COMPETITION COMMISION OF INDIA

Case No. 06/2010

ORDER UNDER SECTION 27 OF THE COMPETITION ACT

Date of Order 11.01.2012

Information Provider

Ms. Anila Gupta,
Opp. H. B. Building NO. 29,
Abhyudaya Nagar, Kalachowky,
Mumbai-400033

Opposite Party

The BEST Undertaking
General Manager, BEST House,
BEST Marg, Fort,
Mumbai- 400001.

As per R. Prasad (Dissenting)

Facts of the case

1. Information has been filed before the Commission under section 19 of the Competition Act, 2002 by Ms. Anila Gupta, (hereinafter referred to as 'the Information Provider or IP') on 27th January, 2010, against the Brihan Mumbai Electric Supply & Transport Undertaking, hereinafter referred to as (BEST).

Allegations

2. The information contains the following facts and allegations:

   i) That she is getting her supplies of electricity at her premises from the

BEST. She had applied to Tata Power Co. Limited (hereinafter referred to as TPCL) for transfer or migration of electricity provider from BEST to TPCL. She approached TPCL on 20.10.2009, through an email but was informed that her request for transfer or migration of electricity provider cannot be acceded to as "BEST being a local government body, changeover rules are not applicable to it."

ii) The Informant then filed a Case before the Maharashtra Electricity Regulatory Commission (hereinafter referred to as 'MERC') against TPCL praying for an order for commencement of supply by TPCL. BEST also filed an affidavit before MERC in the matter opposing the Informant's request for change of electricity provider on the ground that BEST is a local authority having exclusive territorial jurisdiction to supply electricity to the resident within its area and TPCL cannot supply electricity within this area. The case was heard by MERC on 21.1.2010 where BEST reiterated its earlier stand that it is a local authority having exclusive territorial jurisdiction to supply electricity to the residents within its area and that TPCL cannot supply electricity within this area, although, TPCL has expressed its willingness to supply electricity to the Informant. As such, the Informant has alleged that the stand taken by BEST against its consumers is illegal and BEST has blatantly indulged in gross and flagrant abuse of its dominant position.

Order under section 26(1) of the Act.

3. The Commission after analyzing all aspects involved in the case held that "there exists a prima facie case of abuse of dominant position by BEST and

directed, vide its order dated 09.12.2010, the Director General to cause an investigation into the matter under 26(1) of the Act and to submit a report on the said allegations.

Investigation carried out by DG

4. Pursuant to the same, a detailed investigation was carried out by the DG into the allegations of the IP in the light of the conduct of BEST, the provisions of the Electricity Act, MERC rules and regulations and other Acts and Regulations relevant to the case and also by collecting information and evidence from opposite party, third parties and information available in public domain. Statements of Executive of BEST, MERC & TPCL were also recorded and placed on record along with enclosures. The report, submitted by the DG, has essentially looked into following key issues in this case:

   i) Whether BEST enjoyed dominant position in its relevant market in terms of Explanation (a) of Section 4(2) read with Section 19(4) of the Act?

   ii) Whether BEST had abused its position of dominance by way of imposing unfair or discriminatory conditions on purchase of goods; indulgence in practice of denying market access in their relevant market under section 4(2) of the Act?

5. The DG after considering the essential factors contained in Section 19(7) has concluded that the relevant product market in this case was services of distribution and supply of electricity as per definition of Section 2(t) of the Act. As far as the determination of relevant geographical market goes, the investigation after considering all the relevant factors in Section 19(6) has concluded that relevant geographical market in this case was "common

licensed area of BEST and TPCL in the city of Mumbai" for supply of electricity as per definition 2(s) of the Act.

6. The investigation has examined in detail all factors of dominance contained in Section 19(4) applicable to determine the dominance of BEST in its relevant market. The investigation found that BEST was in a position of dominance in terms of *Explanation* (a) *to Section* 4 of the Competition Act, 2002 read with Section 19(4) of the Act as BEST had the ability to act independently of the competitive forces, since they were the sole market operators to dominate in the market of distribution and supply electricity in the area of Mumbai.

7. Further, the DG, based on positioning of BEST in the supply of electricity in the relevant market, found that it enjoys complete dominance by virtue of its market share, market structure and its size and resources. It was observed that BEST is the largest supplier of electricity and holds market share of more than 99% in terms of the number of consumers and revenue in their territory of Mumbai. The BEST has a large size and resources as evident from the revenue generated and supply of electricity in terms of million units to its consumers. It has huge commercial advantage over its only competitor who has miniscule market share of less than 1 % in the relevant market and thus BEST also enjoys total dependence of consumers. Further, its dominance by way of regulatory barriers of entry has been created by the Electricity Act, 2003 and Mumbai Municipal Corporation Act, 1888 which gives exclusive position of monopoly and dominance in the relevant market. Therefore, after assessing all the factors stated in Section 19(4), the

investigation has concluded that BEST enjoyed a dominant position in the relevant market.

8. After having established dominant position of BEST in the relevant market, in- depth analysis and assessment of its conduct and the provisions of the Electricity Act and other Regulations etc. was done by the DG to determine the abuse of dominance under Section 4(2) of the Act. For this, the inquiries made in this case has examined all the relevant facts and the prevailing circumstances and applicable law to the whole system of distribution & supply of electricity in the relevant market. It also considered the sequence of events and interaction between BEST and IP, TPCL and the orders of MERC to assess the abuse of dominance in this case. The investigation made by the DG found several conduct of the BEST which was violative of provisions of Section 4(2) of the Act. The detailed findings of the DG are given below:-

i) It was found that BEST was not permitting supply of electricity by TPCL through the wheeling on its distribution network. It is noticed that BEST does not permit TPCL to use its network in the form of high tension wires, substations etc. by virtue of the provisions of the Electricity Act, 2003. As a result of such restriction, TPCL would have to bear capital expenditure of over 590 crores which was ultimately to be borne by the consumers. The said restriction on wheeling of electricity as existed in the case of BEST was not found to exist in the adjoining area of Mumbai where TPCL had common jurisdiction with Reliance Infra. Thus, wheeling of electricity was found to exist between TPCL and Reliance Infra which shows that a differential & special treatment has been accorded to BEST which

tends to directly or indirectly impose unfair or discriminatory conditions in services as also price of services in violation of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act. The said non- availability of wheeling network of BEST has also resulted in denial of market access to competitors including TPCL in its license area common to BEST which is infraction of Section 4(2)(c) of the Competition Act.

ii) Investigation has also found that BEST was also not permitting its competitors including TPCL to lay its own distribution network for supply of electricity in the given license area. There are evidences of to establish that BEST has been disputing the right of competitors to lay their own distribution network in the common area of license. This act of BEST leads to a situation of basically denying the operation of the license granted to other parties in their licensed area. Thus, BEST is neither providing the wheeling of electricity through its own network nor it is allowing the competitors to develop their own network, which practically results in non-existence of any competitors in their area. This is evident from the fact that TPCL has the presence of merely 1 % in the common license area of BEST in the island of Mumbai. The said conduct of BEST is clearly violative of Section 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(c) of the Act.

iii) Inquiries have also revealed that BEST has been insisting on TPCL to take its prior permission for supply of electricity to consumers. The BEST has been making a claim that it has the exclusive right of supply and distribution of electricity in the license area and therefore the other licensees need to take prior permission from them to supply

electricity. The said conduct was found to create huge entry barriers, driving the existing competitors and resulting in foreclosure of competition in the relevant market. The said act of BEST results in denial of market access in violation of Section 4(2) (c) of the Act.

iv) Lastly, the Investigation has observed that BEST has not been issuing No Objection Certificates and No Due Certificates to the consumers who want to shift from BEST to TPCL. There are several evidences to this effect which have been relied upon to prove the same. The said conduct of BEST is highly discriminative and denial of rights of consumers in choosing the supplier of their choice based on the quality of service and price of the electricity distributor. Similarly, this also leads to denial of market access to its competitors including TPCL in license area common to BEST and therefore, clearly violates the provisions of Sections 4(2(a)(i), 4(2)(a)(ii) and 4(2)(c) of the Act.

9. The investigation, therefore, has concluded that BEST has indulged in several conducts which are abusive of its dominant position in the form of imposing unfair conditions on services; limiting the provision of services and denies market access to competitors and the relevant market. The BEST has therefore been found to have violated the provisions of Sections 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(i) and 4(2)(c) of the Act.

Submission made by the OP

10. When show cause notice was issued to BEST to respond on the findings of DG, it was submitted as under:-

(i) Brihanmumbai Electric Supply and Transport Undertaking of the

Mumbai Municipal Corporation (hereinafter referred to, for sake of brevity, as "BEST"), is constituted under the Mumbai Municipal Corporation Act, 1888 (MMC Act, 1888). BEST, as such, is a statutory Undertaking of a Local Authority.

(ii) BEST is a public utility, which has been and is providing two essential services in the City of Mumbai, namely, (i) mass public transportation in the City of Mumbai as well as its extended suburbs, and (ii) distribution or supply of electricity in the Island City of Mumbai (i.e., the area from Colaba upto Mahim and Sion).

(iii) BEST was earlier a "licensee" under the erstwhile Indian Electricity Act, 1903 and 1910. BEST, under the erstwhile Electricity Act, 1903 and erstwhile Indian Electricity Act, 1910, was licensed to supply electricity under **The** Bombay **Electric License, 1905.** The Bombay Electric Supply & Tramway Company Limited was municipalized about 1947 under the Mumbai Municipal Corporation Act, 1888 and, its name was subsequently changed to Brihanmumbai Electric Supply & Transport Undertaking of the Mumbai Municipal Corporation.

(iv) BEST is currently a "distribution licensee" under the present Electricity Act, 2003. BEST, under Regulation 4 of the Maharashtra Electricity Regulatory Commission (Specific Conditions of Distribution License applicable to Brihanmumbai Electric Supply & Transport Undertaking of the Municipal Corporation of Greater Mumbai) Regulations, 2007, is authorized and required to distribute or supply electricity in the area of supply specified therein, in accordance with the provisions of the Electricity Act, 2003.

(v) TPC was earlier a "licensee" under the erstwhile Indian Electricity Act, 1903 and erstwhile Indian Electricity Act, 1910. TPC, under the erstwhile Indian Electricity Act, 1903 and erstwhile Indian Electricity Act, 1910, was licensed to supply electricity under (i) The Bombay (Hydro-Electric) License, 1907; (ii) The Andhra Valley (Hydro-Electric) License, 1919; (Hi) The Nila Mula Valley (Hydro- Electric) License, 1921; and (iv) The Trombay Thermal Power Electric License, 1953. The area of supply of TPC under its said 4 licenses overlapped with the area of supply of BEST.

(vi) It is pertinent that under the erstwhile Indian Electricity Act, 1910 a local authority engaged in the business of distribution or supply of Electricity (such as BEST) was clearly placed on ,a special pedestal vis-a-vis other licensees, in light of the public character of and public duties and functions discharged by the local authority. This is plainly borne out from a bare reading of the provisions of the Indian Electricity Act, 1910,

(vii) It is moreover significant that in so far as the Island City of Mumbai, TPC, except as provided under its aforesaid four licenses, was necessarily required to obtain prior permission of BEST to distribute electricity in the area of supply of BEST. In the circumstances, TPC could not supply electricity in retail in the area of supply of BEST, without prior permission of BEST. It is pertinent that the existence of such a restrictive condition (i.e., obtaining by TPC of the prior permission of BEST), under aforesaid four licenses of TPC, has been held and recorded by the Hon 'ble Supreme Court of India in case-law

reported as **(2008) 10 Supreme Court Cases 321 (Tata Power Company Ltd. Vis. Reliance Energy Ltd. & Ors.)** As such, TPC, under its aforesaid 4 licenses; supplied electricity in bulk but not in retail. Also, TPC consequently could not and did not layout a distribution system or network to supply electricity in retail.

(viii) The consumers of TPC traditionally have been licensees (under the erstwhile Indian Electricity Act, 1910) and distribution licensees (under the current Electricity Act, 2003) for their own purpose and in bulk, as well as factories (under the erstwhile Factory Act, 1881 and the current Factories Act, 1948) and any Railways previously approved by the local Government, having annual- consumption in excess of 5, 00,000 units per annum. The supply of electricity by TPC to such consumers generally required installation of and / or was facilitated through electricity sub-stations, respectively.

(ix) TPC is currently a "distribution licensee" under the present Electricity Act, 2003. TPC, under Regulation 4 of the Maharashtra Electricity Regulatory Commission (Specific Conditions of Distribution License applicable to Tata Power Company Limited) Regulations, 2008 is authorized and required to distribute or supply electricity in the area of supply specified therein, in accordance with the provisions of the Electricity Act, 2003.

(x) It is most significant that under Regulation 4 of the Maharashtra Electricity Regulatory Commission (Specific Conditions of Distribution License applicable to Tata Power Company Limited) Regulations, 2008, the afore-stated erstwhile restrictive condition (i.e.,

obtaining by TPC of the prior permission of BEST), under aforesaid four licenses of TPC, has been duly included and continued to be made applicable to TPC. In that regard, the Regulation 4 of the Maharashtra Electricity Regulatory Commission (Specific Conditions of Distribution License applicable to Tata Power Company Limited) Regulations, 2008, pertinently provides as follows:

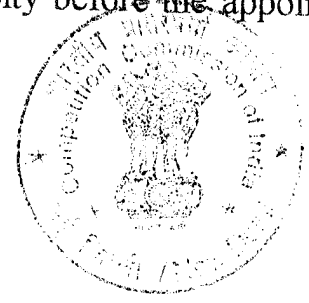
"4 Area of Supply

4.1 The Area of Supply within which the Distribution Licensee is authorized to supply electricity shall be the whole of the area is described in (1) The Bombay (Hydro-Electric) License, 1907; (2) The Andhra Valley (Hydro-Electric) License, 1919,· (2) The Nila Mula Valley (Hydro-Electric) License, 1921,· (2) The Trombay Thermal Power Electric License, 1953 collectively referred to' as, "TPC Licenses") ***subject to such conditions and. exclusions, as specified in, the said TPC*** *Licenses. ... ."*

It is thus significant that in so far as the Island City of Mumbai, TPC, as provided under its aforesaid four licenses read with the Maharashtra Electricity Regulatory Commission (Specific Conditions of Distribution License applicable to Tata Power Company Limited) Regulations, 2008, is necessarily required to obtain prior permission of BEST to distribute electricity in the area of supply of BEST. In the circumstances, TPC of the prior permission of BEST), under aforesaid four licenses' of TPC, has been held and recorded by the Hon'ble Supreme Court of India in the case cited supra. As such TPC cannot supply electricity in retail in the area of supply of BEST. Also, TPC

consequently cannot and should not lay out a distribution system or network to supply electricity in retail, in the area of supply of BEST.

(xi) It is pertinent that under the provisions of the Electricity Act, 2003, including in particular Sections 2(41), 42(3), 43 and 51 thereof, read with Regulation 19 of the MERC (Distribution Open Access) Regulations, 2005, a local authority engaged in the business of distribution of electricity before the appointed date (such as BEST), is clearly placed on a different and separate footing compared to ordinary distribution licensees. The Legislature in its wisdom has clearly and expressly thought it fit to place a local authority engaged in the business of distribution of electricity before the appointed date (such as BEST), on a special pedestal vis-a-vis ordinary distribution licensees, in light of the public character of and public duties and functions discharged by the local authority. The special status given to such a local authority (including BEST) is patently clear from the third Proviso to Section 51 of the Electricity Act 2003. In fact, the Hon'ble Supreme Court of India by a recent Order dated 8.2.2011 made in Civil Appeal No. 848 of 2011 has liberally interpreted Section 51 of the Electricity Act, 2003 in favour of and to advantage of BEST. The special status given to such a local authority (including BEST) is also borne out from Sections 2(47) and 42(3) of the Electricity Act 2003 read-with Regulation 19 of the MERC (Distribution Open Access) Regulations, 2005, whereby Open Access is not allowed in the area of supply of a local 'authority engaged in the business of distribution of electricity before the appointed date (such as BEST).



(xii) Meanwhile, several consumers including Ms. Anila Gupta whose premises were situate within the area of supply of BEST filed petitions before MERC against TPC, BEST and Reliance Infrastructure Limited to direct them to provide electricity supply to the petitioners and make such supply available as early as possible, either on BEST network or by extending its own network, as may be necessary.

(xiii) During the proceedings before MERC, BEST submitted, inter-alia that under the Electricity Act, 2003 and Regulations thereunder, a consumer whose premises are situated within the area of supply of BEST, cannot require supply of electricity (whether through open access or otherwise) from any generating company or licensee, save and except BEST.

(xiv) The MERC, by Order dated 22.02.2010 passed in said Case Nos. 60, 81, 83, 84, 85 & 86 of 2009, held inter-alia that TPC has to operate in terms of its latest license conditions which enjoin TPC to lay its distribution system on network within its entire area of supply and, that TPC is bound to supply electricity to any and all consumers in its licensed area of supply, including consumers who wish to change from BEST to TPC.

(xv) BEST, aggrieved by said Order dated 22.2.2010 passed by MERC, filed an Appeal No. 149 of 2010 before the Appellate Tribunal for Electricity, New Delhi (i.e., APTEL), against MERC and others, to impugn and seek setting aside of said Order dated 22.2.2010. It is pertinent that Ms. Anila Gupta (being, the Informant herein) too, had

been impleaded as Respondent No.8 in said Appeal No. 149 OF 2010. However, APTEL, by Order and judgment dated 14.2.2011 dismissed the Appeal No. 149 of 010 filed by BEST.

(xvi) BEST, aggrieved by said Order and judgment dated 14.2.2011 passed by APTEL, filed Civil Appeal No. 2458 of 2011before Hon'ble Supreme Court of India against MERC and others, to impugn and seek setting aside of said Order and judgment dated 14.2.2011. It is pertinent that Ms. Anila Gupta (being, the Informant herein) too, has been impleaded as Respondent No.8 in said Civil Appeal No. 2458 0f 2011.

(xvii) The Hon'ble Supreme Court of India, by Order dated 14.3.2011 made in said Civil Appeal No. 2458 of 2011, held inter-alia as follows:

"Taken on Board In this case, we find from the impugned decision of the Tribunal that there is no discussion on merits. Prima facie, it appears that no opportunity has been given to the appellant to argue on merits. Hence, issue the notice as to why the matter should not be remitted to the Tribunal on this aspect. Dasti service, in addition, is permitted Pending-further orders, there will be a stay of the operation of the impugned order passed by the Tribunal on 14thPebruary, 2011, in Appeal No. 149 of 2010. "

(xviii) Meanwhile, on 27.1.2010, Ms. Anila Gupta (being, Informant herein) also filed this Case No. 06 of 2010 before the Competition Commission of India, at New Delhi (i.e., CCI) against BEST alleging that BEST (of which she is an electricity consumer) is indulging in

monopolist policies and abuse of dominance in contravention of Sections 3 and 4 of the Competition Act, 2002.

(xix) Alternatively and without prejudice to averments hereinabove, it is significant that Section 3 of the Competition Act, 2002 is not at all applicable with respect to BEST, as BEST has not at all entered into any anti-competitive agreement referred to therein. It is further significant that Section 4 of the Competition Act, 2002 is not applicable with respect to BEST, particularly in light of Clause (g) of sub-section (4) of Section 19 of the Competition Act, 2002. It is pertinent that under Clause (g) of sub-section (4) of Section 19 of the Competition Act, 2002, the CCI, while enquiring whether an enterprise enjoys a dominant position or not under Section 4 of the Competition Act, 2002, is required to have due regard to the factor inter-alia that whether monopoly or dominant position is acquired as a result of any statute or by virtue of being a Government Company or a public sector Undertaking or otherwise. It is respectfully submitted that alleged monopoly or dominant position of BEST, is due to the provisions of Electricity Act, 2003 and Regulations thereunder, which provide for a local authority engaged in the business of distribution of electricity (such as BEST), being placed on a special pedestal vis-à-vis ordinary distribution licensees, in light of the public character of and public duties and functions discharged by the local authority.

(xx) Alternatively and without prejudice to averments hereinabove, it is significant that Ms. Anila S. Gupta (being, Informant herein) had earlier also filed aforesaid Case No. 86 of 2009 before MERC on issue analogous to the one arising under this Case No. 06 of 2010

before CCI, which has culminated in aforesaid Civil Appeal No. 2458 of 2011 pending and sub-judice before the Hon 'ble Supreme Court of India. In that regard, it is significant that Section 60 of Electricity Act, 2003 provides for remedial measures against "market domination". It is further significant that the Competition Act, 2002 is over-ridden by the subsequent Electricity Act, 2003, under Section 174 of the Electricity Act, 2003. As such, Ms. Anila S. Gupta (being, Informant herein) has a complete and effectual system of remedies under the Electricity Act, 2003 and, which have already been invoked by her. The CCI, in these circumstances, ought not and should not exercise jurisdiction in respect of this Case No. 06 of 2010 filed by Ms. Anila S. Gupta.

(xxi) Alternatively and without prejudice to averments hereinabove, it is significant that this Case No. 06 of 2010 is infructuous or not proceeded with by Ms. Anila Gupta (being, Informant herein), in light of the fact that said Ms. Anila Gupta has failed and neglected to provide necessary space (8 x 5 meters) to TPC for installation of HT sub-station to enable TPC to supply electricity to said Ms. Anila Gupta, and; TPC, consequently, having closed on 14.01.2011 the file of said Ms. Anila Gupta about requirement by her of electricity supply from TPC.

FINDINGS ON MERIT

11. Thus, after going through the entire facts of the case, allegations made by the IP, investigation carried out by the DG into those allegations and the submission made by the OP before the Commission, it is clear that the IP is

an electricity consumer in the area of BEST and is getting her supplies of electricity at her premises from the BEST. Now she had made a request to TPC to provide electricity supply to her either on the network of the BEST or by extension of its own network.

12. TPC, on the other hand, expressed its inability to accede to the request of the IP as BEST has denied to provide electricity supply on the ground that "Open Access" under the Electricity Act, 2003 and / or the Regulations framed by the MERC cannot be allowed in the area of supply of a distribution licensee like BEST as it is a statutory undertaking of a local authority. Further, in the light of decision dated 08.07.2008 of Hon'ble Supreme Court reported in (2008) 10 SCC 321 (Tata Power Co. Ltd. & Reliance Energy Ltd. and Others) the distribution system or the network of Tata Power cannot be laid or extended within the area of supply of BEST without the permission of BEST.

13. It was also argued by the BEST that provisions of Section 42(3) of the Electricity Act, 2003 and the Regulation framed by MERC have patently placed a local authority engaged in the business of the distribution of electricity such as BEST, on a different and separate footing compared to ordinary distribution licensee. Thus, the legislature, in its wisdom, has clearly and expressly thought it fit to place a local authority engaged in business of distribution of electricity on a special pedestal vis-à-vis ordinary distribution licensee in light of public character of and public duties discharged by local authorities.

14. Once the BEST has made its position clear, it is essential to examine few questions, e.g., has the provisions of the Electricity Act, 2003, been

interpreted correctly, whether it exempts a local authority such as BEST to provide non-discriminatory open access to others and whether this denial is an abuse of dominance under the Competition Law?

15. Let start with the provisions of Section 42 (3) of Electricity Act, 2003 which read as under:-

"where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, be notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access."

16. So, after going through the above provisions of section 42 (3) of the Electricity Act, 2003, it is found that the whole interpretation made by BEST is misplaced. The section says that if a distribution licensee is a local authority, it is not obliged to supply electricity from a generating company or any licensee other than such distribution licensee. In the case of Ms Anila Gupta there are two distribution licensees in that area i.e. BEST and Tata Power. So, had Ms Anila Gupta or any other person (consumer) required a supply of electricity from a generating company or a distribution licensee other than such distribution licensee i.e. BEST and Tata Power, the changeover was not possible as the BEST, being a local authority was not obliged to supply the same. But, the condition of being a local authority will not apply in the case of existing distribution licensees in that particular area

as the section clearly states that **"other than such distribution licensee".** It means that if a person (consumer) requires obtaining electricity supply from other than the existing distribution licensee, then the condition of being a local authority would apply. Thus, section 42 (3) does not prohibit, in any manner, the Tata Power to supply electricity to a BEST consumer on the pretext that BEST is a local authority. Thus, in my view Section 42(3) of the Electricity Act, 2003 will not apply in the case of the IP. Since, this provision has wrongly been interpreted by BEST and since the entire matter rests on this vital issue, in my view, the denial of "Open Access" to TPC or for that matter to the consumer (IP), the BEST has abused its dominant position.

17. Now, coming to the Regulations of Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations 2005, the MERC itself vide its Order dated 22.02.2010, has held that TPC has to operate in terms of its latest license conditions which enjoin TPC to lay its distribution system on network within its entire area of supply and, that TPC is bound to supply electricity to any and all consumers in its licensed area of supply, including consumers who wish to change from BEST to TPC. When this order was challenged by BEST in appeal before Electricity Appellate Tribunal, (i.e., APTEL), the APTEL, by Order and judgment dated 14.2.2011 dismissed the Appeal No. 149 of 010 filed by BEST.

18. BEST, aggrieved by said Order and judgment dated 14.2.2011 passed by APTEL, filed Civil Appeal No. 2458 of 2011 before Hon'ble Supreme Court of India against MERC and others, to impugn and seek setting aside of said Order and judgement dated 14.2.2011. The

Hon'ble Supreme Court of India, by Order dated 14.3.2011 made in said Civil Appeal No. 2458 of 2011, held inter-alia as follows:

> *"Taken on Board In this case, we find from the impugned decision of the Tribunal that there is no discussion on merits. Prima facie, it appears that no opportunity has been given to the appellant to argue on merits. Hence, issue the notice as to why the matter should not be remitted to the Tribunal on this aspect. Dasti service, in addition, is permitted Pending-further orders, there will be a stay of the operation of the impugned order passed by the Tribunal on 14thPebruary, 2011, in Appeal No. 149 of 2010. "*

Thus, no relief was granted to BEST either by MERC, the APTEL or by the Supreme Court of India, except with the direction to argue on merit before the APTEL. So, the BEST cannot take the shelter of MERC regulations which goes against them.

19. Since, the Electricity Act, 2003 and the Maharashtra Electricity Regulatory Commission (Distribution Open Access) Regulations 2005 does not grant immunity to BEST in this particular case, the issue in question is "Is this an abuse of dominance under Competition Law, because BEST is a dominant player in its area of operation. Here, I would like to refer to the submission made by the BEST before the Commission where BEST, itself, has accepted that it is holding a dominant position in its area of operation as it has acquired this dominant position as a result of the statute and by virtue of being a local authority. Thus, there is no dispute on this issue. The OP has also not challenged the relevant market as determined by the DG. Thus, the only issue remained to be answered is whether BEST has abused its

dominant position by not permitting the supply of electricity to the IP by Tata Power by providing its network or allowing the Tata Power to lay its own network.

20. There is no dispute on this fact that BEST is not permitting supply of electricity by TPCL through the wheeling on its distribution network. It is also not permitting TPCL to use its network in the form of high tension wires, substations etc. in accordance with the provisions of the Electricity Act, 2003. As a result of such restriction, TPCL would have to bear capital expenditure of over 590 crores which was ultimately to be borne by the consumers. The said restriction on wheeling of electricity as existed in the case of BEST was not found to exist in the adjoining area of Mumbai where TPCL had common jurisdiction with Reliance Infra. Thus, wheeling of electricity was found to exist between TPCL and Reliance Infra which shows that BEST is directly or indirectly imposing unfair and discriminatory conditions and prices in providing services of electricity supply in its area of operation which is in violation of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act.

21. I am also in full agreement with the Investigation's finding that BEST is also not permitting its competitors including TPCL to lay its own distribution network for supply of electricity in the given license area. I am also inclined to believe that there are enough evidences to establish that BEST has been disputing the right of competitors to lay their own distribution network in the common area of license. This act of BEST leads to a situation of basically denying the operation of the license granted to other parties in their licensed area. Thus, BEST is neither providing the wheeling of electricity through its

own network nor it is allowing the competitors to develop their own network, which practically results in non-existence of any competitors in their area. This is evident from the fact that TPCL has presence of merely 1 % in the common license area of BEST in the island of Mumbai. The said conduct of BEST is clearly violative of Section 4(2)(a)(i), 4(2)(a)(ii) of the Act. The said non- availability of wheeling network of BEST also results in denial of market access to competitors including TPCL in its license area common to BEST which is infraction of Section 4(2)(c) of the Competition Act.

22. I also hold that the claim of the BEST, that it has the exclusive right of supply and distribution of electricity in the license area and therefore the other licensees need to take prior permission from them to supply electricity, is not correct as this conduct is creating huge entry barriers, driving the existing competitors out of market and resulting in foreclosure of competition in the relevant market. Thus, the DG's findings that the said conduct of BEST is highly discriminative as it denies the rights of consumers in choosing the supplier of their choice based on the quality of service and price of the electricity distributor, is absolutely correct and the provisions of Sections 4(2(a)(i), 4(2)(a)(ii) and 4(2)(c) of the Act, are clearly attracted in this case.

23. Finally, by not providing the supply of electricity to its consumers either through its own network or network of Tata Power, the BEST has indulged in limiting and restricting the provision of services and denying market access to its competitors in its area of operation. This conduct on the part of BEST, is in clear violation of the 4(2) (b) (i) of the Act.

24. Another aspect to consider in this case is the essential facility doctrine. There is no doubt that TPCL can lay down its own network for the supply of electricity in the city of Mumbai but will this laying a parallel line would be in the economic interest of the country as well as the consumers. Ultimately, the cost involved in laying down another network would have to be passed on to the consumers. This issue came up before US Supreme Court in the case of "U S v. Terminal Railroad Ass'n of St. Louis, 224 U.S. 383 (1912), 224 U.S. 383. The issue in that case was that the railways had constructed a bridge which was not put to use by others. The duplicating of facility of another bridge would have caused extra burden on the consumers. The US Supreme Court held that the bridge can be used by the other rail networks subject to the levy of charges but could not be refused to others to use the facility. In fact, the ingredients of the essential facility doctrine which has been explained by the US Supreme court are as under:-

i) Control of the essential facility by a monopolist.

ii) A competitor's *inability practically or reasonably* to duplicate the essential facility.

iii) The denial of the use of the facility to a competitor and

iv) The feasibility of providing the facility to the competitor.

25. Following decision of the US Supreme court, I do not think there is a necessity for the TPCL to lay down a parallel network for the supply of electricity when the network of BEST is available. BEST can only demand whiling charges from the TPCL. To sum up, the abuse of dominance of BEST is established under section 27 of the Competition Act. BEST is directed to allow TATA Power to use the network of BEST by demanding

whiling charges so that the IP can get electricity supply from TATA Power. BEST is also directed to cease and desist from preventing its consumers to switch over to TATA Power.

26. Further, under the power given under section 27(b) of the Competition Act, a penalty of Rupees one crore is imposed on BEST for abusing its dominance under section 4 of the Act as enumerated in this order.

27. Secretary is directed to serve a copy of the order to the concerned parties immediately.

Sd/-
Member (R)

Certified True Copy

13/01/2012

S. PAHLAJANI
ASSISTANT DIRECTOR
Competition Commission of India
New Delhi