

Subject	Issues related to Telecommunications Infrastructure Policy
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Date	Monday, January 17, 2011 1:03 pm
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Infrastructure is an essential vehicle of growth. Transparent policy is another tool to achieve the same objective. The public consultancy by the TRAI is welcome. I specialize in Competition Law and Policy and head the Firm's practice in this space of law. TRAI Act (Act) is an "ex ante" economic regulation of a sector which till the passing of the Act remained within the Government control. Several private players have been operating in India post implementation of the Act and the BSNL and MTNL (both PSUs) have been faced with a fierce competition from such players thereby losing market share and market power in India. However, the infrastructure in the domestic market in India in respect of BSNL particularly is huge and is also an essential facility. In brief, Essential Facilities mean:

"The 'essential facility' doctrine has been articulated as a subset of the so-called 'refusal to deal' cases which place limitations on a monopolist's ability to exclude actual or potential rivals from competing with it. The doctrine is one long-standing limitation on the general rule that a firm has no obligation to deal with its competitors.² As stated by one appellate court:

[T]he essential facilities doctrine imposes liability when one firm, which controls an essential facility, denies a second firm reasonable access to a product or service that the second firm must obtain in order to compete with the first.

Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536, 542 (9th Cir. 1991); see also Byars v. Bluff City News Co., 609 F.2d 843, 846, 856 & n. 34 (6th Cir. 1980) ("a business or group of businesses which controls a scarce facility has an obligation to give

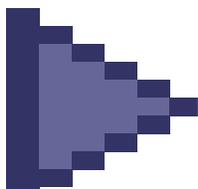
competitors reasonable access to it.”), citing Associated Press v. United States, 326 U.S.

1 (1945); Hecht v. Pro-Football, Inc., 570 F.2d 982, 992 (D.C. Cir. 1977) (“where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restraint of trade to foreclose the scarce facility.”)

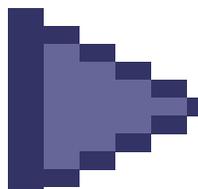
Question therefore arises, does BSNL and/or MTNL or even any private service provider in India has been refusing new entrants to use the essential infrastructure facilities **in any manner** or forcing them to develop duplicate essential facilities? If the answer to the foregoing is in affirmative then the proposed Policy must address the issue and suggest remedial measures to ensure free and fair play and enhance competition within India. Practice of refusal to access essential facilities is considered ‘abuse of dominance’ though dominance under the Competition Act, 2002 (CA02) is not frowned upon because it may have been achieved either by historical reasons or by being efficient.

I shall appreciate if foregoing suggestions are considered and included in the draft Infrastructure Policy papers so that overlap and future forum shopping between the Act (TRAI) and CA02 (CCI) gets minimized and end consumers are better off.

Regards,
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Partner



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