

Before the Competition Commission of India

Case No. 06/2010

Dated: 11.01.2012

Ms. Anila Gupta
Opp. H.B.Building No. 29
Abhyudaya Nagar , Kalachowsky
Mumbai-400033

- Informant

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

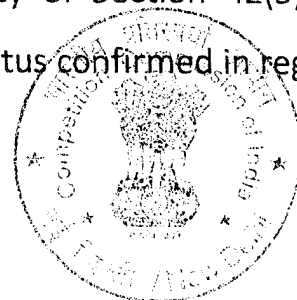
- Opposite Party

ORDER

The present matter relates to the information filed under section 19 of the Competition Act (the Act) on 01.02.2010 by Anila Gupta (the informant) against Brihan Mumbai Electric Supply & Transport Undertaking (BEST) alleging that the Opposite Party has contravened the provisions of the Act.

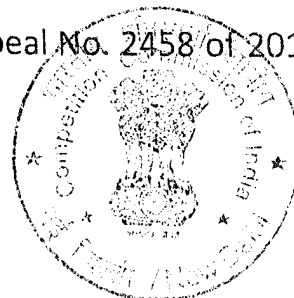
2. In the case, the Commission has passed an order in which following observations and conclusions have, *inter-alia*, been made;

“ 10.4 The entire case rests on the legality of Section 42(3) which enshrines BEST the sanctity of an enclave a status confirmed in regulation



19 of MERC. From the submissions of MERC it is noted that under the licence conditions of TPCL distribution of electricity in the area of BEST is covered under the licence. Regulations (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) issued as per section 57 of the E. Act, 2003, combined with the Electricity Supply Code encumber TPCL to supply and distribute electricity in the area of BEST. TPCL has indicated its willingness (Case No. 86/2009) to give supply of electricity to any premise or owner who wishes to source power from TPCL. This has been contested by BEST on grounds of being a legally created monopoly in the referred area. MERC disposed of the Case no. 86 of 2009 filed by the informant along with 5 other related cases , vide its order dated 22.02.2010. Subsequently, BEST filed an appeal before the Appellate Tribunal of Electricity, New Delhi, which was dismissed by the same vide order dated 14.02.2011. BEST then filed a Statutory Appeal (Civil Appeal No. 2458 of 2011) before the Hon'ble Supreme Court against the order of Hon'ble Appellate Tribunal of Electricity. The Hon'ble Court gave a stay on the impugned order passed by the Tribunal and has subsequently sent it to the Appellate Tribunal for deciding the Case on merits.

10.5 As discussed in the earlier paras, of this order a finding on the issue as to whether BEST has abused its dominant position as per the provisions of the Competition Act, 2002, would depend entirely on the extent of protection available to BEST under Section 42(3) of the Electricity Act, 2003 by virtue of being a local authority. As already mentioned in para 7 of this Order Hon'ble Supreme Court in Civil Appeal No. 2458 of 2011 has



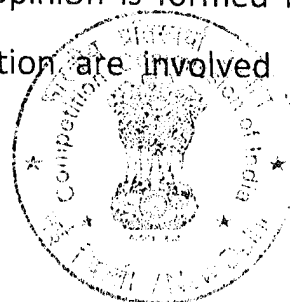
asked the Central Electricity Tribunal to decide the case on merits. The finding of the Hon'ble Central Electricity Tribunal will have a direct bearing on determining the extent of protection available to BEST under Section 42 (3) of the Electricity Act, 2003. In view of these facts it will not be appropriate for the Commission to give a finding in this case at this stage.

10.6 In view of the above, the Commission decides to close this case. However, the informant can again approach this Commission, if she so desires, after a final view is taken in the matter pending before the Electricity Tribunal.”

3. The order of the Commission contains details of the facts and allegations, findings of the Director General (DG) and replies of the Opposite Parties in the matter. I would not repeat them here for the sake of brevity. I am recording my views separately since I differ with the majority view on the conclusions drawn on the issue.

4. To recapitulate, the informant had filed information under section 19 of the Competition Act, 2002 in the case. Pursuant to that, the Commission vide order under section 26(1) directed the Director General (DG) to investigate and submit a report. Following the directions, DG submitted a report of investigation under section 26(3) of the Act and thereafter in accordance with the provisions of the Act replies from the parties were sought by the Commission.

5. If any information is filed and a prima-facie opinion is formed by the Commission considering that issues of competition are involved in the

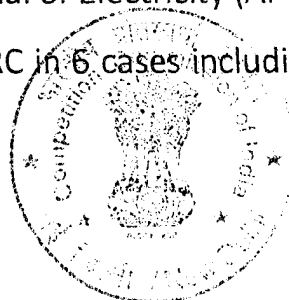


matter, in accordance with the provisions of the Act, the Commission is required to proceed to determine those issues based upon which a prima-facie view was initially formed and DG was asked to submit a report. The issue brought before the Commission was that abusing its dominant position, BEST was denying one of its consumers to switch over to Tata Power Company Limited (TPCL), even though she wanted to migrate from BEST, the current supplier of electricity to her premises to TPCL, another supplier.

6. The majority order in para 10.4 has brought out that the entire case rests on the legality of section 42(3) of the Electricity Act, 2003. The order also concludes that the matter in this case is pending before Appellate Tribunal for Electricity and therefore the Commission decides to close at this stage, although the informant if she so desires may approach the Commission, once the issue is decided by the Tribunal.

7. As has been brought out in paras 4 and 5 above, the issue before the Commission in the matter was to inquire into contravention of the provisions of the Act. The legality of section 42(3) of the Electricity Act, 2003 was not the central point on which the inquiry was instituted. Therefore, it cannot be concluded that the "entire case rests on the legality of section 42(3) of the Electricity Act, 2003" as has been mentioned in the majority order.

8. Further, the order of the Apex Court in Civil Appeal No. 2458 of 2011 emanates out of the Judgment of Appellate Tribunal of Electricity (APTEL) in Appeal No.149 of 2010 against the orders of MERC in 6 cases including the



case of the informant, albeit the matter in all the six cases is the same, pertaining to petitions of different parties for changeover from BEST undertaking to TPCL. The APTEL in its Judgment has concluded that MERC while upholding the contention of the Appellant that the Appellant could not be compelled to share its own network with the TPCL has correctly directed TPCL to supply electricity to the consumers situated in the common area of supply of TPCL and BEST as per the Licence conditions by laying down its own distribution network for giving such supply. The Hon'ble Supreme Court had earlier stayed the operation of this order of APTEL when the matter came up for hearing on 14.03.2011. The Apex Court vide order dated 21.10.2011 has now observed as under;

“ Having heard learned counsel on both sides, we are of the view that, in the interest of justice, both on the question of preliminary jurisdiction as well as on the merits, the Tribunal should hear the parties and decide the matter in its entirety afresh in accordance with law. Since the matter is likely to recur, we request the Tribunal to expeditiously hear and dispose of the matter, preferably within three months from today. All rights and contentions of the parties are kept open. We express no opinion on the merits of the case. The civil appeal is , accordingly , disposed of. No order as to costs.”

9. Thus, as per the order of the Apex Court, the matter primarily to be decided by the Electricity Tribunal after hearing the parties concerned is whether TPCL can lay its own distribution network for giving supply of electricity to the consumers of BEST since the special status of BEST as local



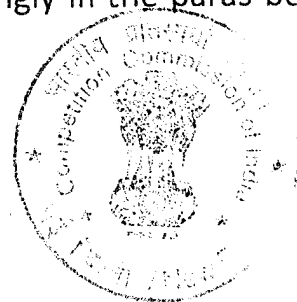
authority under section 42(3) of the Electricity Act, 2003 has already been recognised by the MERC and APTEL against which BEST does not have any grievance. From the available information to the Commission, therefore, question of section 42(3) of the Electricity Act, 2003 which primary deals with the issues of providing non-discriminatory open access of electricity by licensees is not being agitated before the Courts.

10. Be that as it may, the information brought before this Commission is not currently the subject matter of proceedings before any Court and no stay has also been granted to the proceedings by any Court of Law. Otherwise also, exclusion of jurisdiction of civil courts on the matters before the Commission has been provided in section 61 of the Act, which reads as under;

“Exclusion of jurisdiction of civil courts

61. No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Commission or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act.”

11. In this backdrop, I feel that there is no bar on determining the issues of competition in the instant matter and accordingly in the paras below I am recording my opinion.



11.1 In this case, Director General after investigation has given his findings as under;

Relevant Market

11.1.1 DG has concluded that the relevant market in this case is the service of distribution and supply of electricity in the common licensed area of BEST and TPCL in the city of Mumbai.

Determination of Position of Dominance

11.1.2 There are two distribution licensees in the relevant market as observed by DG , BEST and TPCL and after analyzing the factors mentioned in section 19(4) of the Act, DG has brought out that BEST happens to be a dominant player in this relevant market.

Findings on Abuse of Dominance

11.1.3 After examining all the relevant facts of the case, DG has concluded that the conduct of BEST in the instant matter is in contravention of provisions of section 4(2) of the Act. The conclusions drawn by DG are as under;

Contravention in terms of not permitting supply of electricity by TPCL through wheeling on the distribution network of BEST

11.1.4 According to DG, by not permitting access to its distribution network to TPCL, BEST directly or indirectly imposes unfair or discriminatory conditions in provision of services and also directly or indirectly imposes unfair or discriminatory prices of service in violation of



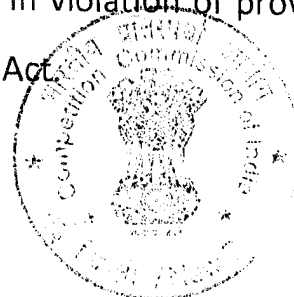
provisions of section 4(2)(a)(i) and section 4(2)(a)(ii) of the Act. Further, according to DG, non-availability of wheeling on network of BEST results in denial of market access to TPCL in its licence area which is common to BEST in violation of section 4(2)(c) of the Act.

Contravention in terms of not permitting TPCL to lay down its own distribution network

11.1.5 It has also been concluded by DG that the act of BEST in not permitting TPCL to lay its own distribution network for supply of electricity in the given licence area is in violation of section 4(2)(a)(i) , 4(2)(a)(ii) and 4(2)(c) of the Act.

Contravention in terms of insistence upon prior permission of BEST for supply of electricity to consumers and for switchover of consumers of BEST to TPCL

11.1.6 According to DG, BEST has contended that requirement stipulated in the earlier licences of TPCL to obtain prior permission of BEST to distribute electricity in area of supply of BEST have been continued to be made applicable to TPCL in the existing licence granted to TPCL under MERC (Specific conditions distribution licence conditions applicable to TPCL) Regulations, 2008. Therefore, BEST has been insisting that its permission/NOC must be obtained for switch over of consumers of BEST to TPCL. This has again been found by DG to be in violation of provisions of sections 4(2)(a)(i) , 4(2)(a)(ii) and 4(2)(c) of the Act.



Contravention in terms of not issuing No Due certificate /NOC to the consumers willing to switch over to TPCL

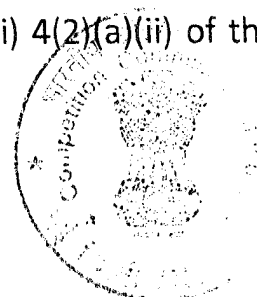
11.1.7 DG has also found that BEST had not been issuing No Objection Certificates/No Due Certificates to the consumers willing to shift from BEST to TPCL in violation of section 4(2)(a)(i) , 4(2)(a)(ii) and section 4(2)(c) of the Act.

11.1.8 Without prejudice to the legal exemptions pleaded by BEST in terms of section 42(3) of the Electricity Act, 2003 and the fact that the issue of electricity by TPCL in the licence area common with BEST is presently sub-judice, DG has concluded that the conduct of BEST is violative of section 4(2)(a)(i),4(2)(a)(ii), 4(2)(b)(i) and section 4(2)(c) of the Act.

12. Determination of issues

12.1 In the majority order of the Commission, BEST has been found to be dominant. Relevant market has also been determined. I agree with the same and therefore I am not separately determining these two issues. As regards abuse on part of BEST, I feel that following issues require determination;

(i) Whether based upon the facts and circumstances of the case, is there a case of violation of provisions of section 4(2)(a)(i) 4(2)(a)(ii) of the Act on the part of BEST?



(ii) Whether based upon the facts and circumstances of the case, is there a case of violation of provisions of section 4(2)(b)(i) of the Act on the part of BEST?

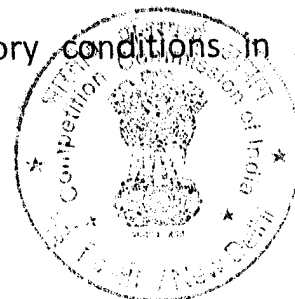
(iii) Whether based upon the facts and circumstances of the case, is there a case of violation of provisions of section 4(2)(c) of the Act on the part of BEST?

Determination

Issue (i) Whether based upon the facts and circumstances of the case, is there a case of violation of provisions of section 4(2)(a)(i) 4(2)(a)(ii) of the Act on the part of BEST?

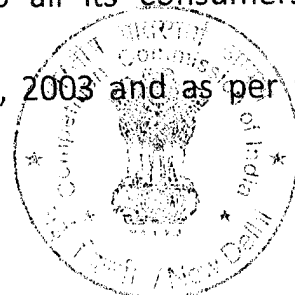
12.2 The provisions of sections 4(2)(a)(i) stipulate that there shall be an abuse of dominant position if a dominant enterprise imposes unfair or discriminatory condition in purchase or sale of goods or service. Further, sections 4(2)(a)(ii) stipulate that there shall be an abuse of dominant position if such an enterprise imposes unfair or discriminatory price in purchase or sale of goods or service.

12.3 It is clear from the findings of DG that the BEST has been found to be engaged in imposing unfair or discriminatory conditions in supply of



electricity and also in imposing unfair or discriminatory price of such supply on a end consumer i.e. the informant. It is not a case of imposing condition in supply or imposing price of such a supply on an intermediate consumer, who after causing some value addition is selling end products to a final consumer.

12.4 In this regard, it is noted that in replies of TPCL to DG in response to a question whether BEST is supplying power to end consumers at a higher rate, TPCL has replied that consumer tariff of all distribution of all distribution licensees including BEST in Mumbai is determined by MERC under section 62 and 63 of the Electricity Act, 2003. MERC has issued the MERC (Terms and Conditions of Tariff) Regulations, 2005 for determination of Tariff and distribution licensees are required under the Electricity Act, 2003 to charge its consumers in accordance with the tariff fixed by the MERC. Thus, BEST is supplying electricity to its consumers in its areas of operations in accordance with the tariff fixed and determined by the MERC and it cannot be said that BEST on its own has imposed unfair or discriminatory price (tariff) for supply of electricity to its consumers. Further, BEST is also supplying electricity to all its consumers on the conditions as per provisions of Electricity Act, 2003 and as per rules and



regulations framed by MERC. Therefore, it cannot also be said that BEST on its own is engaged in imposing unfair conditions of supply of electricity on its consumers.

12.5 Based on the above, I hold that there is no case of contravention of provisions of section 4(2)(a)(i) and (ii) of the Act on the part of BEST in the matter.

Issue (ii) Whether based upon the facts and circumstances of the case, is there a case of violation of provisions of section 4(2)(b)(i) of the Act on the part of BEST?

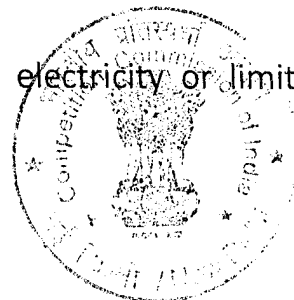
12.6 The provisions of section 4(2)(b)(i) of the Act prohibit any enterprise from limiting or restricting production of goods or provision of services or market thereof. In the instant matter, there is no evidence to suggest that BEST has limited or restricted the provision of electricity or has restricted its market. DG has also not analysed in his report how BEST has been found to be in violation of this particular provision of the Act in the matter.

12.7 BEST is seeking exemption from wheeling in light of section 42(3) of the Electricity Act, 2003 and is also contending that in its area of supply TPCL cannot lay its own distribution network without seeking its prior



permission citing certain licence conditions for its existing consumers who want a switchover.

12.8 However, in the whole matter there is no case of limit or restriction on the supply of electricity by TPCL due to the acts of BEST or limit or restriction on the overall market of electricity. BEST is supplying electricity to its consumers as on date and shall continue to do. It will also endeavour to make supplies efficiently in order to retain them in its own fold. TPCL is free to distribute and supply electricity to its own consumers and also to the new consumers and develop its own infrastructure for that. The facts placed on record show that TPCL is also able to get new consumers for making supplies of electricity in the common areas of supply which it shares with BEST. There is no evidence to suggest that BEST is engaged in an activity which results in restriction of the production or supply of electricity for the existing consumers of TPCL or in the overall market of distribution and supply of electricity. It is also not a case where TPCL or any other distribution licensee is dependent upon BEST for making supplies of electricity to their consumers since BEST is not supplying any input required by them for the supply of electricity to their consumers. There is no case of limiting or restricting supplies or production of electricity or limiting or



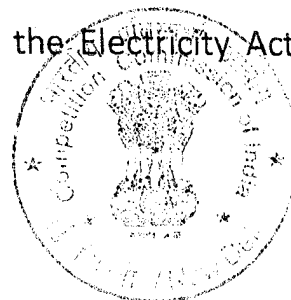
restricting the overall market of distribution and supply of electricity except for the fact that the two competitors – BEST and TPCL are competing for getting more consumers.

12.9 Based upon above, I hold that there is no violation of provisions of 4(2)(b)(i) by BEST in the matter as has been established by DG.

12.10 Although there is no case of limit or restriction of production or supplies or the market of electricity in the matter, I feel that TPCL is not in a position to supply electricity to the consumers of BEST even if the consumers want to switchover and migrate from BEST to TPCL. This brings me to the final issue of determination in the matter which is discussed in the following paras.

Issue (iii): Whether based upon the facts and circumstances of the case, is there a case of violation of provisions of section 4(2)(c) of the Act on the part of BEST?

12.11 From the facts of the case it is noted that BEST is not allowing TPCL its network for wheeling electricity to its existing consumers in its area of supply citing the provisions of section 42(3) of the Electricity Act, 2003,

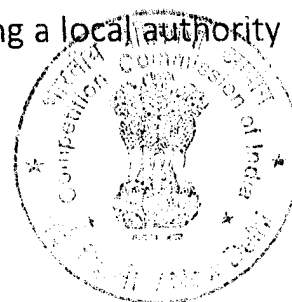


which grants a separate status to local authority as far as open access in distribution of electricity is concerned.

12.12 The provisions of section 42(3) of the Electricity Act, 2003 read as under;

“where any person, whose premises are situated within the area of supply of a distribution licensee,(not being a 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, by 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.”

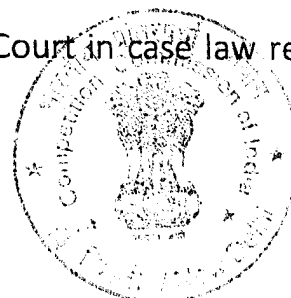
12.13 MERC has issued MERC (Distribution Open Access) Regulation, 2004 for facilitating open access to consumers, licensees and generating companies by the distribution licensees. However, regulation also provides exemption to the local authorities. Thus, BEST being a local authority is not



obliged to allow TPCL to use its distribution network as has been argued vehemently by BEST.

12.14 As brought in the previous paras, MERC and APTEL have also upheld the contention of BEST on this account. MERC, however, has also ruled in its order that there is no legal restriction on TPCL in laying its own network to supply electricity in the areas wherein it has got licence along with BEST. This ruling of MERC has been upheld by the APTEL. BEST had filed civil appeal No.2458 of 2011 before the Supreme Court and vide Order dated 21.10.2011, the Apex Court has remitted the matter to the Electricity Tribunal to decide it afresh on merits after hearing all the parties.

12.15 In the light of existing provisions of Electricity Act, 2003 and also the earlier orders of MERC and Appellate Tribunal for Electricity as on date, the only way that TPCL can supply electricity to the consumers of BEST is to lay its own distribution network. In this context, it is relevant to note that the BEST has put forward an argument that unless NOC is given by it, TPCL cannot supply the electricity in its area. It has also been stated that the existence of such requirement under erstwhile four licenses of TPCL has been found and recorded by Hon'ble Supreme Court in case law reported



as (2008) 10 SCC 321 (Tata Power Co. Ltd Vs Relaine Ltd. and Others). BEST has also stated that such requirement has been incorporated and included by MERC under Regulation 4 of MERC (specific conditions distributions license applicable to the Tata power Co. Ltd) Regulations 2008, which reads as under.

“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 are as described in (1) The Bombay (Hydro-Electric) License, 1907; (2) The Andhra Valley (Hydro-Electric) License, 1919; (3) The Nila Mula Valley (Hydro-Electric) license, 1921;(4) The Trombay Thermal Power Electric License,1953 (collectively referred to as “TPC Licenses”) subject to conditions and exclusions as specified in the said TPC Licenses.”

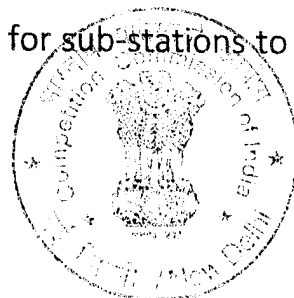
12.16 BEST has argued that in the light of continuation of such requirement provided under erstwhile four licenses by MERC also under the current license granted by MERC to TPCL under the MERC Regulation, 2008, it is indispensable for TPCL to obtain prior permission of BEST to distribute electricity in the area of supply of BEST. TPCL has also in course of



proceedings stated that NOC is a requirement for smooth transition from one licensee to another licensee, because switch over from one to another would mean that the existing metering assets are taken back by the existing distribution licensee and existing supply is disconnected which can be carried out by the existing licensee only.

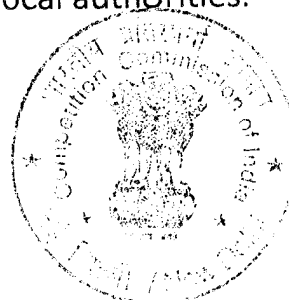
12.17 In the light of earlier orders and judgments of MERC, Appellate Tribunal as on date, the contention of BEST as discussed in para 12.14 and 12.15 above, does not hold good. However, since the Apex Court has asked the Tribunal to look into the matter afresh after giving opportunity to all the parties, BEST is at present not under obligation to allow TPCL to lay its own distribution network till the Tribunal decides against it.

12.18 If the Appellate Tribunal decides against BEST, TPCL would be bound to lay its distribution network and BEST would be obliged to accord permission for the same. However, laying a separate distribution network would mean duplication of existing facilities, requiring substantial capital expenditure. This may also ultimately reflect in the consumer tariffs. Further, as has been brought out by DG in course of investigation, consumers will also have to provide space facilities for sub-stations to TPCL



to enable it to supply electricity. Although TPCL has not refused to lay down its distribution network, it has also drawn attention towards several practical problems in doing so in the areas of BEST. The better option would be, therefore, that BEST allows TPCL to use its existing network for supplying electricity. However, this does not appear to be feasible under the existing provisions of section 42(3) of the Electricity Act, wherein a local authority is not under an obligation to do that.

12.19 Considering above, I feel that the facts and circumstances of the case tend to indicate contravention of section 4(2) (c) of the Act, in a sense that TPCL is not in a position to supply electricity to the consumers of BEST who want to switchover and migrate from BEST to TPCL by using the existing networks of BEST. This could have been seen as a form of denial of market access. However, as the impugned conduct of BEST has legal protection embodied in the provisions of section 42(3) of the Electricity Act, 2003, it cannot be said to be abusive in the context of section 4 (2)(c) of the Act because the Electricity Act in a sense has itself introduced imperfection in the market by according a different status to local authorities.



13. In light of the foregoing, since contravention of none of the provisions of the section 4 of the Act gets established in the matter, the case deserves to be closed.

14. I decide accordingly. Secretary is directed to send a copy of this order to the parties.

Sd/-
Member (T)

Certified True Copy

