

THE COMPETITION COMMISSION OF INDIA

CASE NO. UTPE No. 45/2005

Dated: 31.05.2011

In Re : Suomoto case by MRTPC

Against

1. North Delhi Power Limited
33 KVA Grid, Sub Station Building,
Hudson Lane,
Guru Teg Bahadur Nagar
New Delhi 110 009
2. BSES Rajdhani Power Limited
BSES Bhawan
Nehru Place
New Delhi 110 019
3. BSES Yamuna Power Limited
BSES Bhawan
Nehru Place
New Delhi 110 019

..... Opposite Parties

FINAL ORDER

Consequent upon the repeal of Monopolies and Restrictive Trade Practice Act ('MRTP Act'), the instant case has been received by way of transfer, under Section 66 (6) Competition Act, 2002.

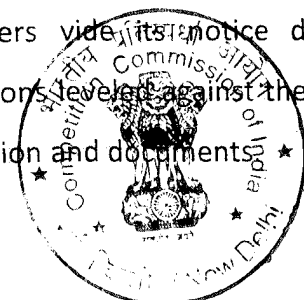


("the Act"), from the erstwhile Monopolies and Restrictive Trade Practice Commission (MRTPC").

Facts of the Case

2 The factual background of the case is as under:-

- 2.1 The present case had been taken up by the MRTPC *suomoto* on the basis of two news reports/articles published in the newspaper, namely, **The Hindu** on 06.06.2005 and 29.06.2005.
- 2.2 According to the news article dated 06.06.2005, the Electricity Distribution Companies in Delhi ('Discoms') are charging more from the consumers for the electricity consumed by their consumers by installing faulty electronic meters resulting in their running fast by 8% to 15%. The Discoms have failed to provide efficient service and improved quality of power to consumers in Delhi.
- 2.3 Further, as per the news article dated 29.06.2005, the Discoms are warning the consumers of imposition of severe penalties for overdrawing the power though there is an inordinate delay for providing load enhancement to consumers.
- 2.4 The MRTPC after taking *suomoto* cognizance of the news report, vide its order dated 15.07.2005 directed the Director General of Investigation and Registration, MRTPC ("DGIR") to investigate the matter and submit the preliminary investigation report.
- 2.5 The DGIR initiated the investigation against the three electricity distribution companies in Delhi namely North Delhi Power Limited ('NDPL'), BSES Yamuna Power Limited ('BSES Yamuna') and BSES Rajdhani Power Limited (BSES Rajdhani') (collectively referred as 'Opposite Parties' or 'Discoms') and issued probe letters vide its notice dated 12.08.2005 to them seeking their comments on the allegations leveled against them in the news articles and asked them to furnish certain information and documents.



- 2.6 The Opposite Parties filed their replies/responses of the notice issued by the DGIR and contended that the provisions of Monopolies and Restrictive Trade Practice Act, 1969 ('MRTP Act') are not applicable to the services rendered by them. Therefore, they have filed writ petition before the Delhi High Court, which vide an interim order dated 13.12.2005 has stayed the proceedings in pursuance of the notices dated 12.08.2005 and 20.09.2005 issued by the DGIR. The writ petition filed by the Opposite Parties was finally disposed of by the High Court vide order dated 18.02.2008. In the aforesaid writ petition, MRTPC had given an undertaking to withdraw the impugned notices with liberty to seek information only on specific complaints of the consumers.
- 2.7 In terms of the order of the Hon'ble Delhi High Court, the DGIR issued fresh probe letters dated 13.06.2008 to the Opposite Parties. The Opposite Parties in their replies to the aforesaid probe letter urged that since Electricity Act, 2003 is a specialized Act as compared to the MRTP Act which is a general Act, the jurisdiction on such issue is limited to Delhi Electricity Regulatory Commission and thus, the probe letters in question are in violation of undertaking given by the MRTPC before the Delhi High Court.
- 2.8 On the issues raised by the Opposite Parties, the DGIR obtained a legal opinion of its counsel who clarified that in terms of order dated 18.02.2008 of the Delhi High Court, there is no bar or direction restraining the DGIR from conducting preliminary investigation undertaken by it and the matter can be investigated further.
- 3 At this stage the matter was transferred to this Commission under Section 66 (6) of the Act. The Commission considered the matter in its ordinary meeting held on 18.06.2010 and 11.08.2010. The Commission vide its order dated 19.08.2010, after having formed an opinion under Section 26 (1) of the Act that there exists a prima facie case, referred the matter to the Director General ("DG") for investigation.



- 4 DG after receiving the direction from the Commission investigated the matter and submitted the report dated 01.10.2010 to the Commission.

Findings In DG Report

- 5 The DG in its report dated 01.10.2010 has submitted that since the issues/allegations raised in the instant case have already been investigated against the same parties in Case No. 6/2009, therefore, further investigation may not be required as in the Case No. 6/2009 all the allegations have been found valid and true.
- 6 As per the DG report, investigating the allegations which have already been established against the same parties may mean reinvestigating the charges which have already been held to have been established.
- 7 The DG has concluded in its report that the decision taken in Case No. 6 of 2009 by the Commission has direct bearing on the issue which was the subject matter of investigation with the office of DGIR, MRTPC in the present case. The DG has requested in his report that the issue involved in the instant case may be considered in the light of the decision in Case No. 6 of 2009.

Discussion

- 8 The Commission considered the Investigation Report dated 01.10.2010 in its meetings held on 27.10.2010, 30.11.2010, 30.12.2010, 20.01.2011, 09.02.2011, 03.03.2011, 22.03.2011 and 26.04.2011.
- 9 The Commission has carefully gone through the investigation report filed by the DG and observed that the DG has not conducted any fresh investigation in the instant case and has relied upon the investigation earlier conducted by him in case no. 6 of 2009. After going through the DG report in this case and the DG report filed in case no. 6 of 2009, the



Commission noted that the allegations which were investigated by the DG in case no. 6 of 2009 were based upon the reports of two newspapers namely The Hindu dated 14.05.2005 and Hindustan Times dated 08.04.2008. In both the news reports it had been alleged that the electric meters installed by Opposite Parties in Delhi were running on the faster side. The instant matter is based upon the report of news articles published in The Hindu dated 06.06.2005 and 29.06.2005.

10 It is also observed that in case no.6 of 2009, the NDPL, BSES Yamuna and BSES Rajdhani had filed their respective replies to the DG report and they were also heard in *extenso* by the Commission. Therefore, as the issue involved in the present matter is squarely covered in case no. 6 of 2009, this case is being disposed off on the basis of the DG report in the instant case, the DG report in case no. 6 of 2009, the replies filed by the Opposite Parties in case no. 6 of 2009 and the ratio propounded in that case and there is no need to launch into fresh inquiry for the disposal of the instant matter.

11 With this view, the findings of DG in case no 06 of 2009, relevant to the instant case, are reproduced herein below:

- a. *"the relevant market in the instant case would mean relevant product market comprising of distribution and supply of electricity and allied facilities like metering and reading of meters, billing etc. and relevant geographic market comprising of the areas of operations of the three companies-BRPL, BYPL and NDPL determined subsequent to privatization of DVB"..*
- b. *"as on date, BSES Rajdhani, BSES Yamuna and NDPL enjoy position of monopoly in their respective areas of operation. The distribution and supply functions are not segregated because of the prevalent state of licensing conditions. Thus, it may be said that as per the provisions of explanation (a) to Section 4(2), the three Discoms are enjoying dominant position in their respective areas of operations".*



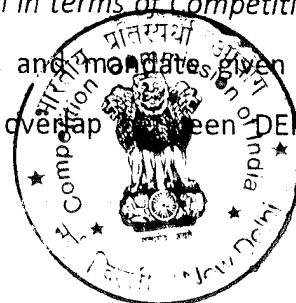
- c. *“ the fact that the Discoms are supplying electricity to the consumers through meters, which are not correct, tantamount to imposing unfair conditions in sale of electricity and consequently abuse of their position of dominance in terms of provisions of Section 4(2)(a)(i) of the Competition Act, 2002”.*

12 After filing the DG report in case no. 6 of 2009, the Commission sought comments of the Opposite Parties on the DG report. The Commission after going through the DG report, the replies filed by the Opposite Parties and the relevant material available on record, framed the following issues:

- (i) *Whether the Commission has jurisdiction to look into the matter or there is any overlap of jurisdiction with the sectoral regulator (DERC)?*
- (ii) *Whether the Discoms have entered into any agreement or carrying on any practice which indirectly determines the sale price of the electricity and limits or controls the production and supply of the electronic meters in violation of Section 3(1) read with 3(3)(a) and (b) of the Act?*
- (iii) *What is the relevant market in this case?*
- (iv) *Whether the opposite parties are in dominant position in the relevant market?*
- (v) *Whether the opposite parties are abusing their dominant position in terms of the provisions of Section 4 of the Competition Act, 2002?*

13 The Commission vide its order dated 11.05.2011 disposed off the above case. The ratio propounded by the Commission in case no 06 of 2009, relevant to the instant case, has been dealt with in the ongoing paragraphs.

14 It is noted that in case no. 6 of 2009 the comments of DERC were sought and it had replied to the Commission that *“specific issues alluded to by the petitioner accusing the Discoms of abuse of their dominant position may be looked into by the CCI in terms of Competition Act, 2002”.* Therefore, after considering the opinion of DERC and comments given to the Commission under the Act, it was held that there is no overlap between DERC and

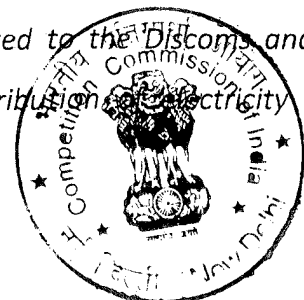


Competition Commission of India, in terms of the jurisdiction in this case. The Commission accordingly proceeded to deal with the issues relating to competition.

- 15 As regard the applicability of the provisions of Section 3 in the present matter the conclusion drawn by the Commission in its order dated 11.05.2011 applies with full force. After examining the material on record the Commission in that case agreed with the conclusion drawn by the DG that based upon the evidence available on record allegation regarding contravention of Section 3(3) read with Section 3(1) of the Act remained unsubstantiated. Dealing with the issue no. 2, the Commission held as under:

"On perusal of the record it is apparent that informant has not furnished any material to substantiate the allegation that the alleged conduct of Discoms is emanating from any agreement or concerted practice. DG has also not found any evidence which could lend support to the allegations made by the informant. There is not an iota of evidence on record to show any concerted action on part of Discoms. Making bare assertions, shorn of any evidence, is not sufficient to establish the contravention. In the absence of any evidence to the contrary there is no reason to disagree with the conclusion drawn by the DG. Therefore, issue no.2 is answered in negative".

- 16 The Commission in case no. 06 of 2009, after taking into consideration the provisions of Section 19(5), Section 19(6), Section 19(7), Section 2(r), Section 2(s), Section 2(t) of the Act, the provisions of Electricity Act, 2003 and on the basis of the various other regulatory provisions, has held that relevant market in the present case is *distribution & supply of electricity in the licensed areas of respective Discoms in Delhi.*
- 17 On the issue of dominance of Discoms in the relevant market the Commission observed that *"three Discoms have been assigned specific areas of NCT (Delhi) for distribution and supply of electricity. As per the prevailing licensing conditions and given the present stage of regulatory reforms, the retail supply of electricity is restricted to the Discoms and in the present case the Discoms are the only licensees for distribution of electricity in their*



respective areas with open access option available only to consumer of 1 MW and above. ~~Therefore, practically Discoms are the only source of electricity available to the consumers in any particular licensed area for supply of electricity.~~ In such a scenario, there are no perceivable competitive constraints faced by the Discoms within the relevant geographic markets of their respective licensed distribution areas. The opposite parties have also not disputed their dominant position in the relevant market of "distribution and retail supply of electricity". The necessary corollary to this is that each one of the three Discoms has the ability to behave independently of the competitive forces prevailing in the relevant market since they have been given exclusive areas for distribution and supply of electricity. This leads to the irresistible conclusion that the three Discoms enjoy position of dominance in their respective areas of operation to the relevant market of supply of electricity to the consumers".

18 While dealing with issue no. 5, the Commission elaborately examined whether by the alleged conduct the Discoms have abused their dominant position in the relevant market and has observed as under:

"16.5 The unfair condition in the instant matter relates to overcharging the consumers due to fast running of meters.

16.6 While finding the Discoms indulging into this kind of abuse the DG has based his conclusion on the data of test results of meters conducted by Central Power Research Institute (CPRI), Bangalore, under the aegis of Public Grievance Cell constituted by Government of NCT of Delhi. This data was provided to the DG by Public Grievance Cell on 18.12.2009 alongwith their submissions. Though the data obtained from Public Grievance Cell has been reproduced in the DG report, the document containing the submissions and test results has not been made part of DG report.

16.7 As per DG report, out of total 2014 meters tested by CPRI in the period July, 2007 till 30.11.2009, 1847 meters had positive errors and only 167 meters had



negative errors. The DG has noted that 91.7 % of the meters tested showed positive errors, while only 8.3 % meters have shown negative errors. DG has also further noted that out of 2014 meters tested till 30.11.2009 a total of 96 meters (4.76 %) have shown positive error of more than 2.5%, exceeding the maximum permissible error limit prescribed for Class-1 meters. It is also borne out from the DG report that after regulations of Central Electricity Authority (CEA) were published in March, 2006, the Bureau of Indian Standards (BIS) published IS 15707 : 2006. According to new Indian Standards, the maximum permissible error for the meters having accuracy of Class 1.0 (which are meters generally used by the domestic consumers) shall be $\pm 2.5\%$ under on site conditions.

- 16.8 The DG has concluded that since overwhelming percentage of meters tested have shown positive errors this is against the principle of normal distribution curve. In view of these facts the DG report concludes that there is substance in the allegation that the meters installed by the Discoms have an upward bias in measurement of electricity.
- 16.9 Based upon the analysis of the data supplied by Public Grievance Cell the DG has come to the conclusion that fast running of meters results in inflated bills for the consumers. In the end the DG has come to the following conclusion:-
"The fact that the Discoms are supplying electricity to the consumers through meters, which are not correct, tantamount to imposing unfair conditions in sale of electricity and consequently abuse of their position of dominance in terms of provisions of section 4(2)(a)(i) of the Competition Act, 2002."
- 16.10 On the other hand, the Discoms have contended that DG has relied on test results supplied by Public Grievance Cell but that report has not been shared with the Discoms and hence, findings of the DG are against the principles of natural justice.



- 16.11 It has been further contended that the report of CPRI supplied by Public Grievance Cell and relied upon by the DG is defective and is not based on any survey and sample size is too small to be held to be representative in character for all the consumers in Delhi. The three Discoms have approximately 30 lakh consumers out of which DG has referred to only 2014 meters which comes to less than 0.1 % of the total consumers to whom electricity is being supplied in Delhi. Further, even the Ministry of Power in its report had accepted that the sample size was defective and too small.
- 16.12 Discoms have also contended that the DG has failed to appreciate the fact that the relevant BIS standards applicable in the present case i.e. IS 15707 : 2006, provides that the maximum permissible error in case of Class-1 meters is $\pm 2.5\%$. Therefore, a meter showing error within this limit is deemed to be a correct meter.
- 16.13 The issue of fast running of meters is related to consumer disputes and has no bearing on the competition issues. Such issues can be looked into by the appropriate authority like Consumer Grievance Redressal Forum & Ombudsmen established under the Electricity Act.
- 16.14 There is no denying the fact that fast running of meters results in inflated bills for consumers. Discoms would earn more revenue for less amount of electricity supplied and on the other hand the consumers may end up paying more than what they are consuming. Undoubtedly, this will amount to unfair practice affecting consumers adversely. However, it needs to be examined whether in the present case there is sufficient evidence to establish such unfair practice which tantamount to an abuse of dominant position by Discoms.
- 16.15 It is evident that DG has based his finding solely on the data of test results of meters of aggrieved consumers provided by the Public Grievance Cell constituted by the Government of NCT (Delhi). These



Bangalore, under the aegis of Public Grievance Cell. It is also noted that this data is compilation of test results conducted during the period running from July, 2007 to November, 2009, on the complaints of those consumers who suspected that their meters were running fast. A total of 2014 meters were tested during this period.

16.16 It is seen from DG's report that NDPL has a consumer base of approximately 11 lakhs consumers whereas, BYPL and BRPL together supply electricity to 31 lakhs consumers in Delhi. Furthermore, out of total consumer base of approximately 42 lakhs, only 2014 meters have been tested in a span of around 2 ½ years. This constitutes a miniscule of total consumers and is less than 0.1%. The size of the test results is too small, and in view of this it is difficult to take it as a representative sample of the large consumer base in Delhi. Moreover, it is also clear that the compilation of test results is not on account of any random sampling which had been undertaken by CPRI. In this test drive commencing from July, 2007, the meters of only those consumers were tested who were suspecting their meters to be running fast. Therefore, the test results compiled by CPRI cannot be taken to be representative sample so as to draw a conclusion that more than 90% of the meters in Delhi are running on positive side. Similar view was expressed by the Committee constituted by the Ministry of Power in its report submitted in September, 2008. This report finds place as Annexure F in the DG report.

16.17 It is also borne out from the examination of said test results reproduced in DG report that out of 2014 meters tested till November, 2014, only 96 meters (0.76%) have been found to be erring on positive side beyond permissible limit of $\pm 2.5\%$ specified by BIS for Class 1 meters. This number is insignificant considering the fact that total consumers in Delhi are more than 40 lakhs. Furthermore, it is not discernible from the DG report that out of 96 meters showing error beyond the permissible limit how many of them were tested before 10, 2009 when



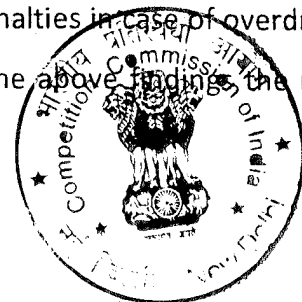
section 4 of the Act came into force. The report is also silent about the fact that how many meters out of 96 defective meters were replaced by the Discoms before the date of enforcement of the Act. As regards those meters which were found running on the positive side, but within permissible limit, it is manifestly clear that no fault can be found on this account because they were running within the accuracy limit stipulated by BIS, and they are deemed to be correct meters in terms of regulations framed by CEA.

16.18 *On the basis of the facts and circumstances of the case and the above analysis, it cannot be said in this context that the Discoms have abused their dominant position in terms of the provisions of section 4 of the Act. Therefore, Issue no.5 is answered in the negative.”*

19 On the basis of above analysis it was held by the Commission in case no. 6 of 2009 that no case of violation of either Section 3 or Section 4 of the Act was established and the Commission closed the proceedings.

Decision

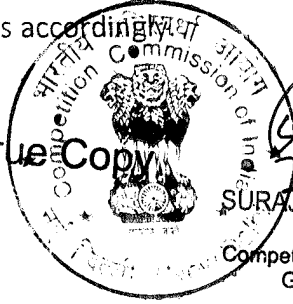
20 In view of the above discussion, the Commission is of the considered view that since the issue involved in the instant case is same as has already been disposed off by the Commission vide its detailed order in case no. 6 of 2009, the ratio propounded in the case no. 6 of 2009 is equally applicable to the facts and allegations of the present case. Therefore, on the basis of the said ratio of case no. 6 of 2009, the Commission does not find any violation of either Section 3 or Section 4 of the Act by the Discoms and conclusions drawn by the DG in case no. 06 of 2009 cannot be accepted. Further, the Commission is of the opinion that allegations regarding Discoms not providing efficient service to the consumers and warning consumers of imposition of severe penalties in case of overdrawn the power do not raise any competition issues. In view of the above findings, the matter



relating to this information is disposed off accordingly and the proceedings are closed forthwith.

21 Secretary is directed to inform the parties accordingly

Certified True Copy



Suraj Parkash Gahlau
16/7/2011

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Office Manager
Competition Commission of India
Government of India
New Delhi