

Before the Competition Commission of India

Case No 06/2010

11.01.2012

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

Opposite Party: BEST Undertaking
General Manager, BEST House
BEST Marg, Fort
Mumbai - 400001

ORDER

1. This case was initiated on the basis of the Information filed under Section 19 of the Competition Act (the Act) on 01.02.2010 by Anila Gupta (the Informant) against the Brihan Mumbai Electric Supply & Transport Undertaking (BEST/the opposite party) alleging, inter alia, contravention of the provisions contained in Section 4 of the Act.

FACTS AND ALLEGATIONS AS STATED IN INFORMATION

2. The facts and allegations of the case, in brief, as stated in the information, are as under:

- 2.1 The Informant, a consumer of electricity of the opposite party, made an application to Tata Power Co. (hereinafter referred to as TPCL) on 20.10.2009 for supply of electricity which would entail migration from the current supplier BEST. TPCL responded by apprising that her request could not be acceded to on the ground that rules for changeover

from one supplier to another were not applicable to BEST, BEST being a local government body.

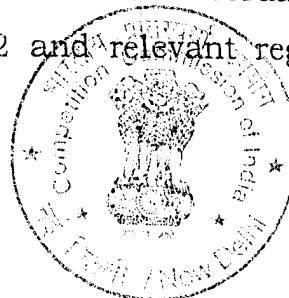
2.2 The Informant subsequently filed a Case No. 86 of 2009 before the Maharashtra Electricity Regulatory Commission (MERC) against TPCL praying for an order for commencement of supply by TPCL.

2.3 During the course of hearing before MERC held on 21.10.2010, BEST opposed the informant's request on the ground that BEST, being a local authority, had exclusive territorial jurisdiction to supply electricity in its area and therefore, TPCL could not supply electricity within BEST's area of supply. TPCL, on the other hand, expressed willingness to supply electricity to the informant.

2.4 It has been alleged by the Informant 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.

3. The Commission, upon an appraisal of all aspects involved in the case including the prevailing situation in the electricity distribution market in Mumbai, passed an order under Section 26(1) of the Act on December 9, 2010 directing the Director General to investigate into the matter.

4. The DG submitted the investigation report on June 26, 2011. The investigation report was sent to the parties seeking their response on the same and further process of inquiry was undertaken in accordance with the provisions of the Competition Act, 2002 and relevant regulations thereunder.



FINDINGS OF DG'S INVESTIGATION

5. The main findings of the investigation carried out by the DG, as presented in the investigation report, are summarised below.

5.1 In order to gather relevant facts and to understand the issues involved in the instant case from the perspectives of the concerned entities, probe letters were issued to the parties and statements of the parties and views of the MERC were recorded by the DG. The key submissions made by each entity, as reported by DG, are as under:

Submissions made by BEST

5.1.1 BEST is a statutory 'undertaking' of the Mumbai Municipal Corporation and is constituted under the Mumbai Municipal Corporation Act, 1888 (MMC Act, 1888). 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 the extended suburbs and (ii) the distribution or supply of electricity in the island city of Mumbai, that is the area from Colaba upto Mahim and Sion.

5.1.2 BEST was a statutory 'licensee' under the provisions of the erstwhile Indian Electricity Act, 1910 (i.e. the old Act) and is presently a statutory 'distribution licensee' under the provisions of the Electricity Act, 2003.

5.1.3 A local authority, such as BEST is placed on a different and separate footing compared to ordinary distribution licensees by the legislature as revealed in Section 42 (3) of the Electricity Act, 2003, which reads, "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, 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.”, Section 51 of the Electricity Act, 2003, which states, “ A distribution licensee may, with prior information to the Appropriate Commission, engage in any other business for optimum utilisation of its assets: Provided that a proportion of the revenues derived from such business shall, as may be specified by the concerned State Commission, be utilised for reducing its charges for wheeling: Provided further that the distribution licensee shall maintain separate accounts for each such business undertaking to ensure that distribution business neither subsidises in any way such business undertaking nor encumbers its distribution assets in any way to support such business: Provided also that nothing contained in this section shall apply to a local authority engaged before the commencement of this Act in the business of distribution of electricity” and Regulation 19 of the Maharashtra Electricity Regulatory Commission (distribution open access) Regulations, 2005 which reads, “ Nothing contained in this regulation shall apply to a local authority engaged in the business of distribution of electricity before the appointed date and to any person whose premises are situated within the area of supply of such local authority”.

5.1.4 On collective consideration of Section 2(41), 14, 42(3), 43(1) and 51 of the Electricity Act, 2003, Regulation No. 19 of the Maharashtra Electricity Regulatory Commission (distribution open access) Regulations, 2005, Maharashtra Electricity Regulatory Commission (general license conditions of

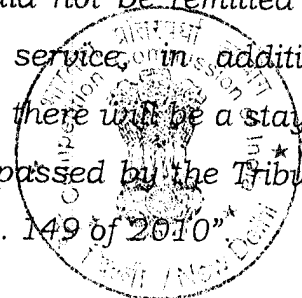
distribution licensees) Regulations, 2006, Maharashtra Electricity Regulatory Commission (specific conditions of distribution licensees applicable to Brihan Mumbai Electric Supply & Transport Undertaking of Municipal Corporation of Greater Mumbai) Regulations, 2007, the special status for a local authority engaged in business of distribution of electricity such as BEST becomes amply clear.

5.1.5 Aggrieved by the order of MERC disposing of Cases No 60, 81, 83, 84, 85 & 86 of 2009, stating that the TPCL shall give supply to the petitioners by creating independent network and without using BEST's network, BEST filed an Appeal No. 149 of 2010 before the Hon'ble Appellate Tribunal for Electricity, New Delhi.

5.1.6 The said appeal filed by BEST was dismissed by the Hon'ble Appellate Tribunal by judgement and order dated 14.2.2011. BEST subsequently has filed, as second Statutory Appeal, a Civil Appeal No. 2458 of 2011 before the Hon'ble Supreme Court against the order dated 14.2.2011 of Hon'ble Appellate Tribunal of Electricity.

5.1.7 The Civil Appeal No. 2458 of 2011 before Hon'ble Supreme Court came up for hearing on 14.3.2011, on which date the Apex court passed the following order:

"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. Desti 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 14th February 2011, in Appeal No. 149 of 2010"



- 5.1.8 MERC (General conditions of distribution license) Regulations 2006 are binding on all licensees in Maharashtra. As per distribution license of M/s TPCL, the area of supply of TPCL overlaps the area of supply of BEST. However, TPCL is required to obtain permission of BEST to distribute electricity in area of supply of BEST, in light of continuation of such requirement from erstwhile licenses of TPCL into the present license of TPCL under the MERC (Specific conditions of distribution license applicable to TPCL) Regulations. The existence of such requirement under such erstwhile licenses has been found and recorded by Hon'ble Supreme Court of India in the case reported as 2008 ELR (SC) 0527.
- 5.1.9 Further, in view of the legal provisions in respect of a local authority including the BEST under the Electricity Act, 2003, it is not permissible to TPCL to set up distribution system and supply electricity in the area allotted to the BEST.
- 5.1.10 TPCL, under erstwhile Indian Electricity Act, 1903 and Indian Electricity Act, 1910, was licensed to supply electricity under Bombay (Hydroelectric) License, 1907; Andhra Valley (Hydroelectric) License, 1919; Nila Mula Valley (Hydroelectric) License, 1921 and Trombay Thermal Power Electric License, 1953. In so far as the Island city of Mumbai is concerned, TPCL except as provided under said four licenses, is necessarily required to obtain prior permission of BEST to distribute electricity in area of supply of BEST. It is further significant that under Regulation 4 of the MERC (Specific Conditions distribution license applicable to TPCL) Regulations, 2008, the said erstwhile restrictive condition (i.e. prior permission of BEST), has been continued to be made applicable to TPCL by virtue of inclusion and continuation of all such conditions as

specified in said four licenses. Extract of Regulation 4 is as under: " The Area of Supply within the Distribution Licensee is authorised 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, 1917; (3) the NilaMula Valley (Hydro- Electric) License, 1921 (4) The Trombay Thermal Power Electric Power Electric Power Electric License 1953 (collectively referred to as TPCL Licenses) subject to such conditions and exclusions as specified in the said TPCL licenses.

- 5.1.11 Existence of such restrictive condition under the said four licenses has been found and recorded by Hon'ble Supreme Court in case-law reported as (2008) 10 Supreme Court Cases 321 (Tata Power Co. Ltd. Versus Reliance Energy Ltd. &ors), and in particular in paragraph Nos. 25, 27, 31, 54 and 98 thereof. In the circumstances, TPCL cannot supply electricity in the area of supply of BEST, without prior permission of BEST.
- 5.1.12 BEST has not given any NOC to any of its customers for switching over supply to TPCL.
- 5.1.13 The averment that the practice carried out by BEST has the effect of determining the prices of the services being supplied by the BEST and being purchased by its consumers in as much as the consumer has been overcharged or the practice has an appreciable adverse effect on competition within India is absolutely without any basis and has been denied.
- 5.1.14 The electricity tariff of BEST is determined by the Hon'ble MERC in accordance with the Electricity Act, 2003 and the Regulations framed by MERC. The tariff which is determined by the MERC is binding upon the BEST as a distribution licensee and has to be complied with by BEST. The BEST therefore has absolutely no role in determining the tariff under the new electricity regime,

and the allegations that the BEST is overcharging the consumers is absolutely without any basis and devoid of merits.

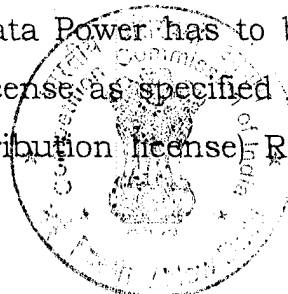
5.1.15 Section 3 of the Competition Act, 2002 is not at all applicable with respect to BEST, as BEST has not at all entered in to any anti-competitive agreement referred to in the said Section. Section 4 of the Competition Act, 2002 is not applicable with respect to BEST, and, particularly in light of Clause (g) of sub-section (4) of Section 19 of the Competition Act, 2002. Further, the Competition Act, 2002 will be overridden by the special and more importantly subsequent enactment of Electricity Act 2003, in light of Section 174 of the Electricity Act, 2003.

Submissions made by TPCL

5.1.16 TPCL was a licensee under the Electricity Act, 1910 and Electricity (Supply Act), 1948 (which now stand repealed under the Indian Electricity Act, 2003). In terms of its license, TPCL supplied power generated in its generation facility to its own retail consumers as well as to other licensees namely BEST and BSES (now Reliance Energy Ltd.)

5.1.17 The MERC, which is the Appropriate Regulatory Commission with regard to the Company, has issued general and specific conditions under the EA 2003 applicable to the existing distribution license of the company. These conditions supercede the conditions originally prescribed in company distribution license.

5.1.18 The distribution of electricity by Tata Power has to be carried out in terms of conditions of its license as specified under the MERC (General conditions of distribution license) Regulations



2006 and the MERC (Specific conditions of distribution license applicable to the Tata Power Co. Ltd) Regulations, 2008.

- 5.1.19 The MERC has issued MERC (Distribution Open Access) Regulations, 2004 for facilitating open access to consumers, licensees and generating companies by the distribution licensees in the State of Maharashtra. Regulation 19 of the Regulations exempts the applicability to local authorities.
- 5.1.20 Section 57 of the EA, 2003 requires a distribution licensee to carry out its operations in compliance with the standards of performance as may be specified by the Appropriate Commission. The MERC has issued the MERC (Standards of Performance of Distribution Licensees, Period for Giving Supply and Determination of Compensation) Regulations, 2005.
- 5.1.21 Further, MERC has issued the MERC (Electricity Supply Code and Other Conditions of Supply) Regulations, 2005 providing for various parameters for carrying out the distribution business including processing of applications for connections, billing and collection etc.
- 5.1.22 Since Reliance and TPCL have coinciding area of supply of electricity, the MERC has issued an interim protocol by order dated 15.10.2009 for the shared use of existing distribution network of TPCL and Reliance by each other for servicing their consumers (including consumers who change over from one distribution licensee to the other).
- 5.1.23 With regard to the BEST area of supply which coincide with TPCL's license area partly, TPCL had proposed a similar arrangement, having regard to MERC's direction in an earlier order dated 15.06.2009 in case no. 113 of 2009, requiring Tata Power to explore options of optimising capex by utilising the

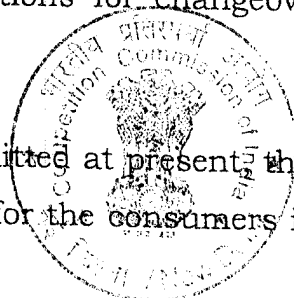
distribution network of the other distribution licensee already present in the area". In the proceeding before the MERC in case no. 86/2009, BEST had contended that it had a monopoly in its area of supply and TPCL could neither lay down its distribution system in the area of supply of BEST nor could use BEST's distribution system to give supply to consumers. The MERC having regard to Tata Powers willingness to extend its own parallel network in BEST area, allowed TPCL to proceed with setting up of its own parallel network in BEST area for applicant customers.

5.1.24 TPCL has the obligation to give supply of electricity to any premise whose owner or occupant has applied for such supply. In case no. 86/2009, TPCL had clearly indicated its willingness to develop network necessary to provide supply to any applicant. It had tried to ensure the use of the existing BEST network to avoid unnecessary capex for developing network, which is ultimately passed on to the consumers as part of tariff.

5.1.25 With regard to the Informant, TPCL needed to extend its existing HT distribution network to the informant's area and install a sub-station of suitable size in such area (8x5 meters). Having regard to the space congestion, informant was asked by TPCL by letter dated 11.03.2010 to provide suitable space for sub-station. Reminders were sent on 22.03.2010. Thereafter, the file was closed on 14.01.2011 since she failed to provide the necessary space for the HT sub-station.

5.1.26 With regard to BEST area of supply, it was informed that Tata Power had received only some applications for changeover of connections from BEST to Tata Power.

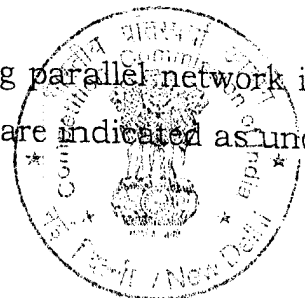
5.1.27 Wheeling of power on BEST is not permitted at present, there is no approved procedure for changeover for the consumers in the



area overlapping with BEST. In case of consumers wishing to switch over from network of existing licensee (BEST/RInfra) to TPCL's network, a consumer is requested to obtain an NOC from the existing licensee for the reason that switch over of supply entails a change in an existing commercial arrangement between the consumer and existing distribution licensee. Any outstanding dues or disputes between the two parties should not result in legal complications for the new licensee. Switchover of supply may also entail a replacement of existing metering arrangements and other assets. As the existing metering assets may belong to the existing distribution licensee, the authority to assess the same belongs only to the distribution licensee. This has been clearly stipulated in the MERC (Electricity Supply Code and other Conditions of Supply) Regulations, 2005. Connection of supply by a new licensee without disconnection of the supply from the existing licensee can create safety issues leading to fatalities. Hence, it is imperative that the existing supply is disconnected which can be carried out by the existing licensee only. All the above issues necessitate that there is proper co-ordination between the consumer, existing licensee and the new licensee. The NOC is the medium through which this can be ensured.

5.1.28 In the area overlapping with BEST, there is no approved procedure for wheeling of electricity by using the distribution network of BEST. In the order dated 22.02.2010, MERC has indicated that Tata Power should lay its own network for providing power supply to consumer willing to switchover from BEST to TPCL.

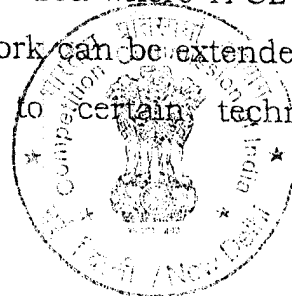
5.1.29 There are significant constraints in laying parallel network in a congested metropolis like Mumbai which are indicated as under:



- Limitation on extension of network beyond technically feasible limits as longer lengths result in substantial voltage drop affecting quality of supply (e.g. for LT cables, limit is about 500 mtrs)
- Lack of availability of space for constructing DSS/CSS (Distribution/Consumer sub-stations)
- Permissions from statutory authorities for excavations for cable laying take 1-3 months
- Fair season availability of only 6 months i.e. October-March as permissions for excavations are provided only during these months
- No permissions for excavations for Roads under Guarantee (1 year guarantee period)
- Denial of permissions for breaking concrete roads
- Area overlapping with BEST area is primarily the South Mumbai area which have fully carriage concretised roads as compared to paver blocks in suburban Mumbai (overlapping with R-Infra)

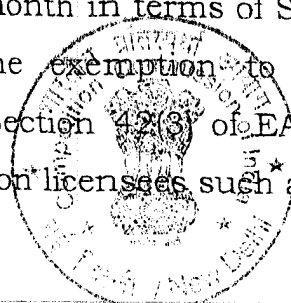
5.1.30 TPCL has been providing supply to consumers in the area overlapping with BEST wherever the extension of its network is feasible. However, in view of the Supreme Court staying Appellate Tribunal for Electricity's judgement which upheld MERC's order allowing Tata Power to extend its own network, Tata Power has been advised to seek clarification from Hon'ble Supreme Court regarding expansion of network in the BEST area.

5.1.31 TPCL historically had consumers in BEST area where TPCL has their own substations. The existing network can be extended to supply to retail consumers subject to certain technical limitations.



Submissions made by MERC

- 5.1.32 The contention of BEST that owners or occupiers of premises situated within the area of supply of local authority cannot be supplied with electricity by a generating company or any other licensee such as the TPCL, is not only fallacious but is a gross misinterpretation of applicable legal provisions. Sub section (3) of Section 42 of the Electricity Act 2003 ("EA 2003") exempts a local authority to wheel electricity from a generating company or any licensee other than such local authority and exempts a local authority from being a common carrier providing non-discriminatory open access to any person whose premises are situated within the area of supply of such local authority requiring a supply of electricity from a generating company or any licensee other than such local authority. But the aforesaid section does not bar a distribution licensee such as TPCL to lay its distribution system in the area of supply of a local authority. In fact, Section 42(1) of EA 2003 makes it mandatory on a distribution licensee such as TPCL to develop its distribution system in its area of supply.
- 5.1.33 The area of supply of TPC and BEST are common areas of supply in the sense that both are distribution licensees having a common area of supply. In Mumbai Island city of South Mumbai area (Island city, approx. From Colaba to Sion and Mahim), TPCL and BEST of the Mumbai Municipal Corporation are authorised under their respective licenses to distribute electricity in retail to consumers. It is mandatory on a distribution licensee such as TPCL to give supply of electricity in statutorily time bound manner of one month in terms of Section 43 of the Electricity Act, 2003. The exemption to wheel electricity to a local authority under Section 42(3) of EA 2003 does not act as a bar to other distribution licensees such as

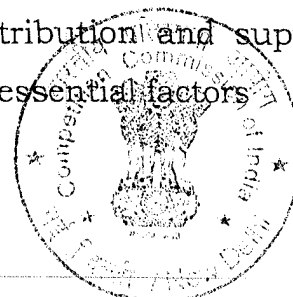


TPCL to operate and maintain their distribution system of wires and associated facilities between the delivery points on the transmission lines or generating station connection and the point of connection of the installation of the consumer for supplying electricity to the consumers in its area of supply.

- 5.1.34 The stand of BEST debarring TPCL from supplying electricity to consumers in its area of supply and to develop its distribution network in its area of supply cuts at the root of legislation which provides that it is "An Act...for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas...". The said stand of BEST not only deserves to be rejected at the threshold but also needs to be severely deprecated.
- 5.1.35 Furthermore, neither are distribution licensees other than BEST any ordinary distribution licensees nor that BEST is put on a special pedestal. All distribution licensees' duty to supply electricity is of public character and public duty and in this regard there is no special dispensation available to BEST to prohibit or bar or hinder entry of other distribution licensees to supply electricity and build their distribution network in furtherance to their public duties. The statutory exemption to a local authority is only to wheeling of electricity.

Relevant Market

- 5.2 The DG, in his report, has concluded that the relevant product market in this case is 'Services of distribution and supply of electricity' based on an evaluation of the essential factors



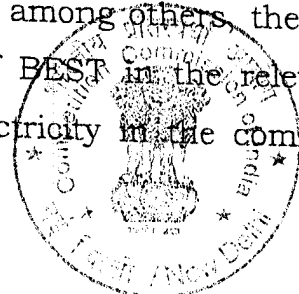
contained in Section 19(7) of the Act and as per the definition provided in Section 2(t). The relevant geographic market has been defined as 'common licensed area of BEST and TPCL in the city of Mumbai' for supply of electricity as per definition provided in Section 2(s) of the Act.

Determination of position of dominance

5.3 In the relevant market as delineated by DG, BEST and TPCL are the two distribution licensees. The dominance of BEST in the relevant market has been assessed by the DG with respect to the factors laid down in Section 19(4) of the Act. The market share of BEST in terms of number of consumers, revenue as well as volume of business was found to be more than 99% under each consumer category as also in the overall relevant market, while the only other licensee TPCL's share stood at a miniscule 1%. The other factors that DG took cognizance of included, inter alia,

- the unparalleled expanse of BEST's distribution network in the relevant market
- BEST being a local authority, the statutory exemption that it is entitled to from being a common carrier providing non-discriminatory open access, as provided by Section 42(3) of the Electricity Act, 2003
- high regulatory entry barriers, the business of distribution and retail supply of electricity being a licensed activity

Based on an analysis of the above factors among others, the DG could reasonably establish dominance of BEST in the relevant market of distribution and supply of electricity in the common license area overlapping with TPCL.



Findings on conducts constituting abuse of dominance by BEST

5.4 The DG, upon examination of the relevant facts, the prevailing circumstances in the distribution and supply of electricity in the relevant market, the applicable legal provisions, sequence of events, interaction between the parties and the relevant orders issued by the MERC, concluded that the conduct of BEST was in contravention of Section 4(2) of the Act. The conclusions of DG on each of the impugned conducts are as under:

Not permitting supply of electricity by TPCL through wheeling on the distribution network of BEST

5.4.1 DG concludes that BEST's stand of not permitting TPCL to wheel electricity on BEST's distribution amounts to imposition of unfair or discriminatory conditions in services as also in prices of services and thus violates Section 4(2)(a)(i) and Section 4(2)(a)(ii) of the Act. Further, as per DG's conclusion, the said non-availability of wheeling network of BEST also results in denial of market access to competitors including TPCL in the relevant market which is in contravention of Section 4(2)(c) of the Act.

Objecting to TPCL to lay down its own distribution network

5.4.2 DG, based on investigation findings, averred that BEST was not permitting its competitor TPCL to lay its own distribution network for supply of electricity in the given license area. This act of BEST, according to DG, leads to situation of denying the operation of the license granted to TPCL in their licensed area. The said conduct was concluded by the DG to be in violation of Section 4(2) (a) (i), 4(2) (a) (ii) and 4(2) (c) of the Act.

Insisting on prior permission of BEST for supply of electricity to consumers and for switchover of consumers of BEST to TPCL

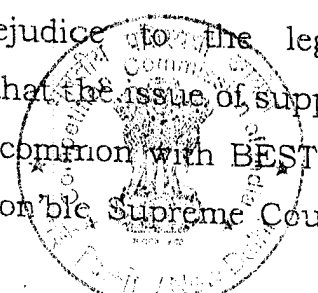
- 5.4.3 BEST's contention that the requirement of prior permission of BEST for supplying electricity in its area of supply, as stipulated in the earlier licenses continued to be applicable in the existing license granted to TPCL by MERC and BEST's continued insistence on its permission/NOC for switchover of consumers of BEST to TPCL has been inferred by DG as an imposition of unfair or discriminatory condition and accordingly is violation of Section 4(2)(a)(i) and 4(2)(a)(ii) of the Act. It was further concluded by the DG that the conduct of BEST in this regard could be stated to be resulting in denial of market access in contravention of Section 4(2)(c) of the Act.

Not issuing No due certificate/NOC to the consumers willing to switch to TPCL

- 5.4.4 It was further observed by the DG that BEST had not been issuing No Objection certificates/No due certificates to the consumers willing to shift from BEST to TPCL. The said conduct again was found to be in violation of Section 4(2)(a)(i), 4(2)(a)(ii) and 4(2)(c) of the Act.

DG's conclusion

- 5.5 On the basis of the findings of the investigation and analysis of the information collected, without prejudice to the legal exemptions pleaded by BEST and the fact that the issue of supply of electricity by TPCL in the license area common with BEST is presently sub-judice and stayed by the Hon'ble Supreme Court,



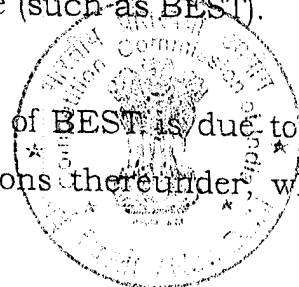
the DG concluded that the conduct of BEST was violative of Section 4(2)(a)(i), 4(2)(a)(ii), 4(2)(b)(i) and Section 4(2)(c) of the Act.

OPPOSITE PARTY'S REPLY TO DG REPORT

6. The DG report was sent to the parties for their comments/objections. The Opposite Party filed its reply vide letter dated 24.08. 2011, reiterating the submissions made before the DG. The main points raised by BEST, inter alia, included the following:

6.1 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 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 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 is patently clear from the third proviso to Section 51 of the Electricity Act, 2003. The Hon'ble Supreme Court of India by an 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 Regulation 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).

6.2 That the 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 authorities.

- 6.3 That Section 60 of Electricity Act, 2003 provides for remedial measures against 'market domination' and that the Competition Act, 2002 is overridden by the subsequent Electricity Act, 2003, under Section 174 of the Electricity Act, 2003. As such the Informant 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 the Informant.
- 6.4 That the instant case is infructuous or not proceeded with by the Informant, in light of the fact that she has failed and neglected to provide necessary space to TPCL for installation of HT sub-station to enable TPCL to supply electricity to the Informant and consequently TPCL having closed the said file.
- 6.5 That TPCL has erroneously, falsely, and/or mala fide stated that (i) TPCL, in terms of its licenses under the Indian Electricity Act, 1910, and Electricity (Supply) Act, 1948, supplied electricity to its own retail consumers as well to other licensees, namely, BEST and BSES (now Reliance Infrastructure Ltd.) and (ii) TPCL has been supplying electricity to consumers in area overlapping with BEST wherever the extension of network of TPCL is available. It was averred by the opposite party that in the Island city of Mumbai, TPCL, 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, TPCL could not supply electricity in retail in the area of supply of BEST, without prior permission of BEST. As such, TPCL, under its erstwhile four licenses read with MERC (Specific Conditions of Distribution License applicable to Tata Power Company Limited)

Regulations, 2008, is necessarily not required to supply electricity in retail in the area of supply of BEST. Also, TPCL consequently cannot and should not lay out a distribution system or network to supply electricity in retail, in the area of supply of BEST.

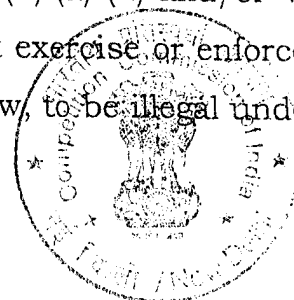
6.6 That TPCL was obliged to supply electricity to any premises whose owner or occupant has applied to TPC for such supply. In this regard, BEST referred to a part of Section 43(1) of the Electricity Act, which provides as under:

43. Duty to supply on request -

(1) Save as otherwise provided in this Act, every distribution licensee, shall, on an application by the owner or occupier of any premises, give supply of electricity to such premises, within one month after receipt of the application requiring such supply:..”

The obligation of TPCL to supply electricity to any premises whose owner or occupant has applied for such supply, is not absolute but it is subject to other provisions of the Electricity Act, 2003 [including the barring of open access and the restrictive condition under Regulation 4 of the MERC (Specific Conditions of Distribution License applicable to Tata Power Company Ltd) Regulations, 2008].

6.7 That the exercise by BEST of its right to be exempted from Open Access and/or wheeling of electricity, in the area of supply of BEST, in accordance with the Electricity Act, 2003 cannot and should not be construed to be violative of Section 4(2) (a) (i), 4(2) (a) (ii) and/or 4(2) (c) of the Competition Act, 2002 or otherwise. That exercise or enforcement of a statutory right can never be construed in law, to be illegal under any legal system.



- 6.8 That the exercise by BEST of its prohibitory right under aforesaid four licenses of TPC read with Regulation 4 of the MERC (Specific Conditions of Distribution License applicable to Tata Power Company Ltd) Regulations, 2008, in accordance with the Electricity Act, 2003, cannot and should not be construed to be violative of Section 4(2)(a)(i), 4(2)(a)(ii) and/or 4(2)(c) of the Competition Act, 2002 or otherwise.
- 6.9 That in these circumstances and for reasons afore-stated, the instant case is mala fide, misconceived and not maintainable and/or liable to and should be dismissed with Cost.

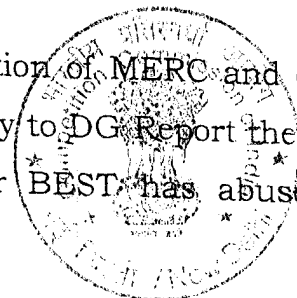
COMMISSION'S VIEW

7. Before analysing the facts of the case it will be relevant to mention here that in Civil Appeal No. 2458 of 2011 (referred to in para 5.1.7 of this order). Hon'ble Supreme Court has passed following orders on 21.10.2011.

"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 it's 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 all 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."

Thus the case is presently before the Hon'ble Appellate Tribunal of Electricity for decision on merits.

8. Having analysed the DG report and the deposition of MERC and of the informant and the response of the opposite party to DG Report the main issue that needs to be addressed is whether BEST has abused its

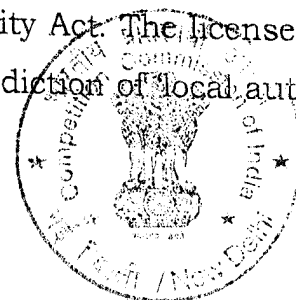


dominant position in the relevant market in the light of the legislative intent of Sec 42(3) of the Electricity Act and Regulation 19 of MERC which in the framework of the Electricity Act accords a special status to local authorities.

9. The facts of the case which are well documented in the earlier section are that a consumer of electricity of BEST namely the informant has approached the Commission for non-competitive behaviour of BEST and has sought relief in terms of compensation damages. The specific nature of the allegation is that BEST has abused its dominant position by denying permission to avail of 'open access' from the second distribution Licensee TPC. As per the informant it is a violation of the provisions of the Competition Act. The DG has concluded contravention of Section 4(2) (a) (i), 4(2) (a) (ii) and 4(2) (c) of the Act.
10. The issue before the Commission is whether BEST has abused its dominant position in the relevant market?

Relevant Market

- 10.1 The relevant market is the distribution and supply of electricity in the Island town and island city of Mumbai, bound by the Mahim Creek on the western side and Sion on the eastern side, which is licensed to be serviced by two electricity distribution licensees BEST and TPCL.
- 10.2 The relevant market is defined by the Licences issued to BEST and TPC by MERC. The licence issued by MERC to BEST also grant the status of 'local authority' to the distribution company enabling it to be classified under Section 42(3) of the Electricity Act. The licensed area of operation of TPC extends beyond the jurisdiction of 'local authority' the Mumbai Municipal Corporation.



Abuse of Dominance

- 10.3 Four instances of abuse of dominance by BEST and contravening Sections 4(2)(a)(i) and (ii) and 4(2)(c) are noted by DG. They are: i) preventing wheeling of electricity by TPCL through the BEST network; ii) BEST denying permission to TPCL for laying down its network for supply of electricity in the licensed area; iii) prior permission of BEST to supply electricity to its consumers as also permitting consumers to switch supply companies; iv) non-issue of no objection certificate (NoC) to consumers who are inclined to shift to TPCL. The DG's report comes to the conclusion regarding violation of the Act in terms of unfair and discriminatory practices with regard to i) condition in purchase or sale of goods or service 4(2)(a)(i); ii) price in purchase or sale of goods or services 4(2)(a)(ii) and 4(2)(c) abuse of dominance by indulging in practice or practices resulting in denial of market access.
- 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 Supreme 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.
- 10.7 Secretary is directed to send the copy of this order to the parties.

Sd/-
Member (GG)

Sd/-
Member (AG)

Sd/-
Member (G)

Certified True Copy

