

COMPETITION COMMISSION OF INDIA

May 11, 2011

Case No. 6 of 2009

Neeraj Malhotra,

Informant

v.

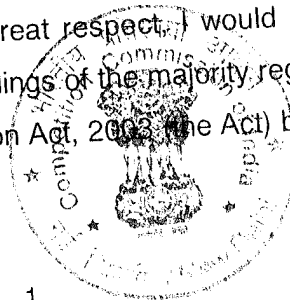
- i) North Delhi Power Limited;
- ii) BSES Rajdhani Power Limited; and
- iii) BSES Yamuna Power Limited

Opposite Parties

ORDER

Per P N Parashar, Member (dissenting):

I have gone through the Majority Order of the Commission in this matter. While concurring with the majority opinion on various points, with great respect, I would like to record a dissenting Order on certain points and issues. On the findings of the majority regarding non-infringement of the provisions of section 4(2) of the Competition Act, 2002 (the Act) by the opposite parties also, I differ from the Majority Order.



2. The Majority Order deals in detail with the factual background, the report of the Director General (DG), the submissions and objections of the opposite parties as well as the scope and applicability of section 3 and 4 of the Act. In order to avoid repetition of the facts and for the sake of brevity, I propose to restate the relevant facts only in brief and will refrain from narrating the details. However, to further clarify certain aspects, I would like to give additional reasons at appropriate places while agreeing with the majority view. Accordingly, I proceed to pass the order as follows:

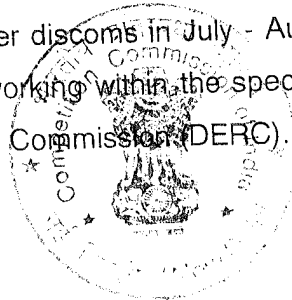
3. The relevant facts relating to the instant information may be summarized as under:-

3.1 The present information has been filed by Neeraj Malhotra (the informant) under section 19 of the Act against North Delhi Power Limited (NDPL/ opposite party No. 1), BSES Rajdhani Power Limited (BRPL/ opposite party No. 2) and BSES Yamuna Power Limited (BYPL/ opposite party No. 3) (collectively the opposite parties) alleging the violations of the provisions of section 3(1), 3(2) and 3(3)(a) and 3(3)(b) read with the provisions of section 4(1) and 4(2)(a)(i) of the Act.

3.2 As per the information, the opposite parties are private companies engaged in supply and distribution of electricity to the consumers within the territory of Delhi for consideration. It has been alleged that the opposite parties have made it compulsory for their consumers to install the meter provided by the opposite parties and that these meters record higher readings than the actual consumption by the consumers.

3.3 In support of the allegations, the informant has cited newspaper reports published in 'The Hindu' on 14.04.2005 and 09.04.2008, 'The Hindustan Times' on 08.04.2008 and 'The Times of India' on 08.04.2008.

3.4 According to the information, as per the report published in 'The Hindu' on 14.04.2005, in a 'meter testing drive' undertaken by the power discoms in July - August, 2004 only around 93% of the meters checked were found to be working within the specified limits, according to statistics given by the Delhi Electricity Regulatory Commission (DERC).



3.5 Further, in the items published in 'The Hindustan Times' on 08.04.2008 and 'The Hindu' on 09.04.2008, it was reported that the Electricity Consumer Advocates Committee had noted that most of the meters tested by the Central Power Research Institution of Bangalore (the CPRI) under the aegis of the Public Grievance Cell (the PGC) were not conforming to the prescribed standards and the meters so installed by the above mentioned enterprises were giving readings upto 2.5% faster as against the 0.5% margin allowed.

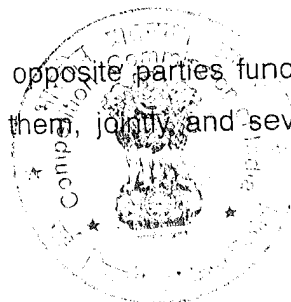
3.6 In another news article published in 'The Times of India' on 23/3/2009', it was reported that a Delhi Government Inspection Report had concluded that almost 90% of the electricity meters checked in the National Capital Territory of Delhi (the NCT) were overcharging the consumers, running 2.5% higher than the error margin limit. As per the Information, 'The Hindustan Times' published on 9/6/2008 had reported that the Hon'ble High Court in its judgment had held that digital electricity meters with an error margin of more than 1% should be considered as defective.

3.7 It has been alleged that the opposite parties purchased and installed the meters themselves and did not allow the consumers to procure and buy the meters of BIS Standard manufactured by any of the manufacturers, thereby reducing the competition in the market in this field. It has been further alleged that almost 82% of the meters installed by the opposite parties are found to be running on the plus side of 2.5% of the prescribed limit.

3.8 It has been submitted by the informant that on the basis of the news item published in 'The Hindustan Times' on 08.04.2008, an investigation had been directed by the Department of Power, the PGC, Government of NCT of Delhi.

3.9 It is alleged by the informant that the opposite parties are abusing their dominant position within the public domain by imposing unfair and discriminatory conditions in purchase of goods i.e. electricity meters and also services, thereby leading to a foreclosure of competition by hindering entry into the market and violating the provisions of section 4(1) and 4(2)(a)(i) of the Act.

3.10 The informant has also alleged that the opposite parties function as a cartel and the practice carried on and the decision taken by them, jointly and severally, has the effect of

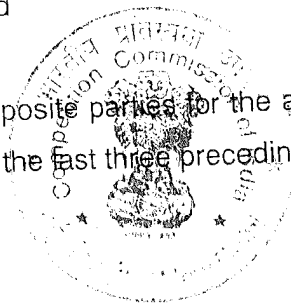


determining the prices of the services being supplied by them and being purchased by its consumers. Further, it is alleged that the opposite parties are overcharging the consumers and thus their practices and decisions have the effect of indirectly determining the sale prices of the services rendered by them.

3.11 It has also been alleged that the arrangement, understanding and concerted action on the part of the opposite parties to supply and install the electricity meters themselves and not allowing its consumers to purchase and install meters of their own choice has the effect of limiting and controlling the production and supply of goods (electronic meters) and provisions of services in the market. As per the informant, this arrangement, understanding and concerted action on the part of the opposite parties, consequently causes an appreciable adverse effect on competition within India and has the effect of driving existing competitors manufacturing and selling electronic meters out of the market thus foreclosing the competition by hindering their entry into the market.

3.12 The informant has *inter alia* prayed for the following:-

- (i) That the Commission should enquire into alleged contravention of the provisions of section 3(1), 3(2) and 3(3)(a) and 3(3)(b) read with the provisions of section 4(1) and 4(2)(a)(i) of the Act;
- (ii) That the Commission may order that the opposite parties be directed to discontinue and not to re-enter in the alleged agreements and to discontinue the practice and the decisions taken by them leading to indirect determination of the sale prices of the services rendered by them;
- (iii) That the Commission may order that the opposite parties discontinue the abuse of their dominant positions which impose unfair and discriminatory conditions in purchase of goods and services by their consumers; and
- (iv) That the Commission may penalize the opposite parties for the alleged violations to the extent of 10% of their average turnover for the last three preceding financial years.



4. The Commission considered the information and before proceeding to pass an order under section 26(1) of the Act, sought view/ comments of the DERC. The DERC *vide* its letter to the Commission dated 30.09.2009 *inter alia* responded:-

...

*Matters relating to electricity tariff have to be decided as per the provisions of the Electricity Act, 2003 and DERC Regulations. Accordingly, Competition Commission of India may not be appropriate forum to deal with such issues.*

*Specific issues alluded to by the petitioner accusing the Discoms of abuse of their dominant position may be looked into by the Competition Commission of India in terms of Competition Act, 2002.*

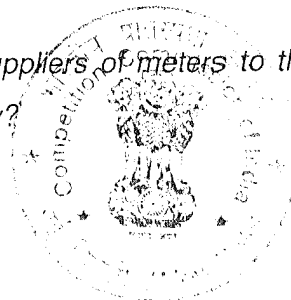
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5. After considering the views/ comments of the DERC and the entire relevant material on record, the Commission found that there exists a *prima facie* case in the present matter and *vide* Order dated 26.11.2009 passed under section 26(1) of the Act directing the DG to conduct an investigation into the matter. In the Order following directions for investigation were also given:

a) *Whether the information is readily available to the electricity consumers regarding their right of getting the meter of their choice installed?*

b) *Whether meters are easily available in the market? In other words, whether consumers have wider choices to procure meters in case they desire to install their own meters?*

c) *Whether there are enough number of suppliers of meters to the consumers and whether they are operating competitively?*



d) *Factual position in respect of the allegations that almost 82% of the meters installed by the discoms are found to be running on the plus side by 2.5% as alleged and hardly any meter is running on slower side?*

e) *Efforts made by the respondents to educate/ help consumers for redressing grievances regarding choice of installation of their own meters, replacement of defective meters etc. the level and extent of advertisements, publicity campaigns by the respondents in this context inter-alia need to be looked into.*

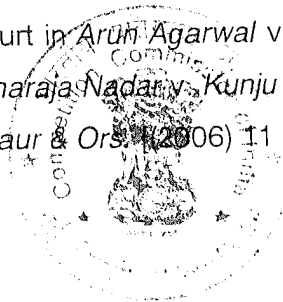
6. The DG in compliance with the directions issued by the Commission conducted investigation, collected evidence and submitted report dated 19.2.2010. The report of the DG including exhibits runs into two volumes.

7. In the Majority Order, observations and findings of the DG have been dealt with in detail and these details need no repetition. However, certain points dealt with by the DG relating to the determination of relevant market require to be highlighted. Hence, I shall refer to the report of the DG in this order at appropriate stages.

8. The opposite parties submitted their detailed replies including preliminary objections dated 28.06.10 and dated 23.04.10 respectively against the report of the DG. A brief summary of the common points raised by the opposite parties in their replies is as under:

8.1 That the order dated 26.11.2009 directing the DG to investigate was passed without any basis and there was no evidence or ground for the Commission to conclude that a *prima facie* case is made out and direct an investigation. It is further submitted by the opposite parties that the order dated 26.11.2009 was unsubstantiated and is without justification and reasoning or basis.

8.2 That the preliminary objections raised by the opposite parties should have been decided before proceeding with the matter on merits. In support of their submission, the opposite parties have cited the judgments of the Hon'ble Supreme Court in *Arun Agarwal v. Nagreeka Exports (P) Limited & Another* [(2002)10 SCC 101] and *K. Kamaraja Nadar v. Kunju Thevar & Ors.* (AIR 1958 SC 687) and *Union of India v. Ranbir Singh Rathaur & Ors.* (2006) 11 SCC 696].



8.3 That the relevant product market has been wrongly defined by the DG and the Commission. It is contended by the opposite parties that there is a lack of clarity on the allegations regarding abuse of dominance. It is further submitted by the opposite parties that they are in the business of distribution and retail supply of electricity and not in the business of manufacturing of meters. Accordingly, the opposite parties have argued that the relevant product market in this case is 'Supply of Electricity' and not the meter market. It is contended that the definition of 'relevant market' by the DG is wrong as he has ignored the provisions of section 19(5), 19(6) and 19(7) of the Act, which provide parameters for defining relevant market and instead relied on extraneous reasons for the purposes of competition investigations such as the CEA regulations, BIS standards etc. It has also been contended that the DG'S findings are based on wrongful assumptions/ definition of 'relevant market'. In view of the above submissions, it is argued that DG'S conclusion that the opposite parties are abusing their dominant position has to be rejected.

8.4 That the issues such as the alleged fastness of the meter/ billing processes adopted by them are not relevant for the purposes of competition issues and are extraneous and have no bearing on the issues before the Commission. It is submitted that the above issues are no longer *res-integra* in view of the judgments of the Hon'ble High court of Delhi in (a) *Suresh Jindal v. BSES Rajdhani Power Limited*, 126 (2006) DLT 49; and 132 (2006) DLT 339, as upheld by the Hon'ble Supreme Court in (2008) 1 SCC 341 and (b) *BRPL v. V.K. Jain* (LPA No. 748 of 2009 ) wherein Hon'ble Division Bench of Delhi High Court has upheld the accuracy limits as provided under the Indian Standards.

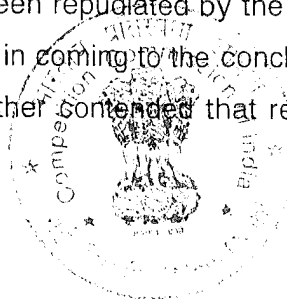
8.5 That the issues such as alleged fastness of the meter/ billing processes are highly technical and can only be dealt with by the sector regulator i.e. Delhi Electricity Regulatory Commission (DERC). It was also submitted that the tolerance limit which is alleged to be illegal and wrong is within the permissible limits as prescribed under applicable law and are covered by various BIS standards. It was further argued that the Commission does not have jurisdiction to delve into matters pertaining to electrical meters and specifications in view of the Electricity Act, 2003 (Electricity Act).

8.6 That the opposite parties are accountable to the DERC which is empowered and has jurisdiction to look into all matters including anti-competitive behavior relating to the electricity sector under sections 60 and 66 of the Electricity Act. In this regard, reference is made to the notification of the DERC (Guidelines for establishment of Forum for redressal of grievances of the consumers and Ombudsman) Regulations 2003 (CGRF Regulations), and constitution of the Consumer Grievance Redressal Forum and the Ombudsman in 2004 which provide mechanism to adjudicate upon and redress various grievances relating to restrictive trade practices, unfair trade practices, deficiency in service and over charging etc. It is contended that if the Commission also looks into the redressal of consumer grievances, it would result in exercise of parallel jurisdiction leading to conflicting orders and consequences. In support of this contention, the opposite parties placed reliance on the decision in the case *Maharashtra Electricity Regulatory Commission v. Reliance Energy & Ors.*, (2007) 8 SCC 381.

8.7 That the meters which are installed in Delhi have to meet certain specifications and BIS standards. It has been pointed out that the opposite parties select the suppliers of meters who meet the technical and financial parameters through international competitive bidding every year and hence it cannot be said that there is foreclosure of the competition. Further, it was submitted that the DERC has also recently amended and declared the competitive bidding guidelines which are binding upon the licensees i.e. the opposite parties.

8.8 That if any consumer elects to purchase a meter, the consumer has to procure the same only from the approved manufacturers because meters of such approved manufacturers meet the technical specifications and are compatible with the network of the opposite parties. It was explained that such list is only indicative and that consumer is free to buy meter from any other manufacturer provided they meet the aforesaid criteria. It is submitted by the opposite parties that the list of dealers is displayed on website for the benefit of consumers and for awareness of the public, the opposite parties have distributed lakh of pamphlets and have published advertisements in newspapers so that consumers can choose their own meters.

8.9 That with respect to the alleged fastness of meters, the DG has relied on a report which is based on assumptions and conjectures and has been repudiated by the Ministry of Power. It is further argued that the process adopted by the DG in coming to the conclusions is flawed and the report as such deserves to be rejected. It is further contended that report also cannot be





relied upon by the DG as the copies of the same were not supplied to the opposite parties and hence, the findings of the DG are against the principles of natural justice.

9. The opposite party No.1 has specifically submitted that it has taken and continues to take certain initiatives towards enhancing consumer awareness regarding the right to procure their own meters according to the prescribed standards and specifications. The opposite party No. 1 has listed the different methods adopted in this regard including posting the information on their website, displaying printed posters at all consumer care centers, distributing pamphlets, broadcasting of radio jingles and newspaper advertisements.

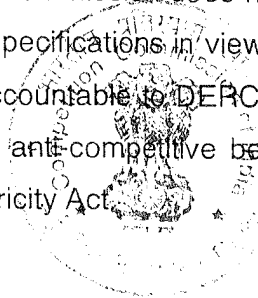
10. In support of the argument that the process adopted by the DG in coming to the conclusions is flawed, the opposite party No. 2 has submitted that while the DG has referred to only 2041 meters out of 30 lakh consumers, the CPRI whose alleged reports have been referred to by the PGC and relied upon by the DG, tested more than six lakh meters for BSES i.e. opposite party Nos. 2 and 3 and found the meters fit for installation.

11. After considering the entire relevant material on record including the report of the DG and the submissions of the parties, the following issues arise for determination:

- I. Whether the Commission has jurisdiction in the present case;
- II. Whether the preliminary objections raised by the opposite parties should have been decided before further proceeding with the matter on merits;
- III. Whether the opposite parties have violated the provisions of section 3 of the Act; and
- IV. Whether the opposite parties have abused their dominant position in violation of the provisions of section 4 of the Act.

Issue I: Whether the Commission has jurisdiction in the present case

12. The opposite parties have contended that the Commission does not have jurisdiction to delve into matters pertaining to electrical meters and specifications in view of the Electricity Act. It was also submitted that the opposite parties are accountable to DERC which is empowered and has jurisdiction to look into all matters including anti-competitive behavior relating to the electricity sector under sections 60 and 66 of the Electricity Act.



13. It may be noted that the mandate of the Commission as enshrined in the preamble of the Act is:

*... to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.*

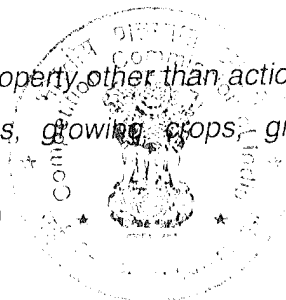
14. The Commission may look into any matter relating to goods or provision of services that involves anti-competitive practices. The present matter relates to allegations of abuse of dominance and anti-competitive agreement by and between the opposite parties with respect to the supply of electricity which is a service as defined in section 2(u) of the Act and meters which are covered under the definition of goods provided in section 2(i) of the Act respectively.

15. Section 2(u) of the Act defines 'service' to include *supply of electrical or other energy*. The definition reads:

*"service" means service of any description which is made available to potential users and includes the provision of services in connection with business of any industrial or commercial matters such as banking, communication, education, financing, insurance, chit funds, real estate, transport, storage, material treatment, processing, **supply of electrical or other energy**, boarding, lodging, entertainment, amusement, construction, repair, conveying of news or information and advertising;*

16. Section 2(i) of the Act provides an inclusive definition of 'goods'. As per the definition in the Act 'Goods' means goods as defined in the Sale of Goods Act, 1930. Section 2(7) of the Sale of Goods Act, 1930 defines goods as follows:

*"goods" means every kind of moveable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things*



*attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.*

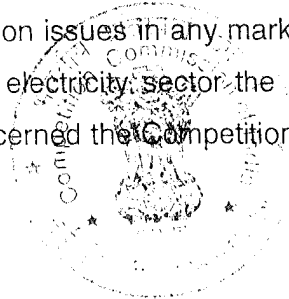
17. It is evident from the above that both the supply of electricity and meters is within the purview of the Act and, therefore, the Commission is not precluded from delving into matters pertaining to electrical meters in so far as they involve competition concerns.

18. With regard to the contentions in respect of sections 60 and 66 of the Electricity Act, it may be noted that the Electricity Act specifically deals with the electricity industry and the matters connected therewith. Sections 60 and 66 of the Electricity Act confer on the appropriate authority powers to issue directions in case of anti-competitive practices and cast a duty to promote the development of the market in the electricity sector. Sections 60 and 66 of the Electricity Act read as under:

*60. The Appropriate Commission may issue such directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.*

*66. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.*

19. The above provisions authorize the sectoral authority to look into competition issues in the electricity sector unlike the Competition Act, 2002 which is an umbrella legislation and empowers the Commission to look into competition issues in any market and is not limited to a specific sector or industry. Hence, while in the electricity sector the Electricity Act may be a specific law so far as competition issues are concerned the Competition Act, 2002 is the specific law.



20. It is an established principle of statutory interpretation that *generalia specialibus non derogant* which means general provisions will not abrogate special provisions. Thus a specific law will supersede a general law. Accordingly in the present matter, the provisions of the Competition Act, 2002 will supersede the provisions of the Electricity Act.

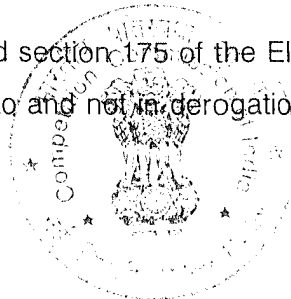
21. Even if for the sake of argument, it is assumed that both legislations are special legislations for the purposes of the present matter then also as per the well known doctrine of *Leges posteriores priores contrarias abrogant* i.e. the later law abrogates the earlier contrary law, the provisions of the Competition Act, 2002 would prevail. The Hon'ble Supreme Court of India has laid down in no uncertain terms that in case both the Acts are special Acts, it is the later Act which must prevail. This principle has been upheld by the Hon'ble Supreme Court in several decisions including in the case of *Solidaire India Ltd. v. Fairgrowth Financial Services Ltd. & Ors.*, (2001) 3 SCC 71, *Allahabad Bank v. Canara Bank* 2000 (4) SCC 406, *Maharashtra Tubes Ltd. v. State Industrial and Investment Corporation of Maharashtra Ltd.* 1993 (2) SCC 144, *Sarwan Singh v. Kasturi Lal*, 1977 AIR(SC) 265 and *Shri Ram Narain v. Simla Banking and Industrial Co. Limited* 1956 AIR(SC) 614.

22. The Electricity Act, 2003 was notified in May 2003 and the provisions of the Competition Act, 2002 are being notified in phases since 2003. Section 60 of the Competition Act, 2002 which was notified and came into force on 19 June, 2003 reads as under:

*60. The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.*

23. Further, it is also a settled rule of interpretation that if one construction leads to a conflict, whereas on another construction, two Acts can be harmoniously constructed then the latter must be adopted.

24. Section 62 of the Competition Act, 2002 and section 175 of the Electricity Act lay down that the provisions of the Acts shall be in addition to and not in derogation of the provisions of any other law for the time being in force.



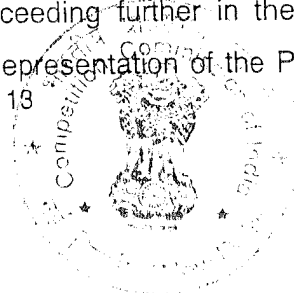
25. As mentioned earlier in this Order, the Commission after considering the nature of the issues involved had sought the views of the DERC in this matter. It is pertinent to reiterate that the DERC in its response *vide* letter dated 30.09.2009 has clearly stated that '*Matters relating to electricity tariff have to be decided as per the provisions of the Electricity Act, 2003 and DERC Regulations. Accordingly, Competition Commission of India may not be appropriate forum to deal with such issues. Specific issues alluded to by the petitioner accusing the Discoms of abuse of their dominant position may be looked into by the Competition Commission of India in terms of Competition Act, 2002.*

26. In view of the above, the argument of the opposite parties that the Commission does not have jurisdiction in competition issues in the electricity sector merits rejection and for the aforesaid reasons I concur with the majority decision on Issue I. Hence, the same is decided in the affirmative.

*Issue II: Whether the preliminary objections raised by the opposite parties should have been decided before further proceeding with the matter on merits.*

27. The contention of the opposite parties is that the order dated 26.11.2009 directing DG to investigate was unsubstantiated and without justification and reasoning or basis and have argued that the preliminary objections raised by them should have been decided before further proceeding with the matter on merits.

28. The opposite parties have placed reliance on various judgments of the Hon'ble Supreme Court of India. On examining the facts and the ratio of the Hon'ble Supreme Court in these cases, it is found that they relate to different issues and are therefore, not relevant in the present matter. The case of *Arun Agarwal v. Nagreeka Exports (P) Limited & Another* (2002)10 SCC 101, involved an objection regarding the jurisdiction of the High Court and it was held that the question of jurisdiction of the court should be decided as a preliminary issue and not at the time of hearing. However, the above case relates to Order XIV of the Civil Procedure Code, 1908. The case cited by the opposite parties *viz., K. Kamaraja Nadar v. Kunju Thevar & Ors.* AIR 1958 SC 687, involved the issue as to whether the election tribunal and the High Court should have decided the preliminary objection before proceeding further in the election petition and the interpretation of sections 82 and 117 of the Representation of the People Act, 1951. The third



authority relied upon by the opposite parties i.e. *Union of India v. Ranbir Singh Rathaur & Ors.* (2006) 11 SCC 696, dealt with preliminary objection as regards the maintainability of the writ petition before the High Court. These cases involved the procedural law under a different statute and the interpretation of the provisions of the same. They are not applicable or relevant to the facts of the present matter or the interpretation of the procedure required to be adopted for forming an opinion under Section 26(1) of the Act.

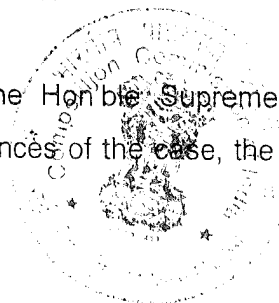
29. Section 26(1) of the Act, *inter alia*, states that on receipt of information under section 19 of the Act, if the Commission is of the opinion that there exists a *prima facie* case, it shall direct the DG to cause an investigation to be made into the matter. In this regard, the Hon'ble Supreme Court in the matter of *Competition Commission of India v Steel Authority of India Limited*, JT 2010 (10) SC 26, has observed:

*... [K]eeping in mind the nature of the functions required to be performed by the Commission in terms of Section 26(1), we are of the considered view that the right of notice hearing is of not contemplated under the provisions of Section 26(1) of the Act.... No inquiry commences prior to the direction issued to the Director General for conducting the investigation. Therefore, even from the practical point of view, it will be required that undue time is not spent at the preliminary stage of formation of prima facie opinion and the matters are dealt with effectively and expeditiously.*

...

*At the stage of forming a prima facie view, as required under Section 26(1) of the Act, the Commission may not really record detailed reasons, but must express its mind in no uncertain terms that it is of the view that prima facie case exists, requiring issuance of direction for investigation to the Director General. Such view should be recorded with reference to the information furnished to the Commission. Such opinion should be formed on the basis of the records, including the information furnished and reference made to the Commission under the various provisions of the Act, as afore-referred.*

30. Thus, in view of the above decision of the Hon'ble Supreme Court, the relevant provisions of the Act and on the facts and circumstances of the case, the Commission was not

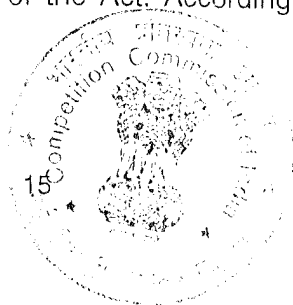


required to hear the parties before deciding whether there exists a *prima facie* case or to decide the jurisdiction of the Commission at that stage. Moreover, none of the parties had raised this issue before the Commission at that stage. On the contrary, even the sectoral regulatory authority i.e. DERC has opined that CCI has jurisdiction to entertain the matter. Therefore, the argument of the opposite parties that the preliminary objections raised by them should have been decided before proceeding with the matter on merits cannot be accepted and the same is rejected. Accordingly, Issue II is decided in the negative.

Issue III: Whether the opposite parties have violated the provisions of section 3 of the Act.

31. Section 3 of the Act prohibits an enterprise from entering into any agreement which causes or is likely to cause an appreciable adverse effect on competition in India and renders any such agreement void. As per section 3(3) of the Act, any agreement between or practice carried on/ decision taken by enterprises engaged in identical or similar trade of goods or provision of services, which *inter alia* (a) directly or indirectly determines purchase or sale prices or (b) limits or controls production, supply, markets, technical development, investment or provision of services shall be presumed to have an appreciable adverse effect on competition. The scope of the term 'agreement' mentioned in section 3 of the Act as defined in section 2 (b) of the Act includes any arrangement or understanding or action in concert whether or not, such arrangement, understanding or action is formal or in writing or intended to be enforceable by legal proceedings.

32. With respect to the allegations of contravention of section 3 of the Act, the DG has found that no evidence of any agreement or action in concert has been furnished to establish that the opposite parties based upon their understandings or through an agreement and independent of any regulatory mechanism have indulged in the acts covered in section 3 of the Act. Further, from the inquiry conducted by the DG, no evidence could be found to establish contravention of the provisions of the said section. Hence, the DG has concluded in the report that the material and evidence available on record in the present matter is not sufficient to establish contravention of the provisions of section 3 of the Act. Accordingly, these allegations remain unsubstantiated.



33. The Commission has considered the entire material and evidence on record and in the absence of any cogent evidence either to show that the opposite parties entered into an agreement with each other and functioned as a cartel or to show that the practice carried on or decisions taken by them, were made jointly, I do not find any reason to disagree with the conclusion of the DG on this issue. I therefore concur with the majority decision on this and the findings of the majority. The issue stands disposed off accordingly.

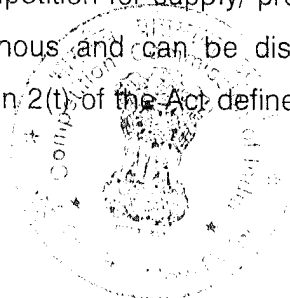
Issue IV: Whether the opposite parties have abused their dominant position in violation of the provisions of section 4 of the Act.

34. For properly adjudicating this issue, I would like to frame the following sub-issues:

- i. What are the relevant market(s) in the present matter and whether the opposite parties are in a dominant position in such market(s). If so, in what manner;
- ii. Whether the opposite parties have imposed unfair conditions and hindered with the consumers' option to procure a meter of their own choice. If so, whether this amounts to an infringement section 4(2)(a)(i) of the Act;
- iii. Whether the opposite parties have created entry barriers for the distribution/ supply of meters denying market access in the relevant market of meters in contravention of the provisions of Section 4(2)(c) of the Act; and
- iv. Whether the allegation that the opposite parties are abusing their dominant position by imposing unfair and discriminatory conditions in purchase of electricity through allegedly fast running meters is established.

*(i) What are the relevant market(s) in the present matter and whether the opposite parties are in a dominant position in such market(s). If so, in what manner.*

35.1 Section 2(r) of the Act defines 'relevant market' as the market which may be determined by the commission with reference to the 'relevant product market' or the 'relevant geographic market' or both. The relevant geographic market as defined under section 2(s) of the Act comprises of the area in which the conditions of competition for supply/ provision of goods and services or demand thereof are distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas. Section 2(t) of the Act defines a relevant product



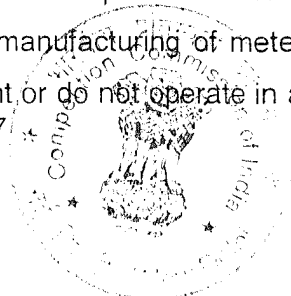


market as a market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer. The relevant geographic market and the relevant product market which may be delineated with regard to the all or any of the factors in section 19(6) and 19(7) of the Act respectively.

35.2 All three opposite parties are distribution companies *inter alia* engaged in the business of distribution and supply of electricity to consumers. It is evident that the electricity as on date is not substitutable or interchangeable with any other product and is to that extent remains unique. Therefore, one of the relevant product markets of the three opposite parties in the present matter is the market of "distribution/ supply of electricity". The above proposition has also been admitted by all three opposite parties in their respective submissions.

35.3 The opposite parties have been allotted specific and exclusive areas of Delhi for distribution and supply of power post privatization of Delhi Vidyut Board (DVB). Therefore, the relevant geographic markets of the individual opposite parties in the present matter comprises of the geographical area as licensed to them for supplying electricity. The opposite parties enjoy virtually 100% market share in their respective areas and have no competitors for the supply of electricity in these areas. Accordingly, the opposite parties are in a dominant position in their respective relevant markets of distribution/ supply of electricity. In this respect, I agree with the Majority Order.

35.4 In the report of the DG, three separate relevant markets have been defined viz., the relevant market in relation to distribution and supply of electricity, the relevant market relating to the meters and the relevant market relating to the billing. The opposite parties have contended that there is a contradiction between the Commission's findings and the definitions of the relevant markets in the report of the DG. In my view, the arguments put forth by the opposite parties in this regard draw strength from the letter and not the spirit of the documents and are liable to be rejected. The opposite parties have also argued that they are in the business of distribution and retail supply of electricity and not in the manufacturing of meters. It is pertinent to note that there is a difference between the markets of 'manufacturing of meters' and the 'distribution/ supply of meter and these constitute two separate and different markets. Not being present in one market relating to meters viz., 'manufacturing of meters' does not necessarily mean that the opposite parties cannot be present or do not operate in any other market relating



to meters including the market of 'distribution/ supply of meters'. Therefore, the contention of the opposite parties in this regard is also devoid of any merit.

35.5 Pursuant to the policy decisions, various regulations and guidelines, BIS standards etc. electricity in the relevant geographic markets can be supplied to consumers by means of only a particular type of meter which as per the prescribed specifications and BIS standards (Consumer Meter). The Consumer Meters (of BIS standard) supplied by different players are interchangeable and substitutable. There are many suppliers of such Consumer Meters in the relevant geographic market. It is pertinent to note that the nature of and conditions prevalent in the market of 'manufacturing Consumer Meters' and the market of 'distribution/ supply of Consumer Meters' are significantly different and resultantly these markets constitute two separate and distinct markets altogether. Even if the opposite parties are not operational in the market of manufacturing Consumer Meters as contended by them, they are in fact actively engaged in the business of distribution/ supply of the Consumer Meters to the consumers. Thus the opposite parties are present in the market of distribution/ supply of Consumer Meters. Therefore, there are two relevant markets in the present matter viz., that the relevant market of distribution/ supply of electricity and the relevant market of distribution/ supply of Consumer Meters.

35.6 While it has been established that the three opposite parties are in a dominant position in one of the relevant markets viz, the market of distribution/ supply of electricity, from the findings of the DG, it is also established that the opposite parties are the predominant suppliers of the Consumer Meters to their respective consumers and enjoy a position of strength in the second relevant market i.e. distribution/ supply of Consumer Meters.

35.7 The statistics in Table 1 as referred to in the report of the DG, clearly indicate that in the relevant market of distribution/ supply of Consumer Meters, the opposite parties in their respective licensed areas have almost a 100% market share.

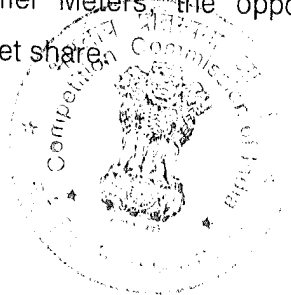


TABLE 1

S.No.	Name of opposite parties	Total No. of consumers	No. of consumers who purchased meters from vendors
1	NDPL [OP No. 1]	11 lakh	1
2	BRPL [OP No. 2]	16 lakh	49
3	BYPL [OP No. 3]	15 lakh	68

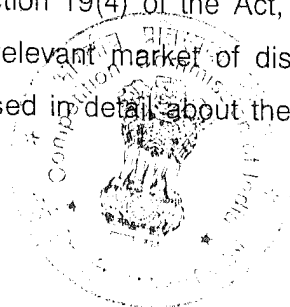
35.8 It is apparent from the above table that the number of consumers who purchased meters directly from the vendors are negligible. It is significant to note that even the few consumers who procured the meters on their own purchased these meters from the vendors approved by the opposite parties.

35.9 Further, the results of the survey conducted by the DG's office through Forward Marketing Research and Consultancy Services, listed in Table 2, indicate that 100% i.e. all the consumers in the survey had procured the meters only from their respective distribution company namely the opposite parties.

TABLE 2

INSTALLATION OF METER WHILE GETTING CONNECTION (%)			
S.No.	Name of opposite parties	Purchased by Self	By Company
1	NDPL [OP No. 1]	0	100
2	BRPL [OP No. 2]	0	100
3	BYPL [OP No. 3]	0	100

35.10 On considering the guiding factors under section 19(4) of the Act, it is found that the opposite parties enjoy a dominant position in the relevant market of distribution/ supply of Consumer meters. The DG in his report has discussed in detail about the applicability of the



factors under section 19(4) of the Act, hence, agreeing with the view of the DG, and for the sake of brevity, I do not wish to restate the same in detail.

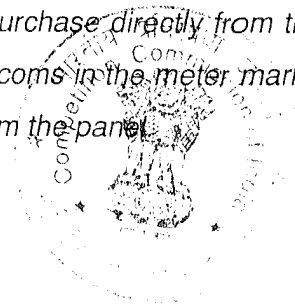
35.11 In view of the above statistics and other material on record, it is found that all three opposite parties enjoy a dominant position in their respective licensed areas in not only the relevant market of distribution/ supply of electricity but also in the relevant market of distribution/ supply of Consumer Meters.

35.12 I may mention that as per the majority view, there is only one relevant market i.e. the market of distribution/ supply of electricity in the present case and the relevant market of distribution/ supply of Consumer Meters has not been dealt with in the Majority Order. The majority has, therefore, not dealt with the issue of whether the opposite parties are in a dominant position in the market of distribution/ supply of Consumer Meters and further as to whether such dominance has been abused.

35.13 In her separate order, Member, Dr. Geeta Gouri has analyzed and dealt with the issue of the second relevant market of distribution/ supply of meters. In her order the relevant discussion of the dominance of the opposite parties in the meter market finds place in para Nos. 7-11. These paras are reproduced below:

*7. As observed in the Majority Order, dominance of the Discoms in the distribution and retail supply of electricity is statutorily established. In the market for meters, purchases of meters by Discoms are all-India. This market is competitive as there are about 200 meter manufacturers in the country. No facts and evidences are brought on record in the DG's report to demonstrate that the Discoms in Delhi account for a large share of the country-wide sale of meter manufacturers to establish their dominant position*

*8. Discoms procure and install meters for the consumers for an empanelled list of manufacturers/ vendors. Consumers can purchase directly from this empanelled list or from the Discoms. Dominance of Discoms in the meter market is attributed to the restricted purchases of BIS meter from the panel.*



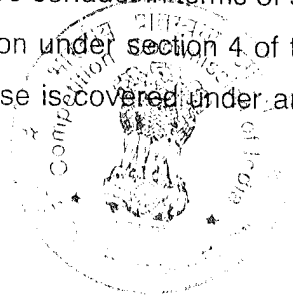
9. As per the evidences gathered by the DG, the Discoms at present supply the BIS approved meters to consumers. In NDPL 1 customer out of the customer base of 11 lakh, 49 in case of BRPL out of customer base of 16 lakh and 68 customers in case of BYPL out of customer base of 15 lakh consumers have procured meters outside the Discom but from the approved vendors of manufactures empanelled by them. In terms of market share, the Disocms enjoy near monopoly in the supply of BIS approved meters to the final consumers.

10. The DG report avers that the low level of awareness of end consumers as regards Regulation 35 have enabled the Discoms to operate independently of market forces.

11. Based on the above analysis, it can be stated that the Discoms enjoy a dominant position in the market of supply BIS approved meters to the end consumers in Delhi.

35.14 As per the above, it is found by Member, Dr. Geeta Gouri that the opposite parties are in a dominant position in the relevant market of distribution/ supply of Consumer Meters. I fully concur with these observations and findings. However, the learned Member has proceeded to observe that the absence of information as regards the consumer choice cannot be categorized as abuse of dominance. The order also includes an analysis as to whether the consumers would be inclined to exercise the choice, if available, in purchase of meters. With great respect, I beg to differ from the observations and the finding of the learned Member on the issue of abuse of dominance.

36. For the purposes of section 4 of the Act, after it is determined that an enterprise is enjoying a dominant position in the relevant market it must be examined whether the conduct of such enterprise falls within the ambit of the abusive conduct in terms of section 4(2) of the Act. It may also be noted that for proving a contravention under section 4 of the Act, it is sufficient to establish that the conduct of a dominant enterprise is covered under any of the sub-clauses of section 4(2) of the Act.



37. At the outset, to determine sub-issues (ii) and (iii), it is necessary to look at the legislative and regulatory framework for consumer meters stipulated by the concerned sectoral authorities in the relevant market.

37.1 As per the provisions of section 53(c) read with section 55(1) of the Electricity Act, there is a prohibition on the supply of electricity except by means of a system which conforms to the specifications as may be specified. Further, no licensee shall supply electricity except through the installation of a *correct meter* in accordance with regulations made in this behalf by the Central Electricity Authority (the CEA). It is also provided that a licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, *unless the consumer elects to purchase a meter.*

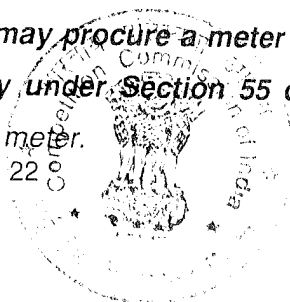
37.2 As per regulation 17(ii) of the Delhi Electricity Regulatory Commission (Performance Standards – Metering & Billing) Regulations, 2002 (the DERC Regulations 2002) *in case of new connection/ replacement of meter, the consumer, may himself procure the meter either from the vendors certified by the licensee, or conforming to licensee's technical specifications. The licensee shall calibrate such meter at consumer's cost and seal the meter. Alternatively, consumer may choose to pay the full cost of the meter provided by the licensee. No meter rent shall be chargeable in such cases.*

37.3 Under the CEA (Installation and Operation of Meters) Regulations, 2006 (the CEA Regulations) *the consumers have the option to procure meters as specified therein and as per the BIS specifications.* To facilitate the same, licensees are required to provide a list of makes and models of the meters as per regulation 6(2)(c) of the CEA Regulations.

37.4 The DERC Regulations 2002 were repealed and replaced by the DERC Supply Code and Performance Standards Regulations, 2007 (the DERC Regulations 2007). Regulation 35 of the DERC Regulations 2007 states:

...

(ii) ... ***The consumer, if so desired, may procure a meter conforming to the regulations issued by the Authority under Section 55 of the Act and the Licensee shall test, install and seal the meter.***



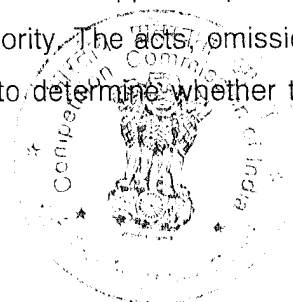
*Provided that, if any consumer elects to provide his own meter at any stage, the same shall be procured by Licensee at consumer's cost **or the consumer may purchase on his own**. Meter purchased by the consumer or on consumer's behalf, shall be tested, installed and sealed by the Licensee. The said meter will, however, have to be consistent with the CEA Regulations published under section 55 of the Act and should have all additional features approved by the Commission. **The features approved by the Commission shall be posted on the website of the Licensees.** ...*

37.5 Thus as per the above Regulation, the consumer may procure a meter conforming to the regulations, consistent with the CEA Regulations with all additional features approved by the DERC. The regulations also provide that if any consumer elects to provide his own meter at any stage, the same shall be procured by the licensee at consumer's cost or the consumer may purchase on his own. Further, under the DERC Regulations 2007, the licensees are obliged to post on their website the features approved by the relevant authority.

37.6 It is important to note that one of the major differences between the DERC Regulations 2002 and DERC Regulations 2007 is that the new DERC regulations do not restrict the customers' choice in meters to only the licensee i.e. the opposite parties or the vendors approved by them.

38. Thus, it is manifest that the new regulations viz., the DERC Regulations 2007 with respect to the choice of meters reinforce the importance of consumers' choice and categorically state that consumers may procure Consumer Meters of their own choice.

39. It is found that the various regulations and guidelines in essence provide the consumers with an option to procure Consumer Meters and to facilitate this choice, the said regulations and guidelines require the opposite parties to provide a list of makes and models of the Consumer Meters. Further, the regulations cast an obligation on the opposite parties to post on their website the features approved by the concerned authority. The acts, omissions and conduct of the opposite parties need to be looked into in order to determine whether they have hindered



with the consumers' option to procure a Consumer Meter of their own choice. The same has to be scrutinized in view of the aforementioned existing legal framework and rules etc.

*(ii) Whether the opposite parties have imposed unfair conditions and hindered with the consumers' option to procure a meter of their own choice and if so, whether this amounts to an infringement section 4(2)(a)(i) of the Act;*

40. The conduct of the opposite party No. 1/ NDPL with respect to the choice of Consumer Meters as gathered from the report of the DG and the other material on record, is analyzed below:

40.1 As per the report of the DG, when the proceedings in this case began, the website of the opposite party No. 1 under the caption 'Install Your Own Meter' provided as below:

*"As per Regulation 17(ii) of the Performance Standard Regulations – Metering & Billing (August 2002), issued by DERC, a consumer may himself procure the meter **from the vendors certified by the licensee** & conforming to licensee's technical specifications as given below:*

*erated Energy Meters*

*Technical Specification"*

40.2 It is noted that the information regarding the DERC Regulations 2002 was posted on its website by the opposite party No.1 even though said regulations had already been repealed and were no longer applicable at that time. In fact as stated earlier, one of the major differences between the DERC Regulations 2002 and the DERC Regulations 2007 was that the latter did not restrict the customers' choice in meters to only the licensee or the vendors approved by them. Further, neither a list of approved manufacturers/ vendors of meters nor technical specifications of the meters as per the DERC Regulations 2002 was posted on the site. During the course of the proceedings, the information under the caption 'Install Your Own Meter' was amended and read as below:





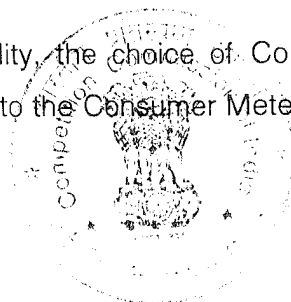
*“As per the applicable Laws, Regulations in force currently, a consumer may himself procure the meter **from the vendors certified by the licensee & conforming to licensee’s technical specifications**”*

40.3 This is significant to mention that a list of only those vendors who were approved by the opposite party No.1 was uploaded on the amended website. It is noted that the amended information merely removed the reference to the repealed regulations by replacing the same with the words ‘applicable laws’. However, the details on the site continued to communicate that the choice of meter for the consumer was limited to the vendors certified by the opposite party No.1. The versions of the website referred to above are annexed to in the report of the DG as Exhibits 3, 4 and 5.

40.4 On going through these Exhibits, it is seen that the opposite party No.1 placed a list of only five vendors and five dealers of the listed vendors on their site. On examination of the websites placed on record by the DG (Exhibits 3, 4 and 5 of the report of the DG), it is evident that the opposite party No.1 had posted outdated information on its website in relation to the choice available to consumers with respect to procuring/ purchasing meters. In the course of investigation by the DG, the information provided on the opposite party No.1’s site was amended and list of certified vendors was also uploaded. However, the revised website provided information which indicated that the consumer’s option was restricted to only those vendors of Consumer Meters who had been empanelled and approved by the opposite party.

40.5 Further, during the investigation by the DG, it was found that the opposite party No.1 through its helpline communicated to a prospective applicant for new connection that only NDPL i.e. opposite party No.1 provides meters for new connections and there is no procedure laid down for the consumers who want to purchase meters on their own. It was further communicated to the prospective applicant that there is no list of vendors for this purpose and meters purchased by consumers on their own are not acceptable to the opposite party No.1 for providing new connections.

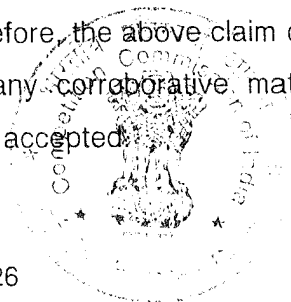
41. From the above, it is evident that in reality, the choice of Consumer Meters for the consumers of the opposite party No.1 was limited to the Consumer Meters of vendors approved by the opposite party No.1.



42. After analyzing the conduct of opposite party No. 1 above, the conduct of the opposite party Nos. 2 & 3 viz., BYPL and BRPL with respect to the choice of Consumer Meters as gathered from the report of the DG and the material on record is analyzed below:

42.1 The opposite parties Nos. 2 & 3 have a common website and provided information on the process of replacement of old, faulty, defective, inaccurate and incorrect range meters under the caption 'Meter replacement' on their website. Under this heading, it is also mentioned that a consumer can opt to install his own procured meter of *BSES specifications and approved make*. While the relevant electricity laws and regulations provide that a consumer may install any meter of BIS approved standard and specifications, the information supplied by opposite parties No. 2 and 3 on their website creates an impression that a consumer who opts to install his own meter may procure the same only from the vendors approved by the opposite parties Nos. 2 and 3. As per the DG report, the opposite parties Nos. 2 and 3 provided a list of only four vendors and seven dealers of the listed vendors on their website. As per the report of the DG, there was no information available on website to the effect that consumers can purchase Consumer Meters from any other vendor, if they so choose. It may be noted that the opposite parties Nos.2 and 3, by placing incomplete information on their website have, in effect, restricted the choice of the consumers to only the vendors approved by the opposite parties Nos. 2 and 3.

43. The opposite party No. 1 has submitted that it has taken and continues to take certain initiatives towards enhancing consumer awareness regarding their right to procure their own Consumer Meters according to prescribed standards and specifications. The opposite party No. 1 has listed the different methods adopted in this regard including posting the information on their website, displaying printed posters at all consumer care centers, distributing pamphlets, broadcasting of radio jingles and newspaper advertisements. However, no sample pamphlet or details of the other initiatives as claimed to be undertaken has been provided by the opposite party No. 1 to the DG or the Commission. Thus, the opposite party No.1 has not corroborated its submission with any evidence or material. Therefore, the above claim of the opposite party No.1 does not have any merit and for want of any corroborative material this claim remains unsubstantiated and hence the same cannot be accepted.



44. Further, the results of the survey conducted by the DG office through Forward Marketing Research and Consultancy Services, listed in Table 3 below, indicate that not more than 20% of the consumers are even aware that they can also purchase the Consumer Meters from independent vendors other than the opposite parties.

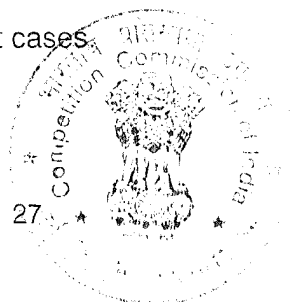
**TABLE 3**

Awareness regarding purchase of meter from independent company (%)			
S.No.	Name of opposite parties	Yes	No
1	NDPL [OP No. 1]	20	80
2	BRPL [OP No. 2]	22	78
3	BYPL [OP No. 3]	15	85

45. It may be noted that the three opposite parties had no lawful authority or power to select or to prepare a panel of the suppliers/ distributors of Consumer Meters for the consumers and by doing so they assumed and are exercising control in the relevant market relating to distribution /supply of Consumer Meters.

46. As per section 4(2)(a)(i) of the Act, there shall be an abuse of dominant position if, an enterprise *inter alia*, imposes unfair condition in purchase or sale of goods or services. Fairness requires transparency. A willful or deliberate omission would be considered unfair. The requirement of communicating the complete information as mandated by the statutes in the interest of the consumers' was not complied with by the opposite parties. Not furnishing such information or mis-communication of the same adversely affects the interests of the consumer.

47. The Act does not define the term 'unfair' and whether a particular condition is unfair would be determined on the basis of the facts and circumstances of each case. The courts have also interpreted this term differently in different cases.



48. In a matter relating to an unfair trade practice in the context of the Monopolies and Restrictive Trade Practices Act, 1969, the Hon'ble Supreme Court in the case of *H. M. M. Limited v Director General, Monopolies and Restrictive Trade Practices Commission*, (Civil Appeal No. 2939 of 1989, 11 August 1998) observed that for holding a trade practice to be unfair, it must be found that it causes loss or injury to the consumer.

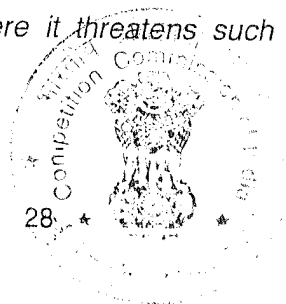
49. The Supreme Austrian Federal Court while deciding the matter of *R. v Re A Loyalty Bonus Scheme*, [2001] E.C.C. 19, involving loyalty bonuses and exclusive supply requirements imposed on its customers by an undertaking which dominates a market, observed:

*Usual methods of competition are permitted and will only become unfair if there are particular circumstances which make competition to provide services obstructive. This is the case if a particular action which may be accounted competition to provide services becomes an obstructive measure directly aimed against the competitor and hindering (if not actually preventing) in offering its services in an appropriate manner in the market, thereby ruling out genuine comparison of services in the future.*

50. The Supreme Austrian Federal Court in this case also observed that practices that are not the result of commercial performance, but aim to prevent or hinder the purchaser's choosing between several sources of supply, and to deny other manufacturers access to the market cannot be reconciled with the aim of fair competition in the Common Market.

51. The Swiss Federal Court in the case of *Chanel S.A. Genève of Geneva and Chanel S.A. of Glaris v EPA AG* [1997] E.T.M.R. 352 observed:

*Taking a functional approach, in making a distinction between fair and unfair competition one must take into account the results which one has a right to expect where an example of fair competition is functioning smoothly. Therefore, competition becomes dishonest where it threatens such use inasmuch as or where it thwarts the expected results.*

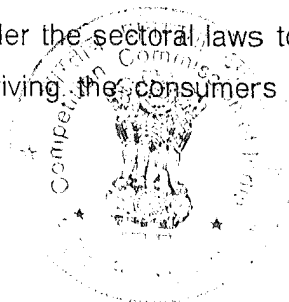


52 It may be observed that in restraining the consumers from exercising their full choice or freedom to procure the meters, they were deprived of their right to choose Consumer Meters of their own choice as guaranteed under the aforementioned regulations. The allegation that the opposite parties benefited by installing Consumer Meters of the suppliers approved by them which were alleged to be running faster may also be noted. Not only this, the opposite parties by compelling the consumers to procure Consumer Meters only through them or through the vendors certified by them adversely affected their interest. Therefore, the conduct of the opposite parties restricting the consumers' choice to the meters supplied by the opposite parties and the vendors approved by them was against the interest of the consumers and had the effect of depriving them of the benefits of a competitive meter market. Hence, the actions of the opposite parties amount to imposing an unfair condition on consumers purchasing electricity and Consumer Meters.

53. Competition law and consumer protection interface has been constantly emphasized and needs no further elaboration. Consumer welfare is an explicitly-stated goal of competition law in India. The preamble of the Act states that it has been enacted inter alia to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India. These objectives are further reflected in the various provisions of the Act including section 18 of the Act wherein the objectives in the preamble to protect consumer interests are reinforced. The Hon'ble Supreme Court of India has in the *Steel Authority of India* case (cited *supra*), observed as under:

... [T]he Act requires not only protection of trade but also protection of consumer interest.

54. A healthy and a competitive economy is imperative to safeguard consumer interests. Among others free choice, price and quality are central to the consumer interest. A market is said to be competitive if consumers can choose between a range of substitutable products and suppliers face no obstacles to supply products or services. The choice available to the consumers must necessarily be a real and genuine choice and not a notional one. Further in the present case, the consumer also has a right under the sectoral laws to be informed about the makes and models of Consumer Meters. Depriving the consumers of making an informed



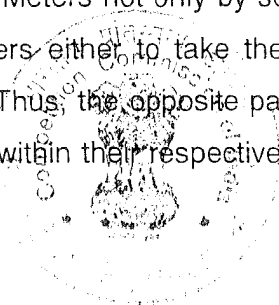
choice or misguiding them to make an ill-informed decision jeopardizes the interest of the consumers.

55. The hypothesis that a consumer may prefer to procure Consumer Meters from the opposite parties over other suppliers despite having complete and correct information is not sufficient to exempt the opposite parties from their legal obligation of disclosing the correct information. The analysis of the apparent benefits of procuring a Consumer Meter from the opposite parties does not take into account the fact that the right may be better exercised in a competitive market where the Consumer Meters would be available at competitive prices and benefits. Even assuming that a fully aware consumer also would prefer to procure the Consumer Meter from the opposite parties would not absolve the opposite parties from the accountability of having posted incorrect information and the consequent contravention of the Act.

56. Accordingly, it is found that the opposite parties have through their actions hindered with the consumers' option to procure a meter of their own choice and thereby imposed unfair conditions on consumers purchasing electricity and Consumer Meters. Thus, the conduct of the opposite parties of depriving the consumers of their rightful option and the consequently imposing an unfair condition on the sale and purchase of electricity and Consumer Meters as detailed above clearly fits within section 4(2)(a)(i) of the Act.

*(iii) Whether the opposite parties have created entry barriers for the distribution/ supply of meters denying market access in the relevant market of Consumer Meters in contravention of the provisions of Section 4(2)(c) of the Act.*

57. For the purposes of section 4 of the Act 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to – (i) operate independently of competitive forces prevailing in the relevant market; or (ii) affect its competitors or consumers or the relevant market in its favour (Explanation to section 4 of the Act). The opposite parties are regulating the supply of Consumer Meters not only by selecting a panel of suppliers of meters but also by directing the consumers either to take the meters from the opposite parties or from the vendors certified by them. Thus, the opposite parties have full and effective control of the supply of the Consumer Meters within their respective licensed areas. It

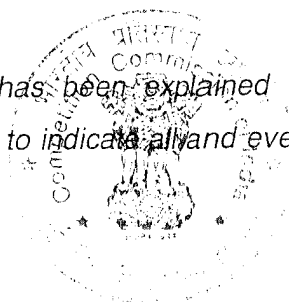


is also observed that all three opposite parties enjoy almost 100% market share in the relevant market of distribution/ supply of Consumer Meters in their respective licensed areas. There is no doubt that the opposite parties are in a dominant position not only in the relevant market of distribution/supply of electricity but also in the relevant market of distribution/ supply of Consumer meters.

58. While section 4 of the Act does not prohibit an enterprise from holding a dominant position in a market, it does place a special responsibility on such enterprises, in requiring them not to abuse their dominant position. As per section 4(2) of the Act, there shall be an abuse of dominant position, if an enterprise *inter alia* directly or indirectly, imposes unfair or discriminatory conditions in purchase or sale of goods or services or indulges in practice or practices resulting in denial of market access in any manner. However, the said section does not contain an exhaustive list of the activities that would amount to a contravention of its provisions. The actions, practices and conduct of an enterprise in a dominant position have to be examined in view of the facts and circumstances of each case to determine whether or not the same constitutes an abuse of dominance in terms of section 4 of the Act. In this regard, it is relevant to quote the decision in the case of *Kanal 5 Ltd v Föreningen Svedska Tonsättares Internationella Musikbyrå* [2009] 5 C.M.L.R. 18, where the Court (Fourth Chamber) observed that *an undertaking in a dominant position is entitled also to pursue its own interests. However, such an undertaking engages in abusive conduct when it makes use of the opportunities arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition.* This proposition of law was also noted in *United Brands Company & United Brands Continental b.v. v. Commission of the European Communities* 1978 E.C.R. 207.

59. As per section 4(2)(c) of the Act, there shall be an abuse of dominant position if any enterprise indulges in a practice resulting in denial of market access in any manner. The Hon'ble Supreme Court interpreted the term 'any' in *Lucknow Development Authority v. M.K. Gupta*, AIR 1994 SC 787:

*In Black's Law Dictionary the word 'any' has been explained as having a 'diversity of meaning' and may be "employed to indicate all and every as well as*



*some or one and its meaning in a given statute depends upon the context and subject matter of statute.*

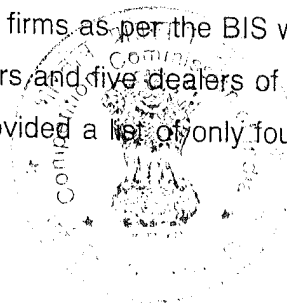
60. 'Any' is a word of wide meaning and *prima facie* excludes limitation or qualification (*Yashwant Stones v. State of Uttar Pradesh*, AIR 1988 ALL 121). Accordingly, the provisions of section 4(2)(c) of the Act have a very wide context and the use of words 'any manner' brings within its scope 'all' or 'every' manner which results in denying access to a market.

61. Therefore, the text of section 4(2)(c) of the Act is far reaching and does not limit or list the ways in which a market access may be denied. For the purposes of this section, the conduct of a party would be tested on the basis of the end effect i.e. whether access to a market has been denied and not. In other words, the same conduct by different parties may attract provisions of section 4(2)(c) of the Act depending on whether the conduct of the parties results into denial of market access in any manner.

62. Owing to the conduct of the opposite parties of limiting the choice of Consumer Meters to the meters supplied by the opposite parties or the vendors approved by them not only hindered the choice of the consumers but also restricted market access to the other distributors/suppliers of the Consumer Meters in the relevant market of distribution/ supply of Consumer Meters

63. The conduct of the opposite parties of publishing a list of only the approved vendors on the websites and misguiding the consumers that the meters may be procured either from the opposite parties or their approved vendors has already been discussed in detail.

64. As mentioned earlier, section 55 of Electricity Act read with regulation 6 of CEA Regulations prescribe that if any consumer elects to purchase a meter, the same may be purchased by him stipulating only that the meters shall bear BIS mark, meet the requirements of the CEA regulations and have additional features as approved by the appropriate authority. It is noted from the report of the DG that as on 10.02.2010 there were ten manufacturers in Delhi and eighty two all over India including some foreign firms as per the BIS website. However, the opposite party No.1 placed a list of only five vendors and five dealers of the listed vendors on their site and the opposite parties Nos. 2 and 3 provided a list of only four vendors and seven



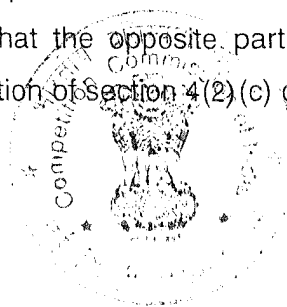


dealers of the listed vendors. It has already been discussed above how the opposite parties informed their respective consumers that the choice of Consumer Meters was restricted to the vendors of meters approved by the opposite parties.

65. The above analysis indicates that there is asymmetry of information which has led to the creation of entry barriers in the market of distribution/ supply of Consumer Meters. The fact that the entry into the meter market was restricted owing to the opposite parties' actions is also corroborated by the statements of the one of vendors of Consumer Meters in Delhi viz., Bentex Control and Switchgear and Company as recorded by the DG in the course of the investigation. The statement of a representative namely Amit Yadav has been recorded by the DG who has stated that there is no competition in the meter market in Delhi and since his firm is not approved by the opposite parties, it cannot supply meters to the consumers of the opposite parties. This evidence illustrates the entry barrier created by the opposite parties in the relevant meter market.

66. Empanelment of meter vendors by the opposite parties had the effect of denying access to the other dealer/ vendors/ distributors of Consumer Meters. In this regard, it may be noted that the quantum of damage is not relevant. It is sufficient that the legal right of consumers as well as vendors of Consumer Meters has been violated. The opposite parties through their conduct restricted the entry of eligible distributors and suppliers of Consumer Meters to the relevant market of meters. Consequently, competition in this market has been hindered and foreclosed.

67. The opposite parties which are dominant in the relevant market of distribution/ supply of Consumer meters through their conduct have allowed market access to only such vendors of Consumer Meters who were approved by them and denied the access to the other vendor/ suppliers. It is evident from the above discussion that the entry of players in the meter market in their respective areas of operations of the opposite parties has been restricted by them through their acts and conduct. Accordingly, it is found that the opposite parties have abused their respective dominant positions and are in contravention of section 4(2)(c) of the Act.



*(iv) Whether the allegation that the opposite parties are abusing their dominant position by imposing unfair and discriminatory conditions in purchase of electricity through allegedly fast running meters is established.*

68. The informant has also alleged that the meters provided by the opposite parties record higher readings than the actual consumption by the consumers. Hence, the issue that the opposite parties are abusing their dominant position by imposing unfair and discriminatory conditions in purchase of electricity through allegedly fast running meters is to be examined separately.

69. It has been established that the opposite parties have hindered with the consumers' option to procure a meter of their own choice. The DG, in the course of investigation, has also found that there is substance in the allegations that the meters provided by the opposite parties do not give the correct measurement of electricity. In this regard, the DG has relied on the reports in the press relating to claims that the meters were moving fast and the report of the testing drive undertaken by the PGC through the CPRI.

70. According to the applicable specifications published by the BIS, the permissible error limit under on-site conditions for Class 1.0 meters is  $\pm 2.5\%$ . Further, as per the report of the DG the opposite parties have also submitted that the permissible error margins of  $\pm 2.5\%$  is the standard as provided by BIS and the same will have to be applied in order to check whether an electronic meter is defective or not. It is also noted that the PGC in its submissions to the DG office stated that for onsite conditions the maximum permissible error margin is  $\pm 2.5\%$ .

71. It is gathered that to ascertain the accuracy of consumer meters, the CPRI under the aegis of the PGC carried out tests of such meters in Delhi on receipt of complaints filed by the consumers. The results of the above test as obtained and reproduced by the DG in the report state that out of the 2014 meters tested 1847 meters i.e. 91.7% showed a positive error and only 167 meters i.e. 8.3% showed a negative error. Further, it is also noted that about 86 meters have tested with a positive error of more than 3%. It is also significant to note that the Committee Constituted by Ministry of Power Regarding Permissible Accuracy Limits of Electricity Meters in its report dated September 2008 cited the results provided by the CEA in this regard. The CEA had collected information about the tests conducted at site by the utilities

since 2007 and the test results of 244305 consumer meters show that about 74% meters showed an error on the positive side.

72. Since 91.7% of the meters tested by the PGC showed an error on the positive side, the DG concluded that the results reflect a skewed pattern which does not support the principles of normal distribution curve. Based on the above, the DG has observed that the fastness of the meters may be related to the fact that the opposite parties supply the said meters and also questioned the intention of the opposite parties in dealing with only certain vendors to procure the Consumer Meters.

73. The opposite parties have submitted that the 2041 meters tested by the PGC represent less than 0.1% of approximately thirty lakh consumer meters installed by the opposite parties. The opposite party No. 2 has further submitted that CPRI tested more than six lakh meters for opposite parties Nos. 2 and 3 and found them fit for installation. In support of this contention, the opposite party No. 2 has produced copies of the sample reports. Upon perusal of these sample reports, it is found that for a lot of twenty thousand meters, the CPRI inspected only thirty two meters as a representative sample. Extending the above logic, it seems that the CPRI inspected only 1056 (approx) as representative meters in the 33 lots inspected by the CPRI and not all the 655,544 meters as argued by the opposite party No. 2. It appears that the representative sample of 2014 tested by the PGC is larger than the representative sample inspected by CPRI. Further, it seems that CPRI conducted the tests of the six lakh meters of the opposite parties Nos. 2 and 3 at the instance of its client BSES viz., opposite parties Nos. 2 and 3. Hence, the findings in CPRI's report also cannot be considered independent and impartial. For the reasons stated above, this argument of the opposite party no. 2 is not acceptable.

74. However, after perusing the material on record, it is found that the findings of the DG in relation to fastness of the meters are primarily based on tests of 2014 meters conducted by the PGC through the CPRI. This sample seems too small and consists of meters under complaint. Hence, the sample taken in the above test cannot be said to be a representative sample of all the consumer meters. It is found that the result of the PGC tests and the other material on record in this regard is not sufficient to conclude that the opposite parties have supplied faulty meters to the consumers. In the absence of sufficient and cogent evidence, it

cannot be said that the opposite parties have abused their dominant position by imposing unfair and discriminatory conditions in purchase of electricity through fast running meters. I, therefore, concur with the majority view on this issue.

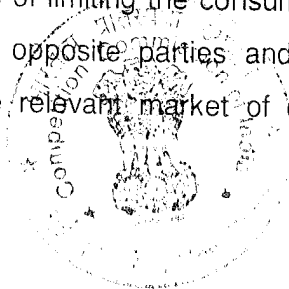
75. In conclusion, it is found that the all three opposite parties have abused their dominant position in the relevant market of distribution/ supply of electricity and the relevant market of distribution/ supply of Consumer Meters by imposing unfair conditions on purchase/ sale of electricity and Consumer Meters in contravention of section 4(2)(a)(i) of the Act. It is also found that the opposite parties by their acts in the relevant market of supply/ distribution of Consumer Meters have denied access of this market to the other distributors/ vendors of the Consumer Meters and hence abused their dominant position in above said market in contravention of section 4(2)(c) of the Act.

76. It may be noted that the neither the gain to the opposite parties is ascertainable nor has the damage to the consumers quantifiable on the basis of the available material on record. Therefore, considering the material on record and in view of the totality of the circumstances, it may not be appropriate to impose a penalty on the opposite parties in the present matter. The opposite parties cannot be allowed to continue to abuse their dominant position and harm the consumers' interest to gain undue profits or to deny the consumers the right to exercise his choice as conferred by the sectoral laws. Hence, it is necessary to issue the appropriate directions under section 27 of the Act.

77. Accordingly, the opposite parties are hereby directed to:

a) comply with the sectoral laws and cease and desist from publishing incorrect or incomplete information or misleading the consumers in any manner with respect to the choice of meters available to the consumers;

b) cease and desist from anti-competitive practices of limiting the consumers' choice of meters to only the vendors of meters approved by the opposite parties and directly or indirectly restricting and/ or denying market access to the relevant market of distribution/ supply of Consumer Meters; and



c) publish complete and accurate information on their respective websites as required by the relevant laws and take necessary steps to make consumers aware of their right to procure a meter of their own choice.

78. Further, as observed earlier in this order, the conduct of the opposite parties amounting to abuse of their respective dominant positions in the two relevant markets resulted primarily from the non-compliance of the relevant sectoral rules and regulations, hence the concerned sectoral authority may look into this matter and take other necessary actions as it deems fit.

**Certified True Copy**

*SP Gahlaut*  
26/5/2011  
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