (OP-1) for the period during which it is not allowed to use LI.

62. After analysing the above clause of the Agreement, the investigation found that OP-1 has reserved all necessary rights in its favour without corresponding obligations. The asymmetric and one sided nature of the rights vested in OP-1 were about finality of the



decision to invoke the said clause, with no liability for any damages or penalty upon itself for non-provision of the licenced infrastructure to the FM Broadcasters during the said period. But putting the FM Broadcasters on unequal terms, thereby making them liable to pay the licence fee even for the period during which they are not allowed to use the licenced infrastructure. The investigation was, therefore of the opinion that the said clause 7.4 of the Agreement is unfair and by incorporating the same in the Agreement, OP-1 contravened the provisions of Section 4(2)(a)(i) of the Act.

Issue 5: Whether clause 14 of the Phase III Agreement regarding the power to nominate the sole arbitrator in case of disputes between the parties can be said to be anti-competitive?

63. According to Clause 14, in the event of any disputes and/or difference arising between the FM Broadcasters and OP-1, the matter “*shall be settled finally by arbitration*”. Thus, there was no alternate avenue available with the licensee/FM Broadcasters to pursue for resolution of the differences or disputes between the two. The FM Broadcaster had to accept the Sole Arbitrator nominated by the CEO of OP-1.
64. In this regard, the DG observed that OP-1 had not only retained the absolute powers in the matter of appointment of the Arbitrator, but also left no right to challenge the constitution of the arbitrator on any of the probable grounds and that the decision of the said Arbitrator was final and binding, leaving no appellate mechanism with the FM Broadcaster. By no stretch of imagination such conditions could be said to be equitable. Rather, these conditions contravene the provisions of Section 4(2)(a)(i) of the Act and being onerous, inequitable, one sided and unfair, being applied by a dominant enterprise.

Issue 6: Unfair charging of rentals towards tower from IP-2.

65. IP-2 alleged that it was asked to pay licence fee by OP-1 at the rates approved for A+ category cities for a tower of height 220 metres though it was provided a tower of height 100 meters by OP-1 at Mall Road. In this regard, Investigation obtained the invoices of



IP-1 and IP-2 issued by OP-1 to analyse discrepancy in the invoices. The detail of invoices are as follows:

Table 1: Advance annual licence fee for Tower

S.NO.	Invoice dated 21.02.2017 for IP-1	Invoice dated 24.08.2017 for IP-2
1	(22.03.2017-21.03.2018)	(10.06.2017- 09.06.2018)
2	Rs. 22,35,450/-	Rs.23,47,223/-

66. From the above table, the DG observed that similarly placed broadcasters were charged differently for certain overlapping period in respect of A+ category city.
67. Further, the DG observed that subsequent to signing of Phase-III agreement between IP-1 and OP-1 on 22.03.2016, OP-1 raised an invoice as per Phase-III rates for the first year. As has been stated above by Mr. A.N. Sharma of OP-1, had the rates referred in the Phase-III agreements approved by OP-2 be financial year wise, then it could have demanded Phase-III rates from IP-1 for the period 23.03.2016 to 31.03.2016 as per 2015-16 rates and for the remaining period 01.04.2016 to 22.03.2017 as per 2016-17 rates. Thus, as per investigation, IP-2 had been subjected to different treatment and asked to pay higher rates.
68. The investigation, however, did not find any contravention of the provisions of Section 4 of the Act by the OPs under following important issues related to Phase III policy :
- (i) Mandatory use of the infrastructural facilities of OPs only, if such infrastructural facilities are already available in that particular city or geographic location, by the FM Radio broadcasters.
 - (ii) Obligation on the broadcasters to pay advance Licence Fee for first year at the time of signing of the Agreement irrespective of the readiness or operationalization of CTI.



- (iii) Clause 3.3 of the Agreement stipulating penal charges on unpaid Licence Fee @ 18% per annum.
 - (iv) Clause 6.1 (a)(i) of the Agreement stipulating incurring of costs for CTI by the broadcasters for use by Indira Gandhi National Open University (IGNOU) without contributing anything.
 - (v) Clause 6.1(m) of the Agreement stipulating payment of taxes as may be levied by the local body/municipality in the jurisdiction on account of any infrastructure by the broadcasters.
 - (vi) Clause 2.1 and Clause 7.1 in the agreement regarding validity period of licence.
 - (vii) Clause 12.3 of the Agreement which cast upon liabilities under certain circumstances.
 - (viii) Clause 7.7 of the Agreement regarding payment of damages quantified at five times the annual rent per sq.m. on pro-rata basis.
69. Based on the evidences gathered, the DG also identified certain officials of the OPs who were liable under the provisions of Section 48(1) and Section 48 (2) of the Act for the aforementioned contraventions.

Written Submissions by Parties

70. The Commission, *vide* order dated 05.03.2019, forwarded a copy of the Investigation Report to the parties as well as the individuals of OPs identified by the DG to be liable under Section 48 of the Act and directed them to file their respective suggestions/objections thereto, if any, latest by 05.04.2019, with an advance copy to the IPs. The IPs were also directed to file their comments/written submissions, if any, by 19.04.2019, with an advance copy to each of the OPs and their individuals and had fixed the final hearing in the matter on 30.04.2019.



71. Subsequently, OPs *vide* separate application(s) dated 05.04.2019, 09.04.2019, 16.07.2019, requested the Commission to grant extension of time for filing their respective objections/suggestions to the Investigation Report and to also adjourn the final hearing scheduled on 30.04.2019. Accordingly, after considering the aforesaid applications, further to its order(s) dated 05.03.2019 and 16.04.2019, the Commission *vide* its order dated 30.05.2019, directed the parties along with the individuals of OPs held liable under Section 48 of the Act to file their respective suggestions/objections thereto, if any, latest by 05.07.2019, with an advance copy to the IPs. The IPs were also directed to file their suggestions/objections, if any, by 22.07.2019, with an advance copy to each of the OPs and their individuals and had fixed the final hearing in the matter on 30.07.2019.
72. All the parties appeared before the Commission on 30.07.2019 for final hearing. At the outset of hearing, the learned counsel for the IPs submitted that there was a delay in filing the objections/suggestions to the Investigation Report and to the submissions made by the OP's as the IPs had proposed to file their respective comprehensive reply(s) to the Investigation Report, submissions by the OPs and their individuals. However, IPs received the responses of the individuals of the OPs very late, and further certain other individuals had not filed replies, till date. Therefore, the IPs sought two days' further time to file the objections/suggestions of IP-2.
73. In view of the requests made by the parties, the Commission decided to grant time as sought by the learned counsel for the parties to enable them to file their respective pleadings, if any, and the Commission fixed the next date of hearing on the Investigation Report on 16.08.2019. The Commission on the said date, heard the submissions of the respective counsel for the IPs as well as the OPs at length and the hearing concluded in the matter.

Written Submissions by OP-1 and its Officials

74. OP-1 submitted that as per the FM Licence Phase III Policy, all FM Licence holders in a city were obliged to co-locate their transmission facilities on lands of OP-1 and install their Antenna on a tower of OP-1. Where no tower of OP-1 is existent, OP-2 would get



a tower constructed by BECIL, where the FM licencees will co-locate in terms of the Phase III policy.

75. OP-1 contended that the Investigation Report was manifestly erroneous both on law and facts. All the adverse conclusions recorded by the DG stem from a misreading of Section 4(2)(a)(i) & (ii) of the Act. The findings that the OPs are an 'enterprise', they constitute a Group and that they enjoy dominant position and they have abused their dominant position are seriously flawed not only from the factual perspective but also from a legal perspective.
76. OP-1 stated that the DG completely ignored the fact that the terms on which the broadcasting licences are to be issued by OP-2 are part of policy decisions of OP-2. OP-1 is in no manner whatsoever concerned with those policy decisions. Its role was limited to making its infrastructure available to FM Broadcaster in furtherance of those policy decisions. Decisions taken by the Government of India in exercise of its sovereign, executive and statutory powers are not decisions of OP-1 nor can the two OPs be treated to be a group.
77. OP-1 submitted that the policy decision taken by the Government of India mandating co-location of transmission infrastructure and infrastructure in the form of land/Tower being licenced by OP-1 was for the benefit of the broadcasters and the policy mandating co-location was based on the recommendations made by TRAI.
78. With regard to the findings of investigation that OP-1 is an enterprise, it was stated that OP-1 is not engaged in an activity of a commercial nature and is only furthering a policy decision of OP-2 that the FM Sector being a new sector ought to be provided certain facilities to enable it to grow. Further, OP-1 was only discharging the functions of the Government of India and the terms on which the infrastructural facilities were provided by OP-1 were not determined by it but by OP-2 and, thereby, any act of OP-1 in aiding the Government policy, could not make it an enterprise while providing infrastructural facilities to private FM Broadcasters.



79. With respect to the finding that OP-1 and OP-2 constitute a Group, it was stated that OP-2 was not an enterprise and reliance was placed on *prima facie* finding of the Commission dated 04.07.2017, wherein it was held 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.*”
80. Based on the above *prima facie* view taken by the Commission, OP-1 contended that if OP-2 is not an enterprise then OP-1 & OP-2 together cannot be said to constitute a Group, even if it is assumed that OP-1 is an enterprise. It was submitted that neither OP-1 nor OP-2 exercised twenty-six per cent or more of the voting rights in each other and OP-2 did not have a Board of Directors. Further, OP-1 had Board of Directors but appointments are made in terms of statutory scheme of Prasar Bharati Act,1990, which granted autonomy to OP-1. OP-2 does not control the management of affairs of OP-1. Rather the management of affairs of OP-1 is vested in its Board in terms of Section 3 of the Prasar Bharati Act. Thus, the finding of the DG that OP-1 and OP-2 constitute a Group is incorrect.
81. OP-1 stated that it does not enjoy a dominant position in the market. It was stated that the rates for use of its infrastructure, whether open land, covered space, tower *etc.*, were determined by OP-2 and not by OP-1. Even where in terms of the contract, rates were proposed by OP-1, they were modified/approved by the Government of India after a rigorous and critical examination by the Chief Adviser (Costs) and the Government of India and in many cases the proposed rates were scaled down. Therefore, OP-1 was not in a position to dictate the price and thus it cannot be said that it enjoyed a dominant position.
82. It was averred that abuse of dominant position calls for a higher degree of proof and the finding of abuse can be arrived at only if the facts are gross in nature and unreasonableness and intention to make financial gain out of a dominant position are writ



large on the record. It was contended that in the instant case, there was no material to show that any unreasonable and unfair price had been imposed. Rather there was material to show that the charges of OP-1 were much less than those of other entities for corresponding facilities. In this regard, OP-1 referred two separate agreements signed by IP-1 with South City Apartment Owners Association and Software Technology Park of India, respectively, for use of open space to install antenna and transmitter. These two agreements are annexed as Annexure A-84 and Annexure A-85 in the Investigation Report. Annexure A-84 is an agreement between IP-1 and South City Apartment Owners Association whereby open space on the roof top was licenced to IP-1 at a rate of Rs.1,43,096/- per sq. mt. per annum in the city of Kolkata. In contrast in the city of Delhi, OP-1 has been charging @ Rs.10,307/- per sq.mt. per annum which comes to less than 8% of what IP-I is paying for open space in Kolkata. The Annexure A-85 is an agreement between IP-I and Software Technological Park of India whereby open space to install an antenna and transmitter was licenced to IP-I at a rate of Rs.9,456/- per sq.mt. per annum. On basis of these two evidences, OP-1 submitted that rates charged by OP-1 were not unfair or unreasonable and did not constitute abuse of dominance.

83. OP-1 stated that as per the Investigation Report, OP-1 received approval for enhanced rate on 16.09.2015, but did not intimate it to IP-I. However, this finding is contradicted by facts as recorded in the Investigation Report itself that OP-2 conveyed its approval to the rates on 16.09.2015. Thereafter, OP-1 had pointed out certain discrepancies in the rates and had taken up the matter with OP-2 *vide* its letter dated 18.9.2015 followed by reminders dated 29.09.2015 and 27.10.2015.
84. It was contended that there were discrepancies in the rates and the matter was taken up by OP-1 on 18.09.2015 *i.e.* within two days after the rates were being conveyed to it. Therefore, OP-1 could not be said to have acted unfairly in not informing private radio broadcaster about the rates when the matter of discrepancies was referred to OP-2 and reminders dated 29.9.2015 and 27.10.2015 were sent. It was stated that informing private radio broadcasters about the rates when there were discrepancies in the rates would have constituted non-application of mind on the part of OP-1. Thus, the conclusion recorded in the Investigation Report was manifestly erroneous as OP-1 was being faulted for not



publishing discrepant rates, when its letters for clarification and correction of the rates were already pending before OP-2.

85. OP-1 submitted that the rates in question had to be published on the OP-2's website. However, OP-1 was faulted for not publishing the rates on its website. It was further submitted that *vide* letter dated 27.10.2015, OP-1 had forwarded the final agreements to OP-2 as desired by it for publication on its website. OP-1 stated that the findings against it are baseless and unwarranted because the terms on which migration was to take place, the amount that was to be charged towards NOTMF and the question whether the rates for utilisation of OP-1's infrastructure ought to have been published at the time of intimating NOTMF were all matters in the realm of a policy decision falling within the sole preserve of OP-2. Thus, OP-1 had no control on any of those decisions.
86. OP-1 submitted that it has been erroneously observed that policy guidelines issued by OP-2 did not stipulate signing of a fresh agreement with OP-1. This finding is contradicted in Investigation Report wherein it is stated that OP-1 was asked to sign the Phase-III agreement as per para 3 of offer of migration dated 24.9.2015 issued by OP-2. OP-1 stated that the offer of migration was part of the policy formulated by OP-2 and every decision taken, every refinement in the policy reflected a policy decision by OP-2 and policy decision cannot be confined only to what appears under the heading Policy Guidelines.
87. It was put forth that the DG over looked the fact that earlier agreements were signed under Phase-II policy of FM. OP-1 stated that those agreements were limited till Phase-II licencees were in existence and once a licencee opted to migrate from Phase-II to Phase-III, the earlier licence automatically stood terminated and therefore, a Phase-III agreement had to be signed. As stated, these Phase-III licences had different terms from the Phase-II licence and were for a term of 15 years. This necessarily required signing of fresh agreement with OP-1. Therefore, the conclusions recorded to the contrary by the DG are flawed and attribution of such conduct to OPs is also incorrect.



88. OP-1 stated that it has been found by investigation that the OPs adopted an incorrect period of block years since 2006-07, which resulted in incorrect and higher base rate for the open space and covered space. OP-1 averred that according to the DG, Phase-II was effective from 2006-07 and, therefore, the block years should have been 2006-07 & 2007-08, and 2008-09 & 2009-10 and so on. Accordingly, the DG found that the rates of Rs.10,307/- and Rs. 12,240/- for open space and covered space, respectively, were fixed by OP-1 for the years 2015-16 which ought to have been the licence fee for 2016-17.
89. OP-1 submitted that the Phase-II rates were notified by the Government of India on 05.01.2006 and it is evident that the rates were effective from the year 2005-06. The base year being 2005-06, the block years would obviously be 2005-06 & 2006-07, and 2007-08 & 2008-09 and so on. OP-1 stated that there was no error whatsoever in taking the block years with effect from 2005-06 and this aspect of the matter was clarified by the General Manager (Commercial) of OP-1 who, during the investigation, stated that that rates for Phase-II were approved by OP-2 during financial year 2005-06 and hence block rates were for the years 2005-06 - 2006-07 and so on. The DG brushed aside the explanation given by the General Manager (Commercial) citing a discrepancy in rates of common facility for Category D cities and returned a finding that OPs had imposed unfair condition in the agreement and had thereby contravened Section 4(2)(a)(i) and had also imposed unfair price and contravened the provision of Section 4(2)(a)(ii) of the Act.
90. OP-1 contended that the discrepancy concerning the common facility rates in category D cities showed that there was no abuse of dominant position. Further, in the Investigation Report, it has been stated that if the base year had been 2005-06, the amount chargeable for Category D cities should have been Rs. 1,61,051/- in 2015-16, whereas the amount charged was Rs. 1,46,410/-. OP-1 stated that due to a calculation error, inadvertently the lesser amount of Rs. 1,46,410/- was charged by OP-1 instead of Rs. 1,61,051/-. Therefore, charging of lower amount can by no stretch of imagination be an instance of abuse of dominant position. Thus, a circumstance that ought to have been considered in favour of OP-1 has been considered adversely. OP-1 further stated that the final decision as to the rates and the date from which they take were to take effect had the approval of OP-2, which had the power to take decisions in exercise of its sovereign, constitutional



and executive powers flowing from Article 73 of the Constitution as well as its statutory powers.

91. The allegation that OP-1 charged excessive rate for a period of eight days every year (23rd March to 31st March) is incorrect. IP-1 entered into an agreement for Delhi with OP-1 with effect from 23.03.2016. In this case, the rates chargeable were on yearly basis. Had the agreement been executed in April, 2016, the higher rate would have been reflected therein. The agreement having been executed on 23.03.2016, a lower rate was reflected. OP-1 submitted that for a period of 357 days out of 365 days, IP-1 availed of lower rates.
92. With respect to the DG finding that higher tower rental was charged in respect of tower aperture under Phase-III and this would exceed the projected replacement cost and OP-1 had not provided the expenditure on maintenance of tower, OP-1 replied that the Additional Director General and General Manager (Commercial) of OP-1 had explained that maintenance charge is in the nature of a provision and maintenance charges cannot be quantified in numeric terms in advance. At times, actual maintenance charge can even exceed the provision and at times it may be less than the provision. It is only a provision for unforeseen contingencies. OP-1 stated that this explanation was brushed aside by investigation.
93. With regard to the finding of contravention of the provision of Section 4(2)(a)(i) of the Act on the ground that OP-1 took a discounting factor of 15% in arriving at replacement cost of a tower whereas the discount from 12 to 13% would have been more appropriate and nearer to market rates, OP-1 stated that these are matters of perception which attracted marginal variations and discount @ 15% as against 13% cannot be said to be an abuse of the dominant position. These calculations were made by the Chief Advisor Costs, Ministry of Finance and not by OP-1.
94. In regard to the issue, whether the liabilities cast upon the broadcasters *vide* clause 7.4 and clause 12.3 of the Agreement applicable under certain situations/ circumstances are one sided and asymmetric in favour of OP-1 and therefore, can be said to be anti-



competitive, OP-1 stated that such a provision is normal in such contracts regarding broadcasting infrastructure. Similar clauses were found in the agreements that IP-1 had signed with other entities including private entities. There can be an emergent and technical circumstance when the infrastructural facilities may not be available. It can be on account of governmental directive or a *force majeure* situation.

95. OP-1 stated that the DG also faulted OP-1 on the ground that the broadcasters have to keep on paying licence fee during such suspension, while there is no right on the broadcasters to claim damages on OP-1. OP-1 submitted that the DG ignored the nature and scope of the provision and has stated that when the broadcasting is suspended from the CTI, the broadcasters continue to use CTI, their equipment are still there at the CTI and are connected to the broadcasting apparatus. The broadcasters continue to use the open and covered spaces of OP-1. Their antenna continues to be perched on the OP-1's tower. Therefore, it is not as if during the time of suspension on account of emergent and technical necessity, broadcasters are not using the licenced infrastructure. If they are using the infrastructure in any manner, they ought to continue to pay the licence fee.
96. The DG's finding that OP-1 retained absolute powers in the matter of appointment of the Arbitrator and left no right to challenge the constitution of the arbitrator and that the decision of the said Arbitrator has to be final and binding, leaving no appellate mechanism with the FM Broadcasters is based upon complete misunderstanding of law. OP-1 stated that every arbitration clause normally contains wording that the finding recorded by the Arbitrator shall be final. However, that does not mean that the Arbitrator's award cannot be challenged. It can be challenged to the extent provided by law. The law is contained in Section 34 of the Arbitration & Conciliation Act, 1996, which sets out the grounds on which the finding of the Arbitrator can be challenged. The reasons forming the basis of the conclusions recorded by the DG being fundamentally and legally flawed, the findings in any case cannot stand.
97. With respect to the DG finding that OP-1 charged unfair rentals towards tower of Mall Road from IP-2, OP-1 replied that IP-2 was correctly charged the applicable Category A+ city rates. Like every other broadcasters in Delhi, IP-2 was catering to population of



more than 1 crore. Having regard to the number of subscriber a particular rate was fixed for Category A+ cities and, it would have been discriminatory and unfair to other broadcasters in Delhi if IP-2 had been charged on Category B City rate.

Submissions by OP-2:

98. OP-2, in its written submission stated that the DG did not delve into the genesis of private FM Radio Broadcasting in the country, particularly the co-location aspects of FM Transmitters at various cities. OP-2 submitted the details on the genesis of FM service started by All India Radio in four metro cities, and gave a background about Phase-I Policy which provided for expansion of FM radio broadcasting services through private agencies for 148 channels in 40 centres across the country.
99. OP-2 stated that under the FM Phase-I scheme in Delhi, Calcutta, Mumbai and Chennai due to technical restrictions, licencees were required to form a consortium and enter into an agreement for using same power transmitter, utilise common transmission tower and share certain common facilities. Further, licencee was permitted to enter into an agreement with a third party so as to enable the latter to set up infrastructural and hardware facilities such as tower, transmitter *etc.*
100. OP-2 averred that Phase-I co-location was insisted only in metro cities. It was noticed that the private integrator, selected by the FM operators, did not execute the work (owing to difficulties arising out of competing private parties having to collaborate with each other, plus difficulty in finding a suitable site *etc.*). This resulted in considerable loss of time in operationalising the channels by the due date (29.12.2001). Therefore, the Government of India was forced to intervene and BECIL, a PSU under MIB, was made the System Integrator for co-location. BECIL was selected because Prasar Bharti (OP-1) (then All India Radio) was unable to undertake the work of System Integration due to lack of mandate. The consortium of licencees approached OP-1 to utilize its common transmission tower at Delhi, Calcutta and Chennai.
101. OP-2 submitted that TRAI gave its recommendations on Phase II of Private FM Radio broadcasting in August, 2004. In its recommendations, TRAI examined the issue of whether co-location as a policy should be given up or needs to be modified for better



implementation. After consultation with all stakeholders, TRAI observed that co-location of FM broadcast transmitters in a city has advantages like Effective Radiated Power (ERP) of all stations is nearly same, efficient utilisation of spectrum, can meet demand of large number of channels, reduced infrastructure costs, avoids radio interference due to distributed transmitter sites and skyline of city is not disturbed.

102. OP-2 stated that TRAI recommended that Co-location of all FM transmitters should be mandated in metros as well as Bangalore and Hyderabad with an agency selected by OP-2 doing the job of integrator and providing the approximate capital cost along with the tender documents. Depending on the number of licencees, co-location could also be considered in Phase-III in other cities.
103. OP-2 stated that in July, 2005 Government introduced the Phase-II Policy wherein 336 FM channels in 90 cities (cities having population of more than 3 Lakhs) across the country were opened for bidding to Indian private companies. OP-2 proposed to nominate BECIL, as an integrator for the purpose of co-location, which was also associated with Phase-I FM.
104. OP-2 further submitted that on 25.07.2011, the Government notified the Policy Guidelines for expansion of FM Radio broadcasting services through private agencies (Phase--III) as huge unmet demand existed for FM radio in many smaller cities which remained uncovered by the private FM radio broadcasting, as only a limited number of cities were taken up for bidding during the first two Phases of FM radio broadcasting. Border areas, particularly in Jammu and Kashmir, North Eastern states and island territories, were largely missing from the FM map. Experience in Phase-II suggested that untapped potential for future growth in the FM radio sector is quite phenomenal, and the growth was likely to be even more pronounced with increasing demand of FM Radio by semi-urban and rural populace.
105. OP-2 then submitted that para 18.2 of FM Phase-III policy is applicable to all CTIs created under FM Phase-II project and thus would include CTIs created by BECIL on Towers belonging to OP-1 as well as Towers constructed in 4 cities of Delhi, Chennai,



Jaipur and Hyderabad by BECIL on behalf of OP-2. OP-2 further stated that had transmitters not co-located in Phase-II in the first stage itself, it would never have been possible to co-locate in Phase-III upon migration or co-locate transmitters of vacant/additional channels of Phase-II auctioned in Phase-III or co-locate additional channels which could be offered in future with reduced inter-channel spacing.

106. To further the public private partnership, considering that the FM Radio sector has witnessed substantial growth, OP-2 found that the situation was ripe for licencees to co-locate on infrastructure of their choice through an integrator, again, of their choice. Therefore, the Government gave this freedom to licencees in the form of Para 18.4 of FM Phase-III policy.
107. OP-2 submitted that All India Radio (AIR) furnished a copy of its Phase-III Agreement along with rates of licence fee for Phase-III duly approved by CEO of OP-1 on 19.05.2015. AIR re-furnished a copy of the same Phase-III Agreement on 23.07.2015, earlier approved by CEO of OP-1, and added Muzaffarpur station in context of clause 6.1(a)(ii) of OP-1's agreement. OP-2 decided that both OP-1 and BECIL will submit a final copy of their respective agreements, duly vetted and approved by their competent authorities, so these can be published on the website of OP-2. It was further decided that OP-1/BECIL could also simultaneously publish the rental agreement on their websites. OP-1 and BECIL were also requested to give priority for phase II licencees operating under Phase-II whose migration to Phase-III was to be made effective by the 30.09.2015 deadline.
108. After notification of NOTMF for Batch-I FM Phase-III auctions on 16.09.2015, OP-2 notified the NOTMF for all Phase-II cities under FM Phase-III on 24.09.2015 including the Phase-I cities whose licencees had been granted extension only up to 30.09.2015 as per Cabinet decision of 16.01.2015. OP-2 issued the offers of migration including schedule of payments to all the migrating operators on 24.09.2015.
109. Further, AIR sent a final copy of two Agreements (incorporating rates of licence fee *etc.* in Schedule-A) for fresh LoI holders (Agreement-I) and for migrating operators



(Agreement-II) on 27.10.2015 for perusal and publication on website of OP-2 by 06.11.2015 for information to private FM Broadcasters as AIR proposed to start signing of agreements with them *w.e.f*, 09.11.2015. AIR also informed that the approval of CEO of OP-1 was obtained in totality including on all type of licence fee to be charged (Schedule-A of agreements) from private Broadcasters, agreements to be signed with them and signing authority of Agreement on behalf of OP-1.

110. It was stated that OP-2 had approved rate of tower rentals and lease charges for Land (Open space as well as Covered space) under private FM Phase-II for co-location facilities in financial year 2005-06. Thus, the base year of rate of rentals was 2005-06. Escalation charges @ 10% were payable after every two years on Open & Covered space and 2.5% per annum on Tower rentals.
111. OP-2 approved rate of rentals for Land (Open space as well as Covered space) under private FM Phase-III for co-location facilities on 16.09.2015 after considering the recommendations of CAC, M/o Finance. The approved rental rate under FM Phase-III was in line of FM Phase-II rate. For example, the rate of rentals for Open space in A+ city under FM Phase-II was Rs. 6,400 per square meter per annum for 2005-06 and after considering applicable escalation charges @ 10% after every two years the rentals for 2015-16 came to Rs. 10,307 per square meter per annum. Same rate of rentals for Open space *i.e.*, Rs. 10,307 per square meter per annum for 2015-16 was approved by OP-2 under private FM Phase-III.
112. OP-2 stated that for Tower in Phase-III, OP-1 proposed on 19.05.2015 that the replacement cost of Towers increased in recent past and applied cost inflation index since 2005 for obtaining current capital cost as new Towers were not procured since 2007. CAC recommended Tower rentals for the year 2015-16 on the basis of the inputs provided by OP-1 to CAC. CAC also stated that OP-2 may also like to consider a suitable increase of rental charges of not less than 5% per annum. Accordingly, this minimum increase of 5% per annum was made applicable for Tower, Open and Covered space rentals.



113. OP-2 stated that approved rental rates for OP-1 infrastructure were strictly in line with the recommendations of an independent and expert body like CAC, Department of Expenditure, Ministry of Finance, who gathered various inputs like capital costs/replacement costs of towers, land rates from OP-1.

Submission of IP-1

114. With regard to the DG finding that both the OPs fall within the definition of enterprise as defined in Section 2(h) of the Act, IP-1 submitted that OP-1 provides infrastructural facilities for radio broadcasting and as per the FM Radio Phase III Policy, such an activity can be undertaken by the consortium of private broadcasters who can build the requisite infrastructure in areas where OP-1 does not provide infrastructural facility. Further, it was stated that OP-1 rendered services for a charge (licence fee) from the broadcasters, and thus, it performed activities of a commercial nature, and OP-1 doesn't perform any sovereign function which shall exempt it from the application of the Act.
115. With respect to the role of OP-2, IP-1 submitted that while OP-2 is a Ministry involved primarily in policy making initiatives, it also performed commercial functions as OP-2 received tower rentals and service tax from broadcasters who were mandatorily required to utilize the infrastructure created by BECIL. While the tower infrastructure was built by BECIL, the ownership vested solely with OP-2 for which BECIL acted as a mere custodian. Therefore, OP-2 performed activities of commercial nature and could be considered as an 'enterprise' under Section 2 (h) of the Act.
116. With regard to the DG's finding that the OPs constitute a Group, IP-1 submitted that OP-2 not only has a material influence on OP-1, but also *de-facto* and *de-jure* control. Though OP-1 is a statutory body with an independent board, OP-1 was being functionally-financially as well as administratively managed by OP-2. The composition of the board of directors also included a representative of OP-2. Further, IP-1 placed reliance on the report of the Expert Committee on OP-1 dated 24.01.2014, to review the institutional framework of OP-1 including its relationship with the Government. OP-1 submitted that the Expert Committee noted that the responsibility of parliamentary oversight of OP-1



lay with the Standing Committee of IT, *via* the OP-2 and also noted that for true autonomy, the funding of OP-1 must be de-linked from the budget of OP-2. The Expert Committee also held that oversight and monitoring of OP-1 is officially one of the primary functions of OP-2 and as per the Memorandum of Understanding signed between OP-1 and OP-2 on 22.05.2000, OP-1 is required to render the monthly account of expenditure and receipts to OP-2.

117. Further, IP-1 averred that from a perusal of copies of OP-1's Annual Reports, it could be ascertained that the internal audit functions for OP-1 are discharged by the Chief Controller of Accounts, OP-2 through its Pay and Accounts Offices identified for the purpose. In this regard, IP-1 also enclosed OP-1's Annual Report for the year 2013-14, 2014-15, & 2015-16. In view of the above mentioned evidences, IP-1 asserted that OP-1 is financially as well as administratively controlled by OP-2. Therefore, OP-1 cannot take the plea of statutory independence to avoid the fact that in effect it constitutes a '*Group*' for the purposes of the present proceedings.
118. Further IP-1 submitted that, OP-1 admitted to have no role to play in the decision making process as the final decision with respect to rates pertaining to tower rentals, open space, covered space and miscellaneous facilities under Phase III Policy was taken by OP-2 and OP-1 merely acted on the decisions of OP-2. IP-1 submitted that in view of this admitted position of OP-1, it was evident that OP-2 controlled the functions of OP-1 and so far as the Act is concerned, the OPs constitute a '*Group*' in the relevant market.
119. With respect to the DG finding that OPs enjoyed dominant position in the relevant market, IP-1 submitted that by virtue of the terms of Phase-II and Phase-III Policy, the OPs had full control over provision of tower infrastructural facilities in the relevant geographic market and OPs effectively remained the sole service providers in the relevant market. Further, the size and resources available to the OPs in terms of government grants and sanction, was incomparable to that of private broadcasters operating in the same relevant market and the private broadcasters who are the consumers of infrastructural facilities provided by the OPs are wholly dependent upon OPs for transmission of their channels in the relevant market. Thus, both the OPs enjoyed their monopolistic/dominant



position in view of the policy issued by them under Phase-II and Phase-III. Submission of IP-1 on issues related to abuse of dominant position by OPs are discussed below:

Issue 1: The stipulations under Phase-III Policy providing for mandatory use of the infrastructural facilities of OPs only, by the FM Radio broadcasters amounts to abuse of dominance under Section 4 of the Act.

120. With respect to the issue that the stipulations under Phase-III Policy providing for mandatory use of the infrastructural facilities of OPs only, amounts to abuse of dominance under Section 4 of the Act, IP-1 submitted that the DG has erred in its analysis by concluding that adoption of such a policy decision cannot be said to be a competition issue under Section 4 of the Act. IP-1 averred that DG has failed to consider the TRAI Recommendations to Phase III-Policy, dated 22.02.2008, in totality. As stated by IP-1, TRAI recommended that a mandatory Reference Collocation Offer (RCO) would be more desirable as it would ensure better transparency and uniform treatment to all the FM radio operators, however, the OPs have failed to incorporate the said recommendation of the TRAI with respect to RCO in its Phase III Policy. Failure to provide any justification for non-retention of RCO as against the mandatory co-location policy, establishes that the OPs have abused their dominant position.

121. IP-1 averred that the analysis of the DG that adoption of Phase III Policy cannot be a competition issue as the same relates to a policy decision of the Government is flawed. IP-1 submitted that DG has failed to consider the TRAI recommendation mandating RCO is an abuse of its dominant position wherein OP-2 in connivance with OP-1 has fixed the terms of Phase III Policy as per own accord.

Issue 2: Conduct of OPs in not informing the enhanced licence fee and other charges payable by a broadcaster from Phase-II to Phase-III till payment of NOTMF is anti-competitive and is a clear demonstration of abuse of dominance by OPs.

122. IP-1 submitted that it concurred with the DG's finding that not-intimating enhanced rates despite receipt of approval by OP-1 from OP-2 is unfair and in contravention of Section 4 (2)(a)(i) of the Act.



123. In this regard IP-1 submitted that *vide* letter dated 05.11.2015, it requested OP-1 to reconsider the increase in licence fee rates in the Phase III Policy. However, OP-1 rejected the said request of IP-1, *vide* letter dated 12.11.2015, wherein OP-1 had stated that as rates of licence fees were same for all broadcasters, it was not possible to negotiate with an individual broadcaster.
124. It was stated that while the Phase III policy clearly stated the need for new bidders to execute agreements, it did not spell out the requirement to sign any agreement with OP-1 in case of migration of existing FM broadcasters. Further, the private FM Broadcasters were informed about the signing of agreement with OP-1 through the offer of migration issued by OP-2 in the months of September-October 2015, and that each of the private broadcasters were given different timelines for signing of the migration GOPA.
125. IP-1 averred that while the OPs claimed that the Policy envisaged automatic migration, it was not automatic in its true sense as the same was subject to fulfilment of other conditions such as depositing NOTMF and signing of GOPA. Further, while OP-1 became aware of the revised licence fee on 16.09.2015, it failed to inform the IP despite knowledge of the same. OP-1 in its response to the DG Report has submitted that until 27.10.2015, the enhanced licence fee rates were not finalised as there were certain discrepancies.
126. IP-1 further averred that *vide* letter dated 16.09.2015, OP-2 conveyed the rates for annual rentals as determined by OP-2, in consultation with the CAC, Ministry of Finance. *Vide* response letter dated 18.09.2005, OP-1 informed OP-2 about certain pricing discrepancies that would arise in the event the new rates are accepted for the sites of Pitampura and metro cities. Accordingly, OP-1 proposed to continue with the existing rates at Pitampura and A+ metro cities. Thereafter, the OPs made changes to the rentals for these cities, without consulting with the CAC.
127. OP-1 submitted that it could not inform the enhanced licence fee before 27.10.2015, however, it expected the private broadcasters to migrate even before such determination. In this regard IP-1 submitted that in the acceptance letter issued by OP-2 on 24.09.2015,



there was no reference of the proposed increase in the licence fee even though the OP received approval on 16.09.2015. IP-1, *vide* acceptance letter dated 24.09.2015, was only intimated to pay NOTMF by 09.10.2015 and sign the GOPA by 23.10.2015, with option to withdraw its decision to migrate by 28.09.2015. Thus, IP-1 had no opportunity to take an informed decision before payment of NOTMF.

128. Further, in view of the contradictory statements issued by OP-1 and OP-2, it was evident that the OPs by not informing the enhanced licence rates, abused their dominant position under Section 4(2)(a)(i) of the Act.

Issue 3: The licence fee for LTI, maintenance charges and miscellaneous charges levied by the OPs from the FM Radio broadcasters for the use of infrastructural facilities in Phase III are non-reasonable *vis-a-vis* the rates charged in Phase II.

129. The DG held that conduct of OPs in charging higher rates from the IPs are in contravention of Section 4(2) (a) (i) & (ii) of the Act. The DG found the act of OPs in contravention of the Act on following grounds:

- (i) Fixing Incorrect block year by OPs
- (ii) Higher base rate for open and covered space for IP-2 for the Mall Road site.
- (iii) Charging higher rate for open and cover space for a short period during the month of March for the years 2016 and 2017.
- (iv) Increase of licence fee from 2.5 % per annum (p.a) to 5 % p.a. is unjustified.
- (v) Use of discounting factor @ 15 % to calculate the replacement cost recovery as against yield of 6-7 % on Government Bond was not as per market standard.

130. In this regard, the IP-1 submitted that while the DG has held the aforesaid acts of OPs are in contravention of the Act, the DG has erred in not taking note of the fact that the CAC had not approved the rates under Phase III Policy. IP-1 averred that CAC *vide* its report dated 20.08.2015 held that it was not in a position to vet the charges as the base charges of Phase II were implemented on an *ad-hoc* basis. Further, no documents were produced before the CAC with respect to fixation of such ad-hoc rates. The DG also failed to examine the basis on which such rates were fixed under the Phase II Policy.



131. IP-1 stated that CAC recommendation was sought on the basis of such arbitrary, ad-hoc rates of Phase II Policy instead of providing any additional data that could have assisted the CAC in opining on the Phase III Policy rates. In the absence of such crucial information, the CAC rightfully refrained from vetting the rates proposed by the OPs under Phase III Policy. The DG failed to investigate these aspects and in the absence of such investigation, the DG erred in concluding that the rates fixed are a part of internal decision-making process, hence cannot be a competition issue.
132. Further, IP-1 submitted that DG was at fault in its analysis of the issue pertaining to collection of replacement cost. Firstly, the DG erred in limiting the analysis only to the issue of whether replacement cost can be recovered by OPs under Phase III Policy. Secondly, the DG ought to have delved into the methodology adopted by the OPs for calculation of the replacement cost along with the attendant inputs such as actual tower cost, tower life *etc.*, in order to arrive at a conclusive decision on the anti-competitive conduct of the OPs. While the DG noted that the replacement cost was calculated as per Indian Accounting Standard-17, it failed to take into account the other aspects such as useful life and functionality of the assets concerned which were also part of the CAC recommendations.
133. IP-1 claimed that the towers so erected by OP-1 were initially meant for use by OP-1's radio stations and not for the use by private broadcasters. Post implementation of the mandatory co-location policy, the private players were merely supplementing and off-setting the losses and expenditure incurred by OP-1 in building the infrastructural facility. IP-1 submitted that the private broadcasters were not bound to pay for the entire replacement cost, more so, while the infrastructure was originally brought to place for use by radio stations owned and operated by OP-1. Further, OPs failed to provide details of the actual cost incurred to build the infrastructure to the DG. The towers so constructed by OP-1 would undergo a depreciation cost annually. In this backdrop on the basis of application of the construction cost approach by the OPs, it was difficult to accept the increase in rentals in respect of replacement cost of towers.



134. It was stated that CAC *vide* its Report dated 20.08.2015, recommended in favour of amortisation of replacement cost for the tower life of 50 years, instead of recovery of the amount within 15 years of licence period as suggested by OP under Phase-III Policy. Further, the Investigation Report concluded that non-reduction of licence fee with the entry of new licence holders does not amount to abuse of the dominant position by the OPs. IP-1 averred that OPs submitted that the tower rentals were fixed considering the maximum number of broadcasters in a city, and therefore, there would be no reduction in tower rental on addition of a new entrant. Contrary to this, OP-1 submitted in its response to the DG's query that the rates of open space or covered space may reduce at the sites where new entrants share OP-1's infrastructure. Furthermore, the OPs failed to submit any document or proof to show that the tower rentals were fixed in view of maximum number of broadcasters in a city and that there would be no possibility of addition of new broadcasters beyond the given maximum number.

Issue 4: Obligation on the broadcasters to pay advance licence fee for first year at the time of signing of the Agreement irrespective of the readiness or operationalization of CTI.

135. With regard to this issue, the DG held that IP-2 was not asked to sign Phase III agreement for the proposed CTI at Delhi which was yet to be commissioned. Against this finding of the DG, IP-1 submitted that IPs were asked to sign phase III agreement for Kingsway Camp site even though the OPs did not have a functional CTI at Kingsway Camp.

136. IP-1 submitted that the DG had failed to consider the fact that OP-1 charged licence fee for interim-set up as also for the CTI, which was under construction with BECIL and hence, was a clear instance of abuse of dominance by OP-1. Further, the DG ought to have expanded its scope of investigation to inquire from other private radio operators operating out of the relevant market in order to conclusively ascertain violation of Section 4 of the Act.

137. IP-1 also averred that Clause 5.1 of GOPA mandated co-location only to existing CTI. The advance licence fee for first year was payable only for functional/ operational CTIs.



Clause 5.3 of GOPA clearly stated that pending creation of co-location facility in Delhi, the successful bidder in Delhi would be permitted to operationalise its channel on individual basis till the co-location facility was commissioned. Despite the fact that the Kingsway Camp site was not operational, OP-1 forced IP-1 to execute agreement for Kingsway Camp site and collected advance licence fee for a year, such an act was a clear proof of abuse of dominant position by the OPs. Thus, the DG erred in not considering this act as a contravention of Section 4 of the Act.

Issue 5: Clause 3.3 of the Agreement stipulating penal charges on unpaid licence Fee@ 18% per annum is anti-competitive.

138. On this issue, the DG concluded that the increase in rate of interest was not anti-competitive. IP-1 submitted that this conclusion was based on OP's submission that the object behind increase in the penalty charges on default was to create deterrent effect on private broadcasters.
139. IP-1 further submitted that the DG limited the scope of investigation as the DG failed to consider the prevalent interest rates under other statutes and merely relied upon the interest rates under Section 201(1A) and penalty provisions under Section 221 of the Income Tax Act. IP-1 averred that on earlier occasions, OP-1 levied interests at the rate of 8-9% in the event of default, and OPs failed to justify the suitability of fixing the penal charges at 18% rates, therefore, the interest rates calculated at 18% p.a. was excessive and arbitrary.

Issue 6: Clause 6.1 (a) (i) and (ii) of the Agreement stipulating incurring of costs for CTI by the broadcasters for use by IGNOU without contributing anything is abuse of dominant position by OP-1:

140. With respect to Clause 6.1 (a) (i) and (ii) of the Agreement relating to use of CTI by IGNOU without contributing anything, IP-1 submitted that DG failed to address the issue pertaining to the fact that cost for utilising CTI was only being borne by private broadcasters and not a penny was incurred by OP- 1, not even for the use of CTI by



IGNOU. The said clause clearly was reflective of abuse of the dominant position by the OPs, and OPs failed to provide any justification for the same.

Issue 7: Clause 6.1(m) of the Agreement stipulating payment of taxes as may be levied by the local body/municipality in the jurisdiction on account of any infrastructure by the broadcasters amounts to anti-competitive conduct by OP-1

141. The DG found that Clause 6.1(m) of the Agreement which required private broadcasters to pay taxes as may be levied by the local body/municipality on account of any infrastructure not to be anti-competitive. IP-1 averred that in arriving at this conclusion, the DG relied upon Section 66(2) of the NDMC Act, 1994, Section 120 of the Delhi Municipal Corporation Act, 1957 and judgment of the Hon'ble Delhi High Court in *MCD v. Ashfaq Ahmed & Anr.*

142. IP-1 submitted that the DG erroneously interpreted Clause 6.1 (m) of the Agreement in terms of the aforementioned provisions of the NDMC Act as well as the DMC Act. IP-1 stated that under both these statutes, the incidence of tax lay on the licensee only in the event that there is a long occupation with an entitlement to construction to the licensee. The right to construct on the premises of OP-1 is absent in Clause 6.1 (m) of the Agreement, which makes the licensee liable to pay tax levied on account of any infrastructure for the purpose of CTI. Neither the clause nor the OPs by way of any communication clarified that the incidence of tax on the licensee would only accrue in the event any infrastructure is constructed by them. The clause thus, is reflective of abuse of dominant position by the OPs.

Issue 8: The liabilities cast upon the broadcasters *vide* clause 12.3 of the Agreement applicable under certain situations/ circumstances are one sided and asymmetric in favour of OP-1 and therefore anti-competitive.

143. With respect to Clause 12.3 of the agreement which provides that “The Licensee may terminate this agreement any time after giving an advance notice of 6 months”, the DG found no violation of provision of Section 4 of the Act as the time period of six months



provided in this clause was longer than that provided in Phase II policy. In this regard, IP-1 submitted that OP-2 failed to bring any document to show that the three months period under phase II policy was insufficient for such logistic and technical works. The DG also failed to investigate into this aspect in a significant manner.

Issue 9: Individuals Arrayed under Section 48 of the Act.

144. IP-1 submitted that the DG has arrayed certain individuals under Section 48 of the Act who were associated with OP-1 and OP-2 at a time when Phase-III Policy was finalised. IP-1 submitted that the individuals arrayed by DG held crucial positions in the senior management of the concerned OPs and were privy to all the discussions and meetings that led to finalisation of the Phase-III Policy. Further, some of the said individuals were even involved in the drafting of the terms and conditions of the Phase-III agreements and the consent and collaboration on the part of the named individuals finally resulted in the Phase-III Policy.

Submission of IP-2:

145. IP-2 concurred fully with the above submission of IP-1. In addition, IP-2 submitted the following:

(i) The DG concluded that Phase-III agreement automatically gets terminated once the GOPA signed between the private broadcasters and OP-2 comes to an end in 2030. IP-2 averred that it is not clear from a bare perusal of the clauses incorporated in the GOPA that the Phase III Agreements executed with the OPs would terminate with the expiry of GOPA. Further, the conduct of OP-1 caused mis-information on IP-2, which may not cast an adverse impact on the market; however, the same clearly demonstrates that OP-1 being the dominant player, adopted a casual approach in adopting Phase-III Policy which has a crucial impact on the relevant market.

(ii) The DG concluded that the 15 years lock-in period under Phase-III Agreement would automatically end with the revocation of GOPA and the DG relied on OP-1's



submissions that the lock-in period was retained for the benefit of the broadcasters to avoid disruption of broadcasting services. IP-2 averred that OP-1 failed to demonstrate how in the absence of a lock-in period, the services would be disrupted. Further, it was submitted that OP-1 failed to justify the suitability of a 15 year lock-in-year period.

(iii) With respect to the issue of Clause 7.7 of the Phase-III Agreement, IP-2 averred that the OPs failed to provide any reasonable justification with respect to quantification of damages at five times the annual rent per sq.m and OP-1 had imposed an onerous burden on the private broadcasters to vacate the infrastructure immediately, on termination of the Agreement. IP-2 claimed that penalty under Clause 5.5 would be imposed even in case of termination arising out of *force majeure*, technical necessity, or any illegal action undertaken by either of the parties. Further, the clause unilaterally imposed penalty without considering the aforementioned exigencies which may cause termination; therefore, Clause 7.7 of the Agreement clearly was a case of abuse of dominance by the OPs.

(iv) The DG Report held that OP-1's act to charge the rates of 220 meter tower in lieu of making a provision of a 100-meter tower and the discriminatory pricing therein was abusive and unfair and IP-2 concurred with the same. After analysing the invoices raised by OP-1, the DG concluded that OP-1 charged similarly placed broadcasters at different rates for certain overlapping periods in A+ category cities and noted that IP-2 had been subjected to different treatment and asked to pay higher rates which was unfair and in contravention of Section 4(2)(a)(ii) of the Act.

Analysis and Findings of the Commission

Analysis on Enterprise and Group

146. The first and the foremost issue to be dealt with in respect of the facts and circumstances of the case is whether OP-1 (Prasar Bharti) and OP-2 (Ministry of Information and Broadcasting, Government India) can be said to be enterprises within the meaning of Section 2(h) of the Act and if so whether they together constitute a "Group" as defined



under Explanation (b) to Section 5 of the Act. For the sake of convenience, Section 2(h) of the Act is reproduced herein below:

“A person or a department of the Government, who or which is, or has been, engaged in any activity, relating to the production, storage, supply, distribution, acquisition or control of articles or goods, or the provision of services, of any kind, or in investment, or in the business of acquiring, holding, underwriting or dealing with shares, debentures or other securities of any other body corporate, either directly or through one or more of its units or divisions or subsidiaries, whether such unit or division or subsidiary is located at the same place where the enterprise is located or at a different place or at different places, but does not include any activity of the Government relatable to the sovereign functions of the Government including all activities carried on by the departments of the Central Government dealing with atomic energy, currency, defence and space”.

147. While passing the order dated 04.07.2017 under Section 26(1) of the Act, directing the DG to investigate into the matter, the Commission in respect of OP-1 had reached a *prima facie* opinion that OP-1 is an enterprise as it is engaged in the services of providing infrastructure facilities to FM Radio Broadcasters on the basis of receipt of licence fee which is a commercial activity. However, in respect of OP-2, the Commission observed that in so far as the function of OP-2 was concerned, it is the nodal Ministry for Information and Broadcasting of the Government of India and is *interalia* engaged in formulation of guidelines, regulation and policies for those matters 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.
148. The investigation, however, has returned a finding that both OP-1 and OP-2 are individually enterprises and collectively a "Group". The investigation has premised its findings on the aspect that OP-2 was the final authority who took decision on the recommendation of CAC and fixed the rates of licence fee for Tower, Open Space, Covered Space and Other Miscellaneous services to be rendered by OP-1 under Phase-III.



149. The Informants, both in their oral submissions made at the time of final hearing as well as *vide* their written arguments filed on 16.09.2019, supported the finding of the investigation in this regard. Reliance has been placed on certain previous decisions of the Commission and that of the judgement of the Hon'ble Supreme Court of India in *CCI vs Coordination Committee of Artists and Technicians of W.B. Film and Television and Ors.*, (Civil Appeal No. 6691 of 2014) wherein it was observed that the test to determine an enterprise should be based on a functional approach adopted *qua* the entity as opposed to the form of that entity. The provision of infrastructural facilities to private radio broadcasters cannot be construed as a sovereign function, as OP-1 charges fees from private radio broadcasters. Further, OP-2 receives licence fee through BECIL, which collects these fees from private radio broadcasters. Thus clear commercial benefits accrue to both the OPs. Also the FM Phase III Policy allowed private parties to form a consortium and set up infrastructural facilities themselves, which indicates that the activity performed by these OPs could not be termed as inalienable.
150. It was stated that as per the Phase-II Policy, co-location of facilities was mandatory in respect of 09 cities (Delhi, Chennai, Kolkata, Mumbai, Bangalore, Hyderabad, Jaipur, Pune and Surat). After perusing the invoices raised by BECIL on the Informant, it was found that tower rental was payable to OP-2 and service tax had been levied on the basic services at the applicable rates. Further, private broadcasters were to enter into agreements with BECIL and contribute their share of Common Transmission Infrastructure (CTI) and as per the MoU signed between OP-2 and BECIL on 16.06.2009, BECIL was to collect rental from broadcasters by raising invoices. Out of the rental received, BECIL could retain some percentage as maintenance and service charges and was required to deposit the balance in the Consolidated Fund of India under intimation to OP-2. Therefore, OP-2 *inter alia* earned annual Licence Fee for its towers, which falls under the domain of economic activity rather than sovereign functions.
151. It has also been contended by the IPs that, notwithstanding that OP-1 is a statutory body created under Section 3 of the Prasar Bharti (Broadcasting Corporation of India) Act, 1990, it is financially and administratively controlled by OP-2. OP-2 exercised *de-jure*



and *de-facto* control and material influence on all activities of OP-1 as per Expert Committee Report dated 24.01.2014. Reliance has also been placed by the IPs on the contention of OP-1 that, it had no role to play in the decision making process as the final decision pertaining to rates under Phase-III Policy lay with OP-2 and OP-1 merely acted as per OP-2's decisions. This shows that OP-2 controlled the functions of OP-1, and thus, both the OPs constituted a Group.

152. OP-1 in its objections as well as written arguments dated 15.05.2019 and 16.09.2019 assailed the findings of the investigation on the aspect of both OP-1 and OP-2 being enterprises under the Act and also forming a group. It was *inter alia* contended that activities of OP-2 were in discharge of its sovereign functions and policy making functions and thus, cannot be said to be commercial in nature. OP-2 consequently does not fall under the definition of enterprise. With respect to the finding that both the OPs constituted a group, it was firstly submitted that since OP-2 is not an enterprise, there cannot be constitution of a group between OP-1 and OP-2. OP-1 is an autonomous statutory corporation. Its members and part time members are appointed by a committee comprising of the Chairman of the Council of States, Chairman Press Council of India and a nominee of OP-2. It could not be said that OP-2 exercised 26% or more voting rights of OP-1 or that OP-2 appoints more than 50% of the members of the Board of Directors of OP-1 or controlled the management or affairs of OP-1. Similar contention was advanced by OP-2 *vide* its written submission dated 17.09.2019. Additionally, OP-2 also averred that broadcasting involves the use of air waves. Such use necessarily involves permission from the State which it accords in exercise of its sovereign functions.
153. OP-1 based on the judgment of the Hon'ble High Court of Delhi in *ESPN Software India Pvt. Ltd. vs Prasar Bharti & Anr* (2013) 204 DLT (DB), submitted that sovereign right of the State to control and regulate the use of air wave or frequency in a manner consistent with public interest is judicially recognised. It was also contended that the privilege of using air waves and terms and conditions specified by the Government of India as part of its FM policy are relatable to section 4 of Telegraph Act, 1885 and provisions of the Indian Wireless Telegraphy Act, 1993.



154. It is pertinent to take into consideration the definition of ‘sovereign’ as delineated from time to time by the Hon’ble Supreme Court and various Hon’ble High courts and Tribunals of the country. In a plethora of cases, courts have defined which activities of government departments fall within the ambit of sovereign functions. Some of the cases which are relevant to the matter under consideration are discussed below.

155. The Hon’ble Supreme Court in *Chairman, Railway Board & Others Vs. Chandrima Das (Mrs) & Others*, (2000) 2 SCC 465, observed that the theory of sovereign power, which was propounded in *Kasturi Lal Ralia Ram Jain v. State of U.P.*, AIR 1965 SC 1039, has yielded to new theories and is no longer available in a welfare state. Functions of the Government in a welfare state are manifold, all of which cannot be said to be the activities relating to exercise of sovereign power. The functions of the State not only relate to the functions of the country or the administration of justice (which are recognized as sovereign functions), but they extend to many other spheres as, for example, education, commerce, social, economic and political activities. These activities cannot be said to be related to sovereign power. The running of Railways was held to be a commercial activity. The Supreme Court expressly rejected the reliance placed on the decision in *Kasturi Lal*.

156. The Hon’ble Competition Appellate Tribunal (COMPAT), in the context of India Trade Promotion Organisation, observed in the case of *India Trade Promotion Organisation vs. Competition Commission of India & Ors.*, Appeal No. 36 of 2014 decided on 01.07.2016 that:

“Although, the term 'sovereign function' has not been defined in the Constitution or the Act, but the same has acquired a definite meaning. It has been repeatedly held by the Courts that sovereign functions of the State/Government are those which are inalienable. These include enactment of laws, the administration of justice, the maintenance of law and order, signing of treaties, meting punishment to those found guilty of committing crime. None of these and similar functions of the State can be delegated or performed by a third party or a private agency. In contrast, any activity relating to trade, business, commerce or like is a non-sovereign function because the same can



be performed by any private party/entity. To put it differently, the functions which are integral part of the Government and which are inalienable are 'sovereign functions' and commercial actions/trading activities and actions, which can either be delegated or performed by the third parties are alienable and are not treated as 'sovereign functions'."

157. *In M/s. Royal Energy Ltd. v. M/s. Indian Oil Corporation and Ors., MRTP Case No. 1/28 (C-97/2009/DGIR) (para. 7.10), the Commission held that if "an anti-competitive conduct flows from any policy of the Government, the Commission can review the same and pass suitable orders under Section 27 and 28 of the Act."*

158. Further, in *Agricultural Produce Market Committee Vs. Ashok Harikuni & Another*, (2000) 8 SCC 61, the Hon'ble Supreme Court held as follows:

"So, sovereign function in the new sense may have very wide ramification but essentially sovereign functions are primary inalienable functions which only State could exercise. Thus, various functions of the State, may be ramifications of 'sovereignty' but they all cannot be construed as primary inalienable functions. Broadly it is taxation, eminent domain and police power which covers its field. It may cover its legislative functions, administration of law, eminent domain, maintenance of law and order, internal and external security, grant of pardon. So, the dichotomy between sovereign and non-sovereign function could be found by finding which of the functions of the State could be undertaken by any private person or body. The one which could be undertaken cannot be sovereign function. In a given case even in subject on which the State has the monopoly may also be non- sovereign in nature. Mere dealing in subject of monopoly of the State would not make any such enterprise sovereign in nature. Absence of profit making or mere quid pro would also not make such enterprise to be outside the ambit of "industry".

159. A distinction *between* sovereign and non-sovereign function of the state was elaborated by the Hon'ble Supreme Court in "*N Nagendra Rao v State of AP* (AIR 1994 SC 2663), wherein the Hon'ble Supreme Court held that



“one of the tests to determine if the legislative or executive function is sovereign in nature is, whether the State is answerable for such actions in courts of law. For instance, acts such as defence of the country, raising (the) armed forces and maintaining it, making peace or war, foreign affairs, power to acquire and retain territory, are functions which are indicative of external sovereignty and are political in nature. Therefore, they are not amenable to jurisdiction of ordinary civil court. No suit under Civil Procedure Code would lie in respect of it. The State is immune from being sued, as the jurisdiction of the courts in such matters is impliedly barred.”

The court further emphasised that:

“In a Welfare State, functions of the State are not only defence of the country or administration of justice or maintaining law and order, but it extends to regulating and controlling the activities of people in almost every sphere, educational, commercial, social, economic, political and even marital. The demarcating line between sovereign and non-sovereign powers, for which no rational basis survives, has largely disappeared. Therefore, barring functions such as administration of justice, maintenance of law and order and repression of crime etc. which are among the primary and inalienable functions of a constitutional Government, the State cannot claim any immunity.”

Thus, the sovereign functions have to be primary and inalienable functions, which includes administration of justice, maintenance of law and order, defence and repression of crime etc.

160. The learned *single* Judge of the Delhi High Court in W.P. (C) No. 993 of 2012 in the matter of *“Union of India v Competition Commission of India and others”* held that:

“the petitioner has entered into a Concession Agreement under its PPP policy. It is, therefore, clear that respondent No. 2 is performing a commercial activity and rendering services for a charge, which, prior to the entering into the aforesaid agreement with the petitioner, was being performed by the petitioner. The petitioner is also carrying out an activity, viz. running the railways, which also has a commercial angle and is capable of being carried out by entities



other than the State, as is the case in various other developed countries. It is, therefore, not an inalienable function of the State.”

161. In the instant case, the activities in question relate to the provision of infrastructure facilities to private FM radio broadcasters in different cities/ area of operations of IPs. If we apply the first test *i.e.* the sovereign functions test as elaborated above, it is amply clear that the provision of infrastructure facilities to private FM radio broadcasters is not relatable to sovereign functions of the Government and neither such activities are exempted from the definition of enterprise as per Section 2(h) of the Act.
162. From the Investigation Report, it is clear that provision of infrastructure facilities to private FM radio broadcasters is an economic/ commercial activity and there are buyers and sellers in that market. OPs are the sellers of the said service and FM radio broadcasters are the buyers. Buyers/ FM radio broadcasters are getting the said services on payment of a fee, implying that the activity in question is an economic/ commercial activity. Further, all the functions carried on by a State are not sovereign functions. Only such functions which are non-delegable, inescapable and inalienable functions are sovereign functions. In the instant matter, some of the activities of OP-2 are being delegated to BECIL. Further, the activities carried out by OP-2 through BECIL are commercial/economic in nature and not inalienable as such and thus cannot be considered to be in the nature of a sovereign function.
163. Having given a careful thought to the submissions of the parties and the findings of the Investigation, the Commission reiterates that OP-2 cannot be considered an enterprise in so far as it is engaged in formulation of guidelines, regulations and policies and matters incidental thereto. However, Commission agrees with the finding of the Investigation that getting towers constructed by OP-2, through the medium of its public sector company *viz.* Broadcast Engineering Consultants India Limited (BECIL) and receiving fee from BECIL, which it in turn collects from various radio broadcasters who have mandatorily co-located their respective facility on such towers, cannot be described as a sovereign function. The nature of the activity is economic in nature as is evident from the copy of the invoices raised by BECIL on the Informants and which is forming part of



the Investigation Report. Even after applying the functional test, it cannot be said that construction of towers and providing co-location services is in the nature of any sovereign function, as such a function can be performed even by third party and is alienable in nature. In fact, the private radio broadcasters have stated to be availing these facilities in cities where the BECIL has not constructed such towers for OP-2. Thus, OP-2 is an enterprise for the purposes of the Act. In the case of OP-1, it is engaged in providing land and tower infrastructure (LTI) and common transmission infrastructure (CTI) to FM radio broadcasters on the basis of payment of a licence fee which is a commercial activity. These activities have not been exempted by the Central Government in exercise of its powers under Section 54 of the Act. Thus OP-1 cannot be said to be performing activity of a sovereign nature and consequently answers the description of an enterprise, for the purposes of the Act.

164. With respect to the findings of the Investigation, that OP-1 and OP-2 form a group, the Commission agrees with such finding of the Investigation given the facts and circumstances of the present case. OP-1 in the course of its decision making with respect to fixation of rates for tower rentals, licence fee *etc.* has predicated the same on the approvals received from OP-2 at each stage and does not appear to have taken any independent decisions in that regard. Based on evidence discussed in the Investigation report, it has been found that OP-2 had exercised some degree of control over OP-1, in respect of fixation of rates under Phase-III policy. This was understandably so as the policy was formulated and issued by OP-2 itself and OP-1 had a greater role in implementation of the same.

Analysis of Dominance and Abuse of Dominance

165. As regards assessment of dominance of OPs, the Commission agrees with the finding of the DG that both the OPs as a group enjoy a position of dominance in the relevant market in each of the geographic locations covered in the instant matter, as discussed in para 25-27 earlier.
166. The Commission having perused the allegations levelled by the IPs, is of the opinion that such allegations *inter-alia* arise out of the terms and conditions imposed on the Informant



and other private FM radio broadcasters by OPs through the agreement entered into under Phase III FM Radio Policy. The issues *inter alia* which require determination in the present matter includes:

- (i) Whether mandatory use of the infrastructural facilities of OPs is abusive
- (ii) Whether increase in Licence Fee and not informing about the same to private FM broadcasters amounts to abuse
- (iii) The date from which the Licence Fee is chargeable at higher rate for Phase-III
- (iv) Whether licence fee/rates for LTI, maintenance charges and miscellaneous charges levied by the OPs from the FM Radio broadcasters are non-reasonable.

These issues are discussed in following paragraphs.

Mandatory use of the infrastructural facilities of OPs is abusive:

167. The Investigation Report concluded that stipulations in the Phase-III Policy providing for mandatory use of the infrastructural facilities of OPs is a policy decision of the Government taken after consultations with the sectoral regulator *i.e.* TRAI. Adoption of such policy decision by the OPs cannot be said to be a competition issue. In this regard, IP-1 had averred that the DG has failed to consider the TRAI Recommendations to Phase III-Policy, dated 22.02.2008, in its entirety. While TRAI had recommended in favour of mandatory co-location, it was also conscious of stakeholder concerns arising thereof. TRAI had, therefore, recommended that a mandatory Reference Co-location Offer (RCO) was required to ensure better transparency and uniform treatment to all the FM radio operators. The OPs, however, have failed to incorporate the said recommendation of the TRAI with respect to RCO in its Phase III Policy.

168. IP-1 has averred that the analysis of DG that adoption of Phase III Policy cannot be a competition issue as it relates to a policy decision of the government is flawed and is against the spirit of the Act which intends to create a balance and ensure fair competition in the market. Further, IP-1 submitted that the plea of the OPs that there was no violation of Section 4 of the Act on the sole ground that mandatory co-location was a policy decision of the Government was erroneous as it failed to consider the TRAI recommendation in its totality which also mandate RCO. This was an abuse of dominant



position wherein OP-2 in connivance with OP-1 had fixed the terms of Phase III Policy as per the own accord.

169. In this regard, the Commission observes from the submission of OP-1 that this co-location policy decision was arrived at after consultations with all stakeholders. The FM policy of co-location of transmission infrastructure and its location on OP-1's land and towers apart from reducing the costs involved also ensured a level playing field for broadcasters in each city. Further, had the transmission facilities of different broadcasters been located at different places, there would have been a possibility of a broadcaster operating from a strategically significant location and having stronger signals and another broadcaster having weaker signals. As a result of co-location all broadcasters broadcast from the same location, from the same transmission infrastructure having the same power and incur the same broadcasting costs. Thus no abuse can be found against the OPs on that count.

Increase in Licence Fee and not informing about the same amounts to abuse:

170. The DG found that the conduct of OPs in not informing the enhanced licence fee and other charges payable by a broadcasters, who were migrating from Phase II to Phase-III, till the date fixed for payment of NOTMF, *i.e.*, 27.10.2015, was in contravention of Section 4(2)(a)(i) of the Act. The DG found that despite the fact that OP-1 got approval for enhanced rate from OP-2 on 16.09.2015, OP-1 did not upload the agreement on its website till 27.10.2015.

171. In this regard, OP-1 submitted that it had found certain discrepancies in the rates as conveyed by OP-2 and had taken up the matter with OP-2 *vide* its letter dated 18.09.2015, followed by reminders dated 29.09.2015 and 27.10.2015. Thus, OP-1 cannot be faulted for not publishing rates, as its letter for clarification and correction of rates was pending before OP-2 at the relevant time. Further, it has been stated that there was no defined procedure for publication of guidelines issued by OP-2 as a result of which OP-1 did not upload the rates and agreements on its website.



172. Further, OP-1 contended that the terms on which migration was to take place, the amount that was to be charged towards NOTMF and the question whether the rates for utilisation of OP-1's infrastructure ought to have been published at the time of intimating NOTMF were all matters in the realm of a policy decision falling within the sole preserve of OP-2. OP-1 had no control on any of those decisions and, therefore, the findings of the investigation against it are clearly baseless and unwarranted.
173. In this regard IP-1 submitted that in the acceptance letter issued by OP-2 on 24.09.2015, there was no reference of the proposed increase in the licence fee even though the OP-1 received approval on 16.09.2015. IP-1, *vide* acceptance letter dated 24.09.2015, was only intimated to pay NOTMF by 09.10.2015 and sign the GOPA by 23.10.2015, with option to withdraw its decision to migrate by 28.09.2015. Thus, IP-1 had no opportunity to take an informed decision before payment of NOTMF, as the enhanced rates came into its knowledge on 03.11.2019, and by this time it had lost the opportunity to withdraw from migration to Phase III.
174. In this regard, the Commission observes from its earlier order dated 03.04.2018, passed under Section 33 of Act with regard to Case No. 29/2016, that the increase in amount is not significant as compared to NOTMF amount paid by IP-1. The amount of NOTMF obtained from the Investigation Report and total fee and charges payable under Phase II and Phase III policies are produced below:

Table 2: Total Fee and Charges payable under Phase II and Phase III agreements

No.	Station	NOTMF (OP-2's communication dated 24.09.2015, Annexure A -44)	Total Fee and Charges payable under old agreement	Total Fee and Charges payable under new agreement	Increase in Total Fee and Charges
1	Ahmedabad	13,17,20,813	25,84,492	30,22,912	4,38,419
2	Bangalore	21,60,00,000	28,13,229	32,52,178	4,38,948
3	Pune	14,00,55,000	29,19,064	33,99,559	4,80,494
4	Delhi	33,33,78,328	29,05,773	30,16,462	1,10,689
5	Chennai	12,27,00,000	16,51,095	20,28,501	3,77,406



175. From the above table, it is evident that increase in total fee and charges was less than 0.05 percent of NOTMF in case of relevant market of Delhi. Further, since such charges and fees were payable under Phase II, it should have been in the reasonable contemplation of IPs that such charges would be applicable under the Phase III also. The Commission in the facts and circumstances of the present case, observes that non intimation of increased fees and charges to IPs before payment of NOTMF at best could be an administrative lapse by the officials of OPs, but certainly not in the nature of casting any new liability on private radio broadcasters including IPs. Further, there is no evidence on record that other private radio broadcasters objected to the same. The non-communication of charges by OP-1 in a timely manner which otherwise the IPs are obliged to pay for continuation of their agreement, cannot be an abuse falling within Section 4 of the Act. The IPs in any case have not contended that under Phase III policy, they were exempted from making payment of such charges when both new and existing broadcasters were fully aware that such charges are payable and there is no exemption from payment of charges. However, notwithstanding that the Commission has not found this act of OPs, to be anti-competitive, still the Commission observes that the OPs should clearly have revealed the various applicable charges to FM broadcasters before payment of NOTMF, so that they could make an informed choice at the inception. In any case the IPs have not set up any case that had they known about enhancement of licence fee, they would not have paid NOTMF and would not have migrated to Phase III, and would have gone out of business with Phase II ending in 2015.

The date from which the Licence Fee is chargeable at higher rate for Phase-III

176. As regards use of incorrect block year for fixation of price, the Commission observes from the findings of the Investigation Report that OPs adopted an incorrect period of block years since 2006-07 which resulted in incorrect and higher base rate for the open space and covered space. According to the Investigation Report, Phase-II was effective from 2006-07 and, therefore, the block years should have been 2006-07 and 2007-08, 2008-09 and 2009-10 and so on. On that basis, the rates of Rs.10,307/- and Rs. 12,240/- for open space and covered space for the years 2015-16, ought to have been the licence fee for 2016-17. In this regard, from the submission of OP, the Commission notes that if



the base year had been 2005-06, the amount chargeable for Category D cities should have been Rs. 1,61,051/- in 2015-16, whereas the amount charged was Rs. 1,46,410/-. OP-1 stated that due to a calculation error, inadvertently the lesser amount of Rs. 1,46,410/- was charged by OP-1 instead of Rs. 1,61,051/-. Therefore, charging of lower amount can by no stretch of imagination be an instance of abuse of dominant position. Thus, a circumstance that ought to have been considered in favour of OP-1 has been considered adversely. The Commission in the fact and circumstances observes that no case of abuse of dominance has been made against the OPs.

177. As regards the conduct of OP-1 *vis a vis* IP-1 for raising an invoice under Phase III rates for the period of 06.12.2015 to 05.12.2016, without execution of agreement between IP-1 and OP-1, the Commission notes from the Investigation Report that the agreement between OP-1 and IP-1 was signed on 22.03.2016, whereas the Phase III licences commenced from 01.04.2015. The investigation found from the invoices submitted by IP-1 that OP-1 subsequently revised the invoice for Bangalore and also for other cities for IP-1, with effect from 23.03.2016. Thus, OP-1 charged higher base rate for open space and covered space from IP-1 from 23.03.2016 to 31.03.2016, because Clause 2.1 of the agreement under Phase III mandated that the agreement shall be valid from the date of its execution. As there was a provision of increase in such charges every year, OP-1 charged higher base rate for seven days every year since 2016. The Investigation Report calculated the charges for Open Space and Covered Space per sq.mt. p.a. to IP-1, as Rs. 10,307/- and Rs. 12,240/-, respectively for the period fee for 2016-17. However, these charges will not be very significant for a seven day period under which OP-1 charged higher base rate from IP-1.
178. The investigation also examined the conduct of OP-1 in raising invoices on IP-2 under Phase III. As submitted by IP-2, it entered into an agreement dated 07.02.2006, with the OP-1, under Phase II, for the use of CTI located at Kingsway Camp, New Delhi. However, on account of the fact that the said CTI was severely damaged, IP-2 executed another agreement with OP-1 on 30.06.2014 for Mall Road site, for use of infrastructure facilities on an interim basis. Further, IP-2 and OP-2 entered into a GOPA on 02.05.2016 for migration from Phase II to Phase III. On perusal of invoices raised by OP-1 on IP-2,



investigation found that OP-1 charged higher base rate for open space and covered space from IP-2 from 01.04.2015 onwards for its Mall Road site, which OP-1 stated as an exception. Further, investigation found that IP-1 and IP-2 were charged differently for certain overlapping period , *i.e.*, 01.04.2016 to 22.03.2017 in respect of A+ category city, which is provided in the table below:

S.No.	Details (Advance annual licence fee for)	Invoice dated 15.03.2016 for IP-1	Invoice dated 11.08.2016 for IP-2
		(23.03.2016-22.03.2017)	(10.06.2016- 09.06.2017)
1	Open space Per sq.mt.p.a	Rs.10,307.00	Rs.10,822.35
2	Covered space Per sq.mt.p.a	Rs.12,240.00	Rs.12,852.00

179. The above table shows difference in charges for the licence fees as OP-1 charged Rs. 500/- (approx.) higher from IP-2. On account of charging of higher rate of licence fee, the DG found contravention of provisions of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act, in case of IP-2. The Commission, after analysing the Investigation Report, is of the view that this minor difference of charges cannot be said to have caused any abuse so as to fall foul of provisions of Section 4 of the Act. Therefore, the Commission does not find the said conduct of OP-1 to be abusive and violative of the provisions of Section 4 of the Act.

180. Further, investigation found that agreement for use of infrastructural facilities of OP-1 at Mall Road was executed by IP-2 on 07.06.2018. However, the agreement signed by IP-2 provides that licence fee would be effective from 01.04.2015 onwards. Relevant clauses of this agreement are reproduced as under:-

“Clause 2.1: Parties agree that this agreement for interim set up shall be valid for a period of Fifteen years commencing from the 01.04.2015 (Validity of GOPA under Phase-III) or commissioning of CTI at Kingsway Camp Delhi or any other place at Delhi, whichever is earlier.”



“Clause 3.2.1: The Licence fee shall be effective from the date of 01.04.2015 i.e. the date from GOPA under Phase III is effective.”

181. Thus, in case of IP-2, the effective date commenced from 01.04.2015 though the agreement was executed between IP-2 and OP-1 on 07.06.2018. On basis of the above clauses in the agreement, investigation observed that the said agreement between IP-2 and OP-1 is different from the model agreement and also from the agreement signed between IP-1 and OP-1. The Investigation Report concluded that the said conduct of OP-1 in demanding licence fee from IP-2 before execution of the agreement is unilateral. In this regard, OP-1 submitted before the DG during the investigation that Mall Road tower is an exception as it is an interim site. The Commission also notes that neither IPs nor the OPs have emphasized this issue in their submissions. Under the given facts and circumstances, minimal increase in the charges cannot be said to have caused any harm to competition in the relevant market.

Non-reasonable licence fee/rates for LTI, maintenance charges and miscellaneous charges levied by the OPs on the FM Radio broadcasters for the use of infrastructural facilities in Phase III.

182. The investigation found that the FM Radio Broadcasters who migrated from Phase II to Phase III had to execute an agreement with OPs for use of CTI or LTI, for which charges were to be paid by the concerned broadcasters. In this regard, various allegations have been levelled by the IPs on account of increase in licence fee/rates for LTI, maintenance charges and miscellaneous charges. The Commission has dealt with the substantive issues which arose through this agreement, on which parties have also made submissions, as below.

183. As regards the allegation that the fixation of licence fee by OPs being arbitrary and without approval from the office of CAC, the IPs have submitted that the CAC was not in position to vet the charges as the base charges of Phase II on which Phase III rentals were calculated were implemented on ad-hoc basis. IPs further submitted that the OPs abused their dominance by modifying the licence fee computation process for miscellaneous facilities from 10 percent every two years to 5 percent every year as the



modification was made without seeking required recommendation from the CAC. In this regard OP-1 submitted that rates charged by OP-2 had been analysed and vetted by the CAC, Ministry of Finance. Further, OP-1 submitted that rates approved by the CAC were less than those were proposed by OP-2. The Commission notes from the Investigation Report that the said rates (Phase-III) were fixed by the Government of India in consultation with Internal Finance Division of the OP-2 and CAC. The Investigation Report also notes that the revision of licence fee @5% every year as against 10% every two years would result in minimal increase. Further, the Commission agrees with the finding of the Investigation Report that undertaking consultations with CAC by OP-2 before granting its approval to the rates is part of internal decision making by the Competent Authority. In view of the above facts and circumstances, the Commission is of the view that the said rates cannot be said to be arbitrary.

184. Similarly as regards allegation of IPs that increase in licence fee by 5% per annum in respect of open space and covered space in Phase-III over the last licence fee paid as compared to 10% increase after every two years in Phase-II is anti-competitive, the Commission notes from the CAC Report dated 20.08.2015, that these rates were fixed by the Government of India in consultation with Internal Finance Division of the OP-2 and CAC. The Commission also notes that the revision of licence fee @5% every year as against 10% every two years would result in an insignificant increase and cannot be said to be arbitrary.

185. As regards allegation of charging of higher base rate for open space and covered space, the Commission observes that there is no material to show that any unreasonable and unfair price has been imposed. From the submission of OP-1, the Commission notes that the amount charged by OP-1 is much less than the charges by other entities for corresponding facilities. In this regard, DG has also attached two evidences as Annexure A-84 and Annexure A-85 in the Investigation Report. Annexure A-84 is an agreement between IP-1 and South City Apartment Owners Association whereby open space on the roof top was licenced to IP-1 at a rate of Rs.1,43,096/- per sq. mt. per annum in the city of Kolkata. In contrast, in the city of Delhi, OP-1 has been charging @ Rs.10,307/- per sq.mt. per annum which comes to less than 8% of what IP-I is paying for open space in



Kolkata. The Annexure A-85 is an agreement between IP-I and Software Technological Park of India, Noida whereby open space to install an antenna and transmitter was licenced to IP-I @ Rs.9,456/- per sq.mt. per annum. This open space was on the roof top, whereas OP-1 charged Rs.10,307/- per sq. mt. per annum for open space at the ground level. The two agreements which are the part of the Investigation Report establish that the rates charged by OP-1 cannot be said to be unfair or unreasonable and do not tantamount to an abuse of its dominant position by OP-1. A party is free to fix the prices for provision of facility provided it is not discriminatory or unfair *qua* the other party to the transaction. In this case there are no allegation or finding to show that different charges from other private broadcasters *vis a vis* IPs.

186. With regard to issue of charging higher tower rental in respect of tower aperture under Phase-III, the DG has found OPs' behaviour in contravention of the provision of Section 4(2)(a)(i) of the Act, on the ground that OP-1 took a discounting factor of 15% in arriving at a replacement cost of a tower whereas the discount from 12 to 13% would have been more appropriate and nearer to market rates. The Commission observes from the DG report that these matters were considered and decided by the Chief Advisor (Costs). Even otherwise this variations, *i.e.*, discounting @ 15% as against 12 or 13% cannot said to be an abuse of the dominant position. Further, the Additional Director General and General Manager (Commercial) of OP-1 had explained that maintenance charge is in the nature of a provision and the same cannot be quantified in numeric terms in advance. The actual maintenance charges may either exceed or fall short of the provision made for this purpose. The Commission notes that these were uniformly charged from all the parties and the IPs were not discriminated against *vis a vis* other private broadcasters.

187. The next allegation by IP-2 is that it was asked to pay licence fee by OP-1 at the rates approved for A+ category cities for a tower of height 220 metres though it was provided a Tower of height 100 meters by OP-1 at Mall Road. The investigation found this act of OP-1 to be abusive and unfair and in contravention of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act. The Commission after analysing the Investigation Report and OP's submissions in this regard notes that licence fee can be based on a number of factors such as height of tower, advantage accruing from the site of the tower, the audience potential,



the rates of comparable facilities, etc. As submitted by OP-1 during investigation, IP-2 selected the site & tower at Mall Road of its own choice and for its own convenience. Further, OP-1 submitted that IP-2 was free to shift to a private site like five other broadcasters who were operating from private sites. Therefore, the Commission does not find the said conduct of OP-1 abusive as the height of tower is not the only factor to decide the licence fee of Tower.

Analysis of clauses in Infrastructure Agreement between OP-1 and IPs

188. The Investigation found that Clause 7.4 and Clause 14 of the Agreement applicable under certain circumstances are unfair and by incorporating them in the Agreement, OP-1 contravened the provisions of Section 4(2)(a)(i) of the Act. The analysis of these two clauses are discussed below.
189. As per Clause 7.4, in the event of emergent or technical necessity, the licensor shall have the right to disallow the licensee from using the licenced infrastructure, after providing prior notice wherever possible. However, the Licensee (FM Broadcasters) shall continue to be liable to pay Annual Licence Fee to Licensor (OP-1) for the period during which it is not allowed to use Licenced Infrastructure (LI). The investigation found that without ascribing proper reasons and without duly explaining the various situations under which the said clause can be invoked by OP-1, OP-1 has reserved all necessary rights in its favour without corresponding obligations. The clause 7.4 is reproduced as under:

“Clause 7.4: That licensor will allow the peaceful and quiet use of the licenced infrastructure to the licensee for the term of this agreement. However, in the event of emergent or technical necessity, the Licensor shall have the right to disallow the use of licenced infrastructure to the Licensee. The Licensor shall inform the Licensee about the emergent and technical necessity in advance, to the extent possible. However, the Licensor shall not be liable to pay any penalty or damages for any such non-provision. The decision of the Licensor in this regard shall be final. The Licensee shall continue to be liable to pay Annual Licence fee to Licensor for the period during which it is not allowed to use LI.”



190. With respect to the allegation that Clause 7.4 is one sided and unfair *qua* the IP's, the Commission notes that the said clause has been provided in the agreement only as an emergent measure and where a technical necessity arises. Further, there is merit in contention of the OPs that even if such an emergent situation arises, though the IP's may not be able to use their licenced infrastructure, their infrastructure and manpower would continue to have access to the place. The Commission agrees with the submission of OP-1 in the circumstances and feels that Clause 7.4 may not give rise to any competition concern, warranting an intervention by the Commission.

191. The Clause 14 of the Agreement is reproduced as under:

“Any dispute or difference arising from this AGREEMENT shall be endeavoured to be settled in the first instance through mutual consultations to be held between the parties to the AGREEMENT. In case, the difference or dispute cannot be settled through such consultations, then the same shall be settled finally by arbitration under the provisions of the Arbitration and Conciliation Act, 1996. It is agreed that the Arbitration shall be conducted at Delhi by a sole arbitrator to be nominated by the Chief Executive Officer, Prasar Bharati and the award so rendered shall be final and binding on such parties.”

192. The investigation found that Clause 14 of the Agreement which provides unilateral powers to OP-1 to nominate the sole arbitrator in case of disputes with the private broadcasters is anticompetitive and an act of abuse of dominance. IP-1 has averred that the DG has held that Clause 14 was incorporated by OP-1 without assessing whether the vesting of power to appoint the Sole Arbitrator only with OP-1 is one sided and unbalanced. Further, in a contractual arrangement between OP-1 and the private broadcasters when both parties are situated at equal position, inclusion of a one-sided clause by a party in a dominant position is a discriminatory condition.

193. The Commission is, however, of the view that aspects relating to appointment of arbitrator *etc* can be suitably dealt under the provisions of Arbitration and Conciliation Act, 1996. In this regard, OP-1 has submitted that the award passed by the Arbitrator is



not final and can be subject to further challenge. In view of the above, the Commission observes that no case is made out against OP-1 on this ground.

194. The investigation did not find contravention of provisions of Section 4 of the Act in respect of the following Clauses which were originally alleged to be abusive by the IPs:

- (i) Clause 3.3 of the Agreement stipulating penal charges on unpaid Licence Fee @ 18% per annum.
- (ii) Clause 4.1 of the Agreement stipulating obligation on the broadcasters to pay advance licence Fee for first year at the time of signing of the Agreement.
- (iii) Clause 6.1(a)(i) of the Agreement stipulating incurring of costs for CTI by the broadcasters for use by IGNOU without contributing anything.
- (iv) Clause 6.1(m) of the Agreement stipulating payment of taxes as may be levied by the local body/municipality in the jurisdiction on account of any infrastructure by the broadcasters.
- (v) Clause 2.1 and Clause 7.1 in the Agreement regarding validity period of licence.
- (vi) Clause 7.7 of the Agreement regarding payment of damages as quantified at five times the annual rent per sq.m. on pro-rata basis.
- (vii) Clause 12.3 of the Agreement which cast liabilities under certain circumstances.

195. On this issue raised from Clause 3.3, IP-1 submitted that the finding of the Investigation Report is based on OP's submission that the object behind increase in the penalty charges on default was to create deterrent effect on private broadcasters. In this regard, IP-1 submitted that the DG limited the scope of investigation as the DG failed to consider the prevalent interest rates under other statutes and merely relied upon the interest rates under Section 201(1A) and penalty provisions under Section 221 of the Income Tax Act. IP-1 averred that on earlier occasions, OP-1 levied interest at the rate of 8-9% in the event of default, and OPs failed to justify the suitability of fixing the penal charges at rate of 18%, therefore, the interest rates calculated at 18% p.a. was excessive and arbitrary. The Commission agree with the finding of the DG that the purpose of this penal rate was to create deterrence from default and accordingly, finds no contravention of the provisions of Section 4 of the Act on this account against OP-1.



196. As regards Clause 4.1 stipulating obligation on the broadcasters to pay advance licence fee for first year at the time of signing of the Agreement, IP-2 raised allegation that there is no basis for the OP-1 to seek security deposit at the time of execution of the agreement, especially when the work of CTI was yet to commence. In this regard, the Commission notes that the present concern arises from the fact that IP-2 was asked to sign two agreements in Phase-III, one for using OP-1's facilities at Mall Road and another for occupying open and covered space of OP-1 at Kingsway Camp site from Phase-II. As analysed by Investigation, the tower at Kingsway camp belonged to OP-2 and the same was destroyed in May 2014. Thereafter, IP-2 started operating from the Mall Road site of OP-1 on its own volition in Phase-II and continued using it even under Phase-III. Further, the Commission notes from the Investigation Report that the agreement that IP-2 was referring, related to the infrastructure already being used by it at Mall Road and had nothing to do with the proposed new CTI. The Commission agrees with the finding of the DG that IP-2 was not asked to sign Phase III agreement for the proposed CTI at Delhi which is yet to be commissioned. Thus, the Commission notes that the allegation of IP-2 that OP-1 sought security deposit at the time of signing of the Phase III agreement in the absence of commissioning new CTI is not correct.

197. With regard to the issue that Clause 6.1 (a) (i) and (ii) of the Agreement stipulating incurring of costs for CTI by the broadcasters for use by IGNOU without contributing anything is abuse of dominant position by OP-1, it has been submitted that DG has failed to address the issue pertaining to the fact that cost for utilising CTI is being borne only by private broadcasters and not at all by OP-1, not even for the use of CTI by IGNOU. IP-1 has further averred that a bare perusal of Clause 6.1 of Phase-III Agreement shows that the Licencee has no scope to even object in any manner, to the use of CTI by the Licensor/OP-1 for running its broadcasting services. Further the licensor was not required to pay any charges for such usage. The said clause, as per IP-1, is clearly an abuse of the dominant position by the OPs and OPs have failed to provide any justification for the same.

198. Clause 6.1 is reproduced as under:

“6.1(a) The Licencee shall:



(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 initial and recurring costs. List of Stations where provisions are to be made is enclosed.”

199. The investigation found that the relevant clause *i.e* Clause 6.1 under Phase-II provided a similar provision vis-à-vis Clause 6.1(a)(i) of Phase-III agreement. Thus, it was evident that private broadcasters, including IP-1 and IP-2, who opted for migration from Phase-II to Phase-III were aware of such an existing provision. As regards Clause 6.(a)(ii), the Investigation found that any changes after installation of CTI *etc.* is a necessity and if not provided for initially, may hamper the interests of OP-1/new entrants for expansion of broadcasting industry. Such clauses, if not incorporated, would also hinder the existing operations of private broadcasters and they may have to render loss of revenues. Thus, the overall benefit that accrues to the Broadcasters overweighs the initial costs incurred by them. The Commission agrees with the findings of the investigation in this regard.

200. With respect to the issue that Clause 6.1(m) of the Agreement stipulating payment of taxes as may be levied by the local body/municipality in the jurisdiction on account of any infrastructure by the broadcasters amounts to anti-competitive conduct by OP-1, IP-1 averred that the DG has relied upon Section 66(2) of the NDMC Act, 1994, Section 120 of the Delhi Municipal Corporation Act, 1957 and judgment of the Hon'ble Delhi High Court in *MCD v. Ashfaq Ahmed & Anr.* It has been submitted that the DG has erroneously interpreted Clause 6.1 (m) of the Agreement in terms of the aforementioned provisions of the NDMC Act as well as the DMC Act. IP-1 has submitted that under both these statutes, the incidence of tax lies on the licensee only in the event that there is a long occupation with an entitlement to effect construction by the licensee. The right to



construct on the premises of OP-1 is absent in Clause 6.1 (m) of the Agreement. Clause 6.1(m) makes the licensee liable to pay tax levied on account of any infrastructure for the purpose of CTI. Neither the clause nor the OPs by way of any communication clarified that the incidence of tax on the licensee would only accrue in the event any infrastructure is constructed by them. The clause thus, is reflective of abuse of dominant position by the OPs.

201. The relevant clause is reproduced below:

“Clause 6.1(m): The Licensee shall pay such additional and/or enhanced taxes as may be levied by the concerned local body/municipality in the city on account of any infrastructure constructed for the purpose of CTI within the Licensor’s premises. Such liability to pay the additional taxes shall be equally shared by all the Licensees.”

202. In this regard, OP-1 submitted before the DG during investigation that in Delhi, Licensor & IGNOU will not be broadcasting from the CTI to be constructed for the private broadcasters. Thus, the apprehension of IP-2 that it had to pay taxes for the infrastructure which was put into use by OP-1 and/or IGNOU is ruled out with the submission of OP-1 that the CTI Tower to be constructed is only for the purpose of private broadcasters.

203. Accordingly, the investigation found that additional tax levied on account of infrastructure constructed by IP-1 through its system integrator for the purpose of CTI on the space provided by PB is not in contravention of any of the provisions of Section 4 of the Act.

204. Also, with respect to the allegation of IP-2 that taxes are not paid by IGNOU and other broadcasting services of OP-1, investigation concluded from the submission of OP-1 that in the relevant market i.e. Delhi, Licensor and IGNOU will not broadcast from the CTI to be constructed for private broadcasters. Hence, in the relevant market, the act of OP-1 is not in contravention of any of the provisions of Section 4 of the Act. The Commission agrees with the finding of the DG.



205. As per Clause 2.1 of the Phase-III agreement, the validity of the agreement was upto 15 years from the date of its execution. In this regard, IP-2 submitted that term of Phase-III agreement ought to commence from the date of operationalisation of the CTI and not from the date of execution of the agreement. The investigation found that the validity of GOPA commences from 01.4.2015. Therefore, any agreement signed with OP-1 for using latter's infrastructural facilities during Phase-III will come to an end on 31.03.2030., *i.e.*, the infrastructure sharing agreement under Phase-III should also be co-terminus with the validity of GOPA. The Commission agrees with the finding of the DG that the act of OP-1 to incorporate Clause 2.1 in the infrastructure sharing agreement is not found to be in contravention of any of the provisions of Section 4 of the Act.
206. As regards clause 7.1 of the agreement, IP-2 submitted that a lock-in provision of 15 years under the Phase-III agreement is arbitrary and unjustified especially since the GOPA expires on 31.03.2030 prior to the 15 year period, as IP-2 will be able to use the CTI only for 10 years, *i.e.* from the year 2020 when the CTI is expected to be commissioned. The investigation, after analysing the validity of Phase III agreement, found that validity of the Phase-III agreement comes to an end once the GOPA for Phase-III is revoked. Therefore, clause 7.1 shall lapse automatically on 31.03.2030 and the lock in period cannot be go beyond 31.03.2030. Accordingly, no contravention of the provisions of Section 4 of the Act was made out on this account against OP-1.
207. Clause 7.7 of the Phase-III Agreement requires the broadcaster to remove its effects from the site on termination of this agreement except as provided in para 7.1 and impose liability on a Licencee to pay damages quantified at five times the annual rent per s.q.m. on pro-rata basis. This clause, it has been alleged, amounts to abuse of dominance. It has been averred that the OPs have failed to provide any reasonable justification with respect to quantification of damages at five times the annual rent per sq.m and OP-1 has imposed an onerous burden on the private broadcasters to vacate the infrastructure immediately, on termination of the Agreement. IP-2 has averred that penalty under Clause 5.5 will be imposed even in case of termination arising out of *force majeure*, technical necessity, or any illegal action undertaken by either of the parties. Further, the clause unilaterally imposes penalty without considering the aforementioned exigencies which may cause



termination, therefore, Clause 7.7 of the Agreement clearly is a case of abuse of dominance by the OPs.

208. In this regard investigation found that though OP-1 can claim damages at the rate of five times the Licence Fee, in practice OP-1 raised invoices dated 14.08.2014 and 28.08.2015 as per Phase-II rates. Since the Phase-III rates were revised and Phase-II rates were not in force, OP-1 cannot raise invoices based on Phase-II rates. Thus, it appears the option left to OP-1 is to demand damages at five times the Licence fee. Had OP-1 adopted this approach it would have cost dearly to private broadcasters including IP-2. OP-1 instead of claiming damages asked them to sign Phase-III agreement for Kingsway Camp site to enable OP-1 to collect the Licence fee at Phase-III rates. Thus, it cannot be said to be affecting IP-2 badly.
209. IP-1 alleged that clause 12.3 of Phase III Agreement applicable under certain situations/ circumstances are one sided and asymmetric in favour of OP-1 and therefore anti-competitive. IP-1 in its information filed before the Commission had submitted that under the Phase-II agreement, broadcasters have the right to terminate the agreement by providing 3 months' notice or payment of 3 months licence fee, in lieu thereof. However the same has been revised to six months in the Phase-III agreement. IP-1 alleged that the change was unreasonable, unjustified and unfair. In this regard, OP-1 submitted during the investigation that a notice period of six months for termination cannot be said to be unreasonable as significant technical and logistical works are involved while isolating a FM channel integrated with other channels in a situation where there is a CTI.
210. In this regard, the DG concluded that it can be said that the time period of six months provided in clause 12.3 of the agreement, though longer than that provided in Phase-II agreement, is not unfair, unreasonable or arbitrary when analyzed in totality of the facts and circumstances of the case.
211. In this regard, IP-1 submitted that OP-2 failed to bring any document to show that the three month period under phase II policy was insufficient for such technical and logistical works. The DG has also failed to investigate into this aspect in a significant manner.



212. Without going into the merits of the arguments raised in respect of Section 48, at this stage, since the Commission has observed that the OPs have not been found to have contravened the provisions of Section 4 of the Act, as discussed above, the question of liability on its officers under Section 48 of the Act does not arise.
213. Lastly, the Commission notes that some of the allegations made against the OPs emanated from lack of timely communication with private broadcasters which created uncertainty, such that they were not aware of the changes in rates applicable to them. In this regard, the Commission feels that if OPs had taken steps to make disclosures at the appropriate time, discomfort, if any, to the parties could have been avoided and the obligations of agreement under Phase III policy could have been put into effect with more certainty. The Commission advises the OPs to bear this in mind.
214. The Secretary is directed to forward the order to all parties.

Sd/-
(Ashok Kumar Gupta)
Chairperson

Sd/-
(Sangeeta Verma)
Member

Sd/-
(Bhagwant Singh Bishnoi)
Member

New Delhi

Dated: 30.01.2020