



**COMPETITION COMMISSION OF INDIA**

**Case No. 33 of 2014**

**In Re:**

**XYZ**

**Informant**

**And**

**REC Power Distribution Company Ltd.**

**Opposite Party**

**CORAM**

**Mr. S. L. Bunker  
Member**

**Mr. Sudhir Mital  
Member**

**Mr. Augustine Peter  
Member**

**Mr. U. C. Nahta  
Member**

**Dr. M. S. Sahoo  
Member**

**Mr. Justice G. P. Mittal  
Member**



### **Appearances:**

*For the Informant* : CA Ranjan Sardana, Advocate;  
Mr. A. Ganesan, Advocate

*For OP* : Mr. Krishnan Venugopal, Sr. Advocate;  
Ms. Pallavi Shroff, Advocate;  
Mr. Gaurav Ray, Advocate;  
Mr. Rohan Arora, Advocate;  
Mr. Abhijeet Sinha, Advocate;  
Mr. S L Batta, GM (Legal) REC; and  
Mr. S C Garg, CEO, RECPDCL.

### **Order**

1. The present case arises out of an information filed by XYZ (identity confidential) (hereinafter, the 'Informant') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter, 'the Act') against REC Power Distribution Company Ltd. (hereinafter, 'RECPDCL'/'OP'), alleging *inter alia* contravention of the provisions of Section 4 of the Act.

2. **Brief facts and allegations:**

2.1 An elucidation of the factual matrix that has given rise to the present case may be useful. Rural Electrification Corporation Limited (hereinafter, 'REC') was incorporated in the year 1969 with the main objective to finance and promote rural electrification projects in the private and public sector in India. It finances rural electrification projects across India and also provides loans to Central/ State Sector Power Utilities, State Electricity Boards, Rural Electric Cooperatives, NGOs and Private Power Developers.



- 2.2 RECPDCL, a wholly owned subsidiary of REC, was set up in the year 2007 with specific focus on developing and investing in electricity distribution and related activities. The Informant has alleged that RECPDCL has been leveraging its association with REC for securing work related to consultancy services in relation to proposed rural electrification projects, mainly preparation of Detailed Project Report (DPR), by giving verbal assurance of securing approvals for the financing of such projects by REC. It has been alleged that RECPDCL has secured various orders relating to consultancy services in case of rural electrification projects from the state distribution utilities under the Rajiv Gandhi Grameen Vidyutikaran Yojana (RGGVY) scheme on the pretext that REC is the nodal agency for implementation of RGGVY. It has thus, distorted competition in the market for consultancy services related to the said project.
- 2.3 The Informant was further aggrieved because of the awarding of DPR preparation work to RECPDCL on nomination basis by various state utilities without following the tendering process in complete disregard to the CVC guidelines and competition law principles. This allegedly amounted to denial of market access to the competitors of RECPDCL in the consultancy market. Thus, as per the information, the manipulation of competition by RECPDCL under the aegis of REC amounted to contravention of the provisions of Sections 4(2)(c) and 4(2)(e) of the Act.
- 2.4 The Commission *prima facie* found merit in the allegations of the Informant and *vide* its order dated 13.01.2015 directed the Office of the Director General (hereinafter ‘the DG’) under Section 26(1) of the Act to conduct an investigation and submit its report. The DG report was received by the Commission on 17.07.2015.



### 3. DG's Findings and Analysis

- 3.1 It is pertinent to mention that the Informant has not specifically named REC as an Opposite Party in the present case. However, considering the allegations, *i.e.* leveraging of dominant position in the market in which REC is operating, the DG has analysed the alleged anti-competitive conduct of REC and RECPDCL as a group.
- 3.2 To delve into the issues/allegations, the DG examined the nature and scope of the activities carried out by REC and RECPDCL to evaluate whether they fall under the definition of 'enterprise' within the scope of Section 2(h) of the Act or not. Further, the ownership structure of REC and RECPDCL was examined to assess whether they are part of the same group as defined under Explanation (c) of Section 4 (2) read with clause (b) of the Explanation to Section 5 of the Act or not. Thereafter, the DG proceeded to examine the conduct of OP group on the touch stone of the provisions laid down under Section 4 of the Act.
- 3.3 The DG noted that REC, a Central Public Sector Enterprise under Ministry of Power, was incorporated in 1969 with the main objective to finance and promote rural electrification projects all over the country. The DG examined the role of REC as a nodal agency for the rural electrification projects under the RGGVY and as a financial institution providing financial assistance to State Discoms. It was noted that over the years, REC has expanded its business to include financing of various types of power projects across the states and it also extends financial assistance to power projects of both State Governments and private sector either on its own or in consortium with other financial institutions or banks.



- 3.4 Further, it was observed that RECPDCL, a wholly owned subsidiary of REC, was incorporated with the objectives of (i) promoting, developing, constructing, owning, operating, distributing and maintaining 66 KV and below voltage class electrification/distribution electric supply lines/distribution systems; (ii) promoting, developing, constructing, owning and managing Decentralized Distributed Generation and associated distribution systems; and (iii) facilitating consultancy/execution of the above for other agencies/government bodies in India and abroad. Therefore, considering the objectives and activities of REC and RECPDCL, the DG observed that both these entities are directly involved in economic activities and as such are qualified to fall within the ambit of the term 'enterprise' as defined under Section 2(h) of the Act.
- 3.5 On the issue whether REC and RECPDCL are group companies, the DG referred to OP's Annual Report for the financial year 2013-14 wherein it was stated that RECPDCL was a wholly owned subsidiary of REC and all key decisions were taken by the Board of RECPDCL where the REC nominees exercise control. Further, the said annual report clearly stated that the Key Management Personnel of RECPDCL were employees of REC deployed on part time basis. It was also noted that both the companies have a common Chairman and common members as their Board of Directors. Also, the DG observed that RECPDCL shares the offices of REC at many places and the officers of REC have signed agreements on behalf of RECPDCL. Therefore, the DG concluded that REC and RECPDCL constitute a 'group' as required for the purposes of Section 4 of the Act. Thus, REC and RECPDCL are hereinafter referred to as the 'OP group' in this order.
- 3.6 To analyse the conduct of the OP group, the DG delineated two relevant product markets—*first*, the market in which REC is operating; and *second*, that in which RECPDCL is providing services.



- 3.7 With regard to the first relevant product market, the DG reviewed the dynamics of rural electrification schemes to determine the role of REC. It was observed that in compliance with the provisions of Sections 4, 5 and 6 of the Electricity Act, 2003, Rural Electrification Policy was notified *vide* notification dated 23.08.2006. The policy aimed at providing electricity access to all rural households within 5 years. In April 2005, the RGGVY was launched by merging all ongoing schemes such as Pradhan Mantri Gramodaya Yojana (PMGY), Kutir Jyoti Program (KJP), Minimum Needs Program (MNP), Accelerated Rural Electrification Program (AREP), Rural Electricity Supply Technology Mission (REST) *etc.* Henceforth, RGGVY became the flagship scheme for rural electrification by the Ministry of Power, Government of India with REC as the nodal agency for its implementation and operationalisation. Under the RGGVY, 90% of the project cost is provided as capital subsidy by the Government of India. The rest 10% can be financed either by REC as soft loan or contributed by States through their own resources or through loan taken from other financial institutions. In the year 2014, RGGVY was subsumed with the newly launched scheme, Deendayal Upadhyaya Gram Jyoti Yojana (DDUGJY).
- 3.8 It was observed that not only were there different schemes for electrification but also the funding mechanism of Government of India for urban and rural projects was also different. It was noted that on account of distinguishable needs, technical requirement and target sector, the policy instruments launched for electrification of rural areas are different from electrification of urban areas. The DG also noted that the only flagship scheme of the Central Government for rural electrification is RGGVY/DDUGJY. Considering the uniqueness of the projects falling under the said rural electrification schemes which cannot be equated with other electrification projects which are non-subsidised, the DG was of the



view that, the upstream relevant product market in this case would be *'the market for financing of rural electrification projects under RGGVY/DDUGJY schemes'*.

3.9 On the second relevant product market (downstream), the DG noted that in case of rural electrification projects under RGGVY/DDUGJY, the entire process of project management by any Project Implementing Agency (PIA) requires three consultancy services *i.e.* preparation of DPRs, Third Party Inspection (TPI) and PMC (Project Management Consultant). The DG opined that though consultancy services are required under various schemes for the power/electrification projects, the scope of consultancy work differs from scheme to scheme. Thus, the DG concluded that the second relevant product market would be *'the market for consultancy services for rural electrification projects under RGGVY/DDUGJY schemes'*.

3.10 The DG observed that since the consultancy services for rural electrification are required for power projects in India, the relevant geographic market would be *'India'* under Section 2(s) read with Section 19(6) of the Act.

3.11 Hence, the two relevant markets delineated by the DG were:

- i) *'the market for financing of rural electrification projects under RGGVY/DDUGJY schemes in India'*;
- ii) *'the market for consultancy services for rural electrification projects under RGGVY/DDUGJY schemes in India'*

3.12 On the issue of dominance, the DG noted that under RGGVY, 90% of the project cost is provided as subsidy by the Government of India and for the remaining 10%, the State Government/ Discoms have to arrange their own resources or can take a loan from any financial institution including REC.



In so far as capital subsidy component is concerned, the same is released only through REC. The DG observed that being the nodal agency, REC is responsible for implementing, notifying all the guidelines and formats required for implementation of the project under RGGVY, appraising DPRs before putting them up before the Inter-Ministerial Monitoring Committee (hereinafter, 'IMMC'), conducting all works relating to holding of the IMMC meetings for approvals, administering the Grant Component, maintaining a dedicated web portal for submission of DPRs and for maintaining the MIS of the projects, monitoring guidelines compliances, setting procedures, disbursements *etc.* under the scheme, monitoring physical and financial progress of the projects including quality of works and deploying Third Party services of outside agencies/manpower for concurrent evaluation of project implementation. Thus, REC was found to be carrying out the key functions in the execution of RGGVY/DDUGJY. It was further noted that the Chairman of REC is the Member Secretary/Convener of IMMC.

3.13 The DG further observed that as far as the 10% financing component is concerned, REC has been financing most of the projects. It was noted that out of 10 States for which sanction was accorded in financial year 2011-12 under 12<sup>th</sup> plan Phase II, only Chhattisgarh had not availed the loan component from REC. Out of 15 States for which sanction was accorded in financial year 2013-14 under 12<sup>th</sup> plan, only 3 states (Chhattisgarh, Odisha & Tripura) had not availed the loan component from REC. It was also observed by the DG that out of total loan component under the RGGVY/DDUGJY from 2009-10 to 2014-15 (Rs. 5860.17 crores); approximately 55% had been funded by REC (Rs. 3304.23 crores). Thus, the DG observed that apart from being the nodal agency for the grant of capital subsidy under RGGVY/DDUGJY, REC had a high market share in the market for provision of financing of rural electrification projects in India. The rest was self-financed by State Discoms.



- 3.14 It was also noted that REC has pan-India presence with a network of 18 Zonal and Project offices for development and conduct of its business. Further, it was observed that RECPDCL is not only the main agency that prepares DPRs for the said scheme, but also undertakes work related to TPI and PMC for the PIAs. Further, the DG observed that the Discoms across India have to deal with REC at various stages of the scheme, from notification of guidelines and formats to appraising DPRs, administering the grant component, disbursals, monitoring progress & quality *etc.* This dependence, as per the DG, made REC the first preference of Discoms in respect of the loan component, even though the same could be raised from other channels/institutions.
- 3.15 Further, the DG took into account various factors laid down under Section 19(4) of the Act *e.g.* regulatory barriers, financial risk, high capital cost of entry, marketing and technical entry barriers, economies of scale, existence of vertically integrated entities *etc.* lead to entry barriers for other project finance companies to enter into the upstream relevant market and compete with REC. It was further gathered that a MoU with the Ministry of Power was executed by REC to facilitate the Government's mission in achieving 100% rural electrification and enriching of quality of life of rural population. The DG thus noted that the dominance of REC in the market of financing of rural electrification under RGGVY/DDUGJY stemmed from the key nodal role being assigned to it by the Ministry of Power wherein its role *inter-alia* was to coordinate, facilitate and monitor the work and appraise the DPRs *etc.* Based on the above analysis, the DG concluded that REC as a group was clearly in a dominant position in the *market of financing of rural electrification projects in India under RGGVY/DDUGJY schemes.*



- 3.16 To analyse the allegation of contravention under Section 4 of the Act, the DG identified two issues—*first*, whether the OP group had leveraged its position for securing orders to enter into or protect the market for consultancy services for rural electrification projects in violation of Section 4(2)(e) of the Act; and *second*, whether the conduct of OP group has resulted in denial of market access to other service providers who are the competitors of RECPDCL for consultancy services for rural electrification projects in violation of Section 4(2)(c) of the Act.
- 3.17 The DG gathered information from various State Discoms regarding how they had awarded the work related to DPRs, TPI and PMC for rural electrification projects during 2010-2014. After detailed investigation, the DG observed that while there is no direct evidence of REC leveraging its position by giving directions to PIAs to award consultancy work to RECPDCL on nomination basis/single tender basis, the fact remains that RECPDCL has been able to secure work on nomination basis/single tender basis from the PIAs.
- 3.18 Relying on State Discoms' inability to justify their preference in awarding the work to RECPDCL on nomination/single tender basis, the DG concluded that the conduct of RECPDCL showing backing by REC while communicating with the PIAs to award the work showed that REC's dominance in financing of rural electrification projects was directly translating into the award of consultancy work by the PIAs to RECPDCL. The DG further opined that though there is no direct evidence from Discoms that REC was leveraging its dominant position, in view of the dominance of REC in the primary market owing to its role as a financing institution and also as the nodal agency for all appraisal, monitoring, disbursement of funds inspector *etc.*, it would be unreasonable to expect the Discoms to offer direct evidence.



- 3.19 In such a case, the DG was of the view that the existence of conflict of interest in conjunction with the responses of the consumers *i.e.* Discoms and various competitors of RECPDCL are sufficient to establish a case on the basis of such circumstantial evidence against the OP group. In view of the foregoing, the DG concluded that OP group was using its position of dominance in the market of financing of rural electrification projects in India under RGGVY/DDUGJY to protect its market for consultancy services for rural electrification projects under RGGVY/DDUGJY in violation of Section 4(2)(e) of the Act.
- 3.20 On the alleged contravention of Section 4(2)(c) of the Act, the DG examined whether after the entry of RECPDCL in the downstream relevant market, other players were able to get consultancy work from the Discoms or not. The DG took into account the actual allocation of DPRs to RECPDCL *vis-à-vis* its competitors. The DG observed that from 2009-10 to 2014-15, out of total 378 DPRs prepared under RGGVY, RECPDCL prepared 80 DPRs for projects costing Rs. 669769.37 Lakhs whereas PIAs themselves prepared 177 DPRs for projects costing Rs. 2053525.98 Lakhs, WAPCOS Ltd., prepared 9 DPRs for projects costing Rs. 184235.92 Lakhs, Medhaj Techno Concept Pvt. Ltd. prepared 69 DPRs for projects costing Rs. 900134.45 Lakhs, IL Kota prepared 19 DPRs for projects costing Rs. 71994.30 Lakhs, ERDA prepared 7 DPRs for projects costing Rs. 52402.60 Lakhs, MECON Ltd. prepared 4 DPRs for projects costing Rs. 28025.40 Lakhs and AKS prepared 13 DPRs for projects costing Rs. 277459.39 Lakhs.
- 3.21 The DG stated that market access to other participants has been denied after the entry of RECPDCL to the extent of the work awarded to RECPDCL on nomination basis. The DG noted that RECPDCL was awarded 70 DPRs on nomination basis out of 189 DPRs prepared by



consultants during 2013-14. This conduct of REC and RECPDCL as a group, as per DG, has resulted in denial of market access to other participants in the market which is a violation of Section 4(2) (c) of the Act.

#### **4. Reply/ Response of the Parties to the DG Report**

4.1 The Commission heard the counsels of the Informant and OP in detail during the ordinary meetings held on 29.10.2015, 03.11.2015 and 19.11.2015. Their respective replies/objections to the DG report and data submitted by them were taken on record and considered by the Commission. Bereft of details, their contentions are summarised in the following paragraphs.

#### **Reply/ Response of the Informant to the DG Report**

4.2 *Vide* its various submissions, *inter alia*, dated 29.09.2015, 12.11.2015 and 30.11.2015, the Informant in-principle, endorsed the findings of the DG. The Informant however, placed on record its areas of differences with the understanding of the relevant markets delineated by the DG, though the relevant markets were not challenged as such. Further, the Informant stated that some of the abusive practices by RECPDCL under the aegis of REC were ignored by the DG *e.g.* the DG has failed to take into account the fact that amount sanctioned against DPRs prepared by RECPDCL (56.34%) was higher than DPRs prepared by other competing agencies (28.98% on an average) and also, disbursal mechanism was stated to be easier for OP's customers/clients. The Informant further challenged the data submitted by RECPDCL stating it to be false and misleading.

4.3 On the first relevant market, the Informant submitted that the DG has defined the market correctly but has confused the 10% loan component



under RGGVY. It was submitted that RECPDCL derives its strength from the powers vested in it by virtue of REC being the nodal agency under RGGVY. With regard to the second relevant market, the Informant agreed with the delineation of the relevant market by the DG as market for consultancy services where RECPDCL allegedly gets a preferential treatment because of its affiliation with REC. With regard to dominance, the Informant alleged that the position of dominance of RECPDCL should be seen in the context of it being the nodal agency for appraisal, monitoring, disbursement of funds *etc.*, and not just being the financing agency of the balance funds required. Thus, the Informant agreed with the findings of the DG that OP group held a dominant position in the first relevant market.

4.4 With regard to abuse, the Informant highlighted that no justification had been provided for RECPDCL capturing 41.79% of the work that too in its initial year of its operation. Further, it was averred that the DG has wrongly observed that the allegations only pertained to award of DPR work to RECPDCL. As per the Informant, anti-competitive issues exist in all three consultancy services *i.e.* DPR, TPI (Third Party Inspection) and PMC (Project Management Consultancy). The Informant, while endorsing the findings of the DG submitted that the conduct of OP group has resulted into denial of market access to other players in the market in violation of Section 4(2)(c) of the Act.

4.5 It was contended that the conduct of OP group in leveraging its dominant position to favour its group entity, RECPDCL, has affected the competitive process in the downstream market for consultancy services. It was claimed that RECPDCL has been awarded the work at prices which were higher than the competitive price. The Informant illustrated the cases of Paschimanchal Vidyut Vitran Nigam Limited (PVVNL) and another



Discom in U.P. (Agra) where tenders were cancelled and the work was subsequently awarded to RECPDCL on nomination basis at higher prices.

- 4.6 *Vide* its submissions dated 12.11.2015, the Informant challenged the expert opinion of Dr. Geeta Gouri relied upon by RECPDCL (hereinafter referred to as the ‘Opinion’) stating that the same is biased and commissioned at the instance of a law firm advising RECPDCL in the present matter. It was submitted that in the said Opinion, the first relevant market has been unnecessarily widened to include both grants and loans. Similarly, the observation made on dominance and abuse of dominance in the said Opinion was also challenged by the Informant.
- 4.7 Further, it was submitted that the conflict of interest issue has not been properly dealt with by the DG and the same is in conflict with the final order of the Commission in Case No. 74 of 2012 (*Indian Exhibition Industry Association vs Ministry of Commerce & Industry & Indian Trade Promotion Organization*) which was also signed by Dr. Geeta Gouri. The Informant has relied on Supreme’s Court’s order in ‘*Nagar Nigam, Meerut vs Al Faheem Meat Exports Pvt. Ltd & ors.*’ (SLP(Civil) No. 10174 of 2006) case wherein it has been held that work can be awarded on nomination basis only in rare and exceptional cases. Therefore, Discoms have faulted in their duties and mandates under the procurement laws and CVC guidelines by awarding the work on nomination basis to OP.
- 4.8 The Informant alleged that OP failed to offer any justification with regard to the ‘West Bengal Project’ which it had obtained on the same date when the IMMC approved the DPR for WBSEDCL (West Bengal Discom). As per the Informant, the said project was approved on 19.02.2015. This approval was required to be based on a Need Assessment Document (NAD). However, the consultancy to prepare the NAD was itself awarded to RECPDCL on 19.02.2015. Further, the consultancy work related to



preparation of the DPR was also awarded to RECPDCL on the same date *i.e.* 19.02.2015. The Informant alleged that later it was found that the approval for award of the consultancy work for NAD and DPR was itself given by the competent authority only on 25.02.2015. The Informant relied on this instance to allege that RECPDCL was getting the work without any tendering process.

4.9 The Informant has highlighted that there was an apparent conflict of interest as the employees of REC were working for the OP. Further, the CEO of RECPDCL *i.e.* Mr. Dinesh Arora was also acting as the ED of RGGVY. Mr. Dinesh Arora also attended the meeting of IMMC held on 19.02.2015, even though he officially had no role to play in the approval. It was claimed that subsequent to the order of the Commission dated 13.01.2015, Mr. Dinesh Arora was removed from the position of ED-RGGVY/DDUGJY and was appointed as the nodal officer of the scheme for the state of Uttar Pradesh which shows that RECPDCL wanted to keep Mr. Dinesh Arora involved in the scheme so that he can influence the Discoms in some capacity. It was also alleged that REC used to share the agenda prepared for the Committee Meetings with the distribution licensees where RECPDCL was awarded the consultancy work which is supposed to be kept confidential.

4.10 On the basis of the above stated facts and assertions, the Informant contended that even though there is no direct evidence, the circumstantial evidence establish beyond doubt that OP group has abused its dominant position to affect competition in the downstream market and to favour its subsidiary RECPDCL.



### **Reply/ Response of OP to the DG Report**

4.11 The OP, *vide* its reply dated 21.10.2015, vehemently denied the findings of the DG for want of evidence demonstrating any anti-competitive conduct. It was averred that the DG's conclusions are based on untested statements of a few interested parties and are based entirely on purported circumstantial evidence. It was highlighted that there is no direct evidence of anti-competitive conduct by RECPDCL available on record and the DG report has ignored certain evidence that was in favour of the OP. It was also submitted that the DG report suffers from methodological, procedural and analytical infirmities rendering it unreliable.

4.12 The OP relied on the Opinion given by Dr. Geeta Gouri (hereinafter, 'the Opinion') in order to support its contention on primary relevant market and REC's position in the said market, which allegedly has not been considered by the DG. Regarding DG's delineation of the primary/first relevant market, the OP submitted that the DG has narrowly defined the primary market and that the market should be the '*market for financing of electrification schemes in India*'. It has been submitted by OP that the DG has not only ignored the basic test for defining the relevant market but has also failed to take into account the demand side assessment and wrongly relied on supply side assessment.

4.13 From the demand side perspective, it was urged that the consumers of REC's services are State Utility Boards/ electricity Discoms and private project developers. For these consumers, there is no distinction between financing of electrification schemes in rural and for urban areas as their requirement pertains to financing for creation of an asset, be it rural or urban and an asset cannot be classified as rural or non-rural/ urban. It was further argued that the assets created do not have any distinguishable technical features that can make them rural or non-rural/urban assets. It



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was submitted that the funding of such projects can come from various sources and depending upon the availability of a particular source of financing, the power project developer shifts from one source to another. Thus, as per OP, from the demand side perspective, the market comprises of all modes of financing of electrification projects, without any distinction between rural and non-rural segment. It was contended that projects which were rural a few years back are no longer rural because of the expansion in urban boundaries.

4.14 It was further submitted that provision of subsidy under a scheme cannot be considered as a basis for delineation of a relevant market because the source of funds does not matter as far as the actual use of funds allocated is concerned. From the lender's point of view, REC caters to all class of borrowers, with a similar risk profile, for all electrification projects. The rate of interest charged by banks/financial institutions may not vary while offering loans to Discoms/ State Utility Boards as the borrowers' creditworthiness from the lender's perspective remains the same. Therefore, the prices of services in the present case remain the same irrespective of whether the Discoms/ State Utility Boards use the funds for rural or urban electrification projects. It was submitted that there are no specialised institutions which finance only electrification projects for rural areas. Therefore, the contention made by the DG that electrification projects can be classified into rural projects and urban projects, according to OP, does not hold good.

4.15 The OP further stated that the secondary market should be '*market for consultancy services in India*'. According to the OP, the DG has determined the secondary market taking into account all consultancy services, namely DPR, TPI and PMC. However, the analysis in respect of abusive conduct is focussed solely on the preparation of DPRs. It was also averred that the preparation of DPRs is not restricted to the RGGVY but



are prepared for other electrification schemes also. The OP further stated that from demand side perspective, the demand by consumers is for a range of consultancy services, irrespective of whether the services are performed for electrification projects in rural or non-rural/ urban areas. Further, from the supply side perspective, all consultancy companies offer services for electrification projects (be it in rural or urban areas). Therefore, the finding by the DG regarding the delineation of secondary market, according to OP, was incorrect. The OP agreed with the DG's finding with regard to the relevant geographic market, *i.e.* India.

4.16 As far as dominance of REC in the primary market is concerned, it was submitted that approvals for DPRs are required at various levels and that the checks and balances ensure that REC cannot act in an anti-competitive manner to favour its subsidiary. It was submitted that since the final approving authority is the IMMC pursuant to which funds are sanctioned for a particular project, REC has no substantive role to play. As regards provisioning of finance, it was submitted that REC is only one of the financial institutions and commercial banks and other financial institutions such as PFC, IFCI and IIFCL that lend to the sector. Moreover, a large part of rural financing is from Government funds channelled through agencies. Therefore, it was contended by the OP that there is no dependence of customers on REC. It was further submitted that there are low entry barriers in the market for financing of electrification projects and thus, REC is not dominant in the said market.

4.17 It has further been stated that REC and OP's operations are not linked in a manner that can create synergies or confer market power to REC group (consisting of REC and OP). Thus, the core operations of REC and RECPDCL cannot "work in tandem" and generate cost savings and efficiency.



4.18 It has been pointed out by OP that the DG has erred in applying the provisions of Section 4(2)(e) of the Act. It was submitted that the close associational links required between two markets to establish a case of leveraging is absent in the present case as the two markets exist independently of each other. It was also contended that the DG has not demonstrated any “use” of alleged dominant position by the OP group in one relevant market to enter into or protect the second relevant market. Further, it was averred that the ‘circumstantial evidence’ highlighted by the DG does not amount to satisfying the requirements for ‘leveraging’ abuse to be made out.

4.19 It was also stated that neither any ‘competitor’ nor any ‘consumer’ of RECPDCL has provided any evidence which could establish that the relationship between RECPDCL and REC has resulted in additional works being provided on nomination basis to the OP. As per the OP, awarding work on nomination basis is not *per se* anti-competitive in nature. The stage of deciding whether to prepare a DPR in-house or to outsource the same to a consultant is a decision for the PIA to make and therefore, REC group is not involved in such decision making process.

4.20 It was further submitted that RECPDCL being a wholly owned subsidiary of REC is a factual assertion and the expression of this fact alone cannot be construed to be anti-competitive. It has been averred that the DG has not provided any evidence to establish that RECPDCL enjoyed informational advantage in respect of projects being REC’s subsidiary.

4.21 Further, according to the OP, the DG has failed to consider that RECPDCL outsourced work to third parties in the initial stages to build its own expertise in the area and did not outsource the entire project as its competitors are currently doing. The OP submitted that only 30% of the work has been provided in collaboration with Tata Power Delhi



Distribution Limited (TPDDL) and this cannot amount to being an anti-competitive practice.

4.22 The OP further stated that the DG erred in finding that OP group's conduct had resulted in denial of market access in the secondary market. It was submitted that the past rulings of COMPAT indicate that denial of market access would occur if the dominant incumbent acts in a manner that prevents market access to a competitor in the same relevant market. It was submitted that the DG has incorrectly stated that on its entry, the market for consultancy services was denied to its competitors whereas OP's market share falls to below 10% when other consultancy services (TPI and PMC services) are considered. Accordingly, it has been stated that RECPDCL is not in a position to exclude competitors in the secondary market.

4.23 Relying on the aforesaid arguments, the OP prayed that the DG's findings against it be rejected as the evidence on record does not establish contravention of any of the provisions of Section 4 of the Act.

## 5. Issues and Analysis

5.1 The Commission has perused the DG report and the replies/objections filed by the Informant and the OP, along with the material available on record, besides hearing the counsels appearing for the parties. The findings of the DG and contentions of the parties which have already been summarised above are not reiterated hereunder for the sake of brevity.

5.2 At the outset, it is noted that the Informant has alleged that RECPDCL is securing orders on the basis of its verbal promise that it would get easy/faster approvals from its parent company, REC. However, considering that the allegation also pertains to such assurance being



premised on the fact that REC is the nodal agency for RGGVY, the Commission is of the view that it would be relevant to assess the dominance of REC in the relevant market.

- 5.3 The DG has found that OP group has leveraged its dominant position through REC to favour its subsidiary RECPDCL in violation of Section 4(2)(e) of the Act and denied market access to other consultancy service providers which are the competitors of RECPDCL in violation of Section 4(2)(c) of the Act.
- 5.4 Since both the aforesaid issues fall within the ambit of Section 4 of the Act, it is imperative to deal with certain preliminary questions which are germane to any assessment under Section 4 of the Act before going into the main issues mentioned above. While looking into the objects of REC and the OP, the DG has observed that they are directly involved in economic activities and, hence, both are enterprises under Section 2(h) of the Act.
- 5.5 As stated earlier, REC is the nodal agency at the Central Government level to implement the RGGVY. Apart from its role as a financial institution where it provides financial assistance to State Discoms, State Government Departments, Rural Electric Cooperatives *etc.*, its prime responsibility is to facilitate the effective implementation of schemes such as RGGVY. In return for the functions performed as a nodal agency, REC receives 0.5% of the project cost approved by the IMMC or award cost, whichever is lower, as its fee. Based on the foregoing, the Commission finds that REC is performing commercial functions, both as a nodal agency and as a financing institution, and thus, it is an enterprise under Section 2(h) of the Act. Similarly, RECPDCL which is engaged in providing consultancy services, also squarely falls within the ambit of the word 'enterprise' as per Section 2(h) of the Act.



5.6 Further DG has considered REC and RECPDCL as part of a ‘Group’ while assessing their conduct under Section 4 of the Act. As per Explanation (b) to Section 5 of the Act, a ‘group’ has been defined as under:

*(b) “group” means two or more enterprises which, directly or indirectly, are in a position to — (i) exercise twenty-six per cent or more of the voting rights in the other enterprise; or (ii) appoint more than fifty per cent of the members of the board of directors in the other enterprise; or (iii) control the management or affairs of the other enterprise;*

5.7 The Commission notes that it is not a disputed fact that RECPDCL is a wholly owned subsidiary of REC. Further, as observed by the DG during investigation, Chairman of RECPDCL is the Chief Managing Director (CMD) of REC. Further, both REC and OP share common board affiliations, posting of REC officials on secondment in RECPDCL *etc.* all these *inter-alia* clearly indicates the close linkages between the two enterprises. Thus, the Commission holds that REC and RECPDCL form a ‘group’ for the purposes of Section 4 of the Act as defined under Explanation (b) to Section 5 of the Act.

5.8 The next step in the analysis of abuse of dominance is the determination of relevant market that defines the boundaries of competition between enterprises. The primary objective of defining the relevant market, from the product as well as geographic perspective, is to identify those actual competitors that are capable of constraining the behaviour of the enterprise/group in question and of preventing it from behaving independently of competitive forces. Sections 2(r), (s) and (t) of the Act provide the legal framework within which such relevant market definition is to be determined.



- 5.9 The DG has defined two relevant markets for the purpose of assessing the allegations in the present case. The DG has noted that RGGVY was launched by the Central Government as the flagship scheme after reviewing all other existing schemes. The unique subsidy element of 90% of project cost by the central government was also seen as a distinctive feature to define the relevant market specific to RGGVY by the DG. Further, since November 2014, RGGVY has been subsumed in the newly launched scheme DDUGJY. In view of the above, the DG defined the first relevant market as *'market for financing of rural electrification projects in India under RGGVY/DDUGJY schemes'*.
- 5.10 The Informant has submitted that the grant/ loan component under RGGVY is such that the Central Government provides 90% as capital subsidy and 10% of the project cost is provided by REC as soft loan or contributed by States themselves through their own resources/ financed through loan from financial institutions which is a unique feature of the grant/ loan component and thus, the scheme becomes a separate product having no substitute to it. Hence, as per the Informant, the first relevant market determined by the DG is correct. Such relevant market, as per the Informant, was similar to the relevant upstream market proposed by it *i.e. 'providing/ distributing grant/ loan under RGGVY plan/scheme on behalf of Ministry of Power in rural India'*.
- 5.11 The OP disagreed with the first relevant market defined by the DG stating it to be too narrow and devoid of incorporating the real test for defining the relevant markets. According to the OP, there should be no distinction between rural electrification projects and urban electrification projects. Thus, OP proposed the first relevant market to be *'market for financing of electrification schemes in India'*.



5.12 The Commission has given a thoughtful consideration to the different relevant market definitions offered by the DG, the Informant and the OP and has also examined the varied reasons offered by them. The Commission has also examined the Opinion submitted by the OP. The OP has objected that the Opinion was not taken into consideration by the DG. In this regard, it is noted that the Opinion was submitted to the DG on 27.07.2015 *i.e.* after the date of submission of DG report before the Commission *i.e.* 15.07.2015 and as such, the same could not have been considered by the DG. However, since the Commission has already taken that on record, nothing remains in the said objection.

5.13 Dr. Geeta Gouri, in her Opinion, has contended that defining the first relevant market as ‘market for financing of rural electrification projects’ is not appropriate *inter-alia* on account of the following:

- a) Assets in the electricity sector cannot be classified as ‘rural’ or ‘non-rural’ on the basis of their technical feature. In the asset register of the Discoms, the assets are classified on the basis of their technical features and not on the basis of locality.
- b) Characterisation of markets on the basis of stand-alone and decentralised generation is not sustainable since stand-alone projects are not specific to rural areas of remote villages.
- c) Finance is fungible even if the cost of finance differs from source to source and the dimension of substitutability cannot be applied where money is concerned. There is no concept of a separate box for subsidised finance and non-subsidised finance. Purchases are made by Discoms on the basis of whatever funds are available.



- 5.14 The Commission is of the view that, as per the Act, the delineation of relevant market is to be guided by an assessment of demand-side substitutability in terms of characteristics, price and intended use. In the instant case, while rural and non-rural *assets* may not be distinguishable in terms technical features, it cannot be disregarded that electrification *projects* in rural India are characterised by distinct challenges, scope and objectives. It is in recognition of the specificities and unique challenges of rural electrification that the the legislature mandated a different policy and financing framework for rural electrification. Further, when a Discom intends or decides to undertake a project which falls in the ambit of rural electrification, a substitutability assessment between rural and non-rural assets becomes inconsequential.
- 5.15 Secondly, the Commission is not in agreement with the view that finance being fungible, the capital subsidy provided under the rural electrification schemes does not have any bearing on substitutability between financing of rural electrification projects and financing of non-rural electrification projects. The Commission finds the argument unacceptable. Price is one of the factors specified in the Act for being considered in the determination of substitutability. In this case, it is the price or cost of finance which distinguishes the rural electrification schemes which provide capital subsidy for rural electrification projects from other financing options in form of loans provided by various financial institutions which may be available to the Discoms for non-rural electrification projects. The grant or capital subsidy component (to the tune of 90%) makes financing of rural projects under the rural electrification schemes clearly distinct from financing of other projects only through loans since loans and grants cannot be viewed as substitutes owing to their substantially varying cost to the consumers, *i.e.* the Discoms.
- 5.16 Further, there are specialised agencies that undertake/monitor/finance rural electrification and urban electrification schemes. Hence, the Commission



opines that rural electrification schemes and urban electrification schemes are not substitutable and interchangeable, by reason of characteristics of the products or services, their prices and intended use. The Commission, however, does not agree with the findings of the DG that relevant market should be scheme specific. Though it is true that during the period of investigation RGGVY was the flagship scheme, it does not warrant the determination of relevant market on that basis. Based on foregoing, the first relevant product market in the present case would be '*market for financing of projects under rural electrification schemes*'. Since such schemes are launched by central government throughout India, the conditions of competition for provision of services are distinctly homogeneous, thereby implying that the relevant geographic market would be '*India*'. The first relevant market, thus, would be '*market for financing of projects under rural electrification schemes in India*'.

5.17 It is observed that the main issue in the present case relates to leveraging of dominance by the OP group in the first relevant market to get consultancy work on nomination basis in the second relevant market, thereby, distorting the competition in the second market. Hence, the need for defining the second relevant market arises in the present case.

5.18 With regard to the second relevant market, the DG has observed the market to be, '*market for consultancy services for rural electrification projects in India under RGGVY/DDUGJY schemes*'.

5.19 It has been stated by the DG that for consultancy services of rural electrification projects, PIAs prefer agencies that have expertise in the field of rural electrification. The DPRs submitted under RGGVY/DDUGJY have to be prepared in accordance with the guidelines issued by REC, *e.g.* carrying out GPS based field survey; preparation of Single line Diagram in Autocad/ Arc Map or any other drawing software; load flow studies; compilation and



punching of data captured during field survey after checking; formulation of DPR *etc.*

5.20 The Commission observed that as per the OP, the second relevant market should be '*market for consultancy services in India*'. It is submitted that similar to the RGGVY, DPRs are prepared for other electrification schemes, including R-APDRP, which is an urban electrification scheme. The services offered for an electrification project in rural areas are similar in nature to the services offered for an electrification project in urban area. Further, it has been averred by the OP that consultancies such as Medhaj, Ernst & Young *etc.* provide a variety of consultancy services and the demand by consumers is for a range of consultancy services and is not restricted to a single service. According to the OP, various consultancy service providers are not restricted to provide their services only in relation to electrification projects in rural areas. Further, since the services offered for electrification projects in rural areas and non-rural/urban areas are similarly priced, both are substitutable.

5.21 As per the Informant, the procedure involved for grant of loan requires submission of Detailed Project Report (DPR) and after grant of loan, there are two more stages, PMC and TPI and thereafter, preparation of Project Closure Scheme which comes into picture after sanctioning of the grant/ loan. DPR, PMC and TPI are prepared by Consultants. Further, the primary market requires the preparation and submission of DPRs, PMCs and TPI to REC during the course of sanctioning, disbursement of the grant/ loan. Preparation of DPR, PMC and TPI for getting the grant/ loan is a totally different market from any such other consultancy as the purpose of these consultancy services is to get the sanction for disbursement of grant/ loan. The market, therefore, is '*providing of consultancy services in preparing DPR, PMC and TPI in respect of procedure for sanctioning, disbursement and further disbursement of grant/ loan under RGGVY*'.



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- 5.22 From the responses received from other consultancy firms, the DG has observed that these companies which are in the consultancy business are providing all types of consultancy services related to rural electrification, urban electrification, consultancy for private players or other consultancy services which are not related to the electrification projects at all. Thus, as per the DG, there exists supply side substitutability as the consultancy firms are not constrained to restrict their services to a particular sector *i.e.* rural or urban.
- 5.23 The Commission, however, notes that the relevant product market, as per the scheme of the Act, takes into account the demand side substitutability assessed on the basis of physical characteristics, price and intended use of the product. This means that the relevant product market needs to be defined from the point of view of the consumer. Thus, what needs to be taken into account is whether the consumers *i.e.* Discoms (or PIAs) perceive consultancy service providers for rural and urban electrification projects as substitutable or not. In this regard, the DG has observed that in case of rural electrification projects, PIAs prefer consultancy services from agencies that have expertise in the field of rural electrification. Further, from the responses received from various Discoms, it is observed that for preparation of DPRs under RGGVY, they prefer consultancy firms having prior expertise in this field. Further, DPRs prepared under rural electrification schemes have to take into account the distinct/specific local requirements pertaining to a particular area/district/region where the electrification project is proposed to be implemented, such as scattered hamlets, coverage of Below Poverty Line (BPL) household, focus areas, field survey *etc.*, whereas the DPRs prepared under urban electrification schemes may have different requirements.
- 5.24 Further, the Commission is of the view that the three consultancy services *i.e.* DPRs, PMC, and TPI are different from each other in terms of their



characteristics and thus, cannot be included in one relevant market. It may be noted that DPRs are prepared prior to the project approval and therefore, considered to be a pre requisite/ requirement for any project proposed by a Discom. The consultancy services related to TPI and PMC, on the other hand, are required subsequent to the approval of the project. Further, these three services are not brought as bundled and are usually considered individually by the Discoms. Moreover, it is noted by the Commission that since the main issue in the present case is whether RECPDCL is taking advantage of its association with REC to get all the DPR preparation work from the Discoms under RGGVY/DDUGJY, it will be appropriate to confine the secondary relevant market to only preparation of DPRs. Therefore, the Commission is of the view that the secondary relevant market in the present case would be, *'market for preparation of DPRs for projects under rural electrification schemes in India.'*

### **Dominance**

- 5.25 After the delineation of the relevant market, the next step is to assess whether the entity under consideration holds a position of dominance in the relevant market or not. As per the explanation to 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.
- 5.26 The DG has found that under the RGGVY, the capital subsidy component is released only through REC. Being the nodal agency, REC is responsible for undertaking various important tasks for implementation of the project under the RGGVY. It was also observed by the DG that out of the total loan component under the RGGVY/DDUGJY during 2009-10 to 2014-15 (Rs. 5860.17 crore); approximately 56% was funded by REC (Rs. 3304.23 crore)



while the rest was self-financed by the Discoms. Thus, the DG observed that apart from being the nodal agency for the grant of capital subsidy under RGGVY/DDUGJY, REC had a high market share in the market for provision of financing of rural electrification projects in India. Further, the DG also considered high entry barriers in the form of regulatory barriers, financial risk, high capital cost of entry, marketing and technical entry barriers, economies of scale *etc.* On the basis of aforesaid, the DG has concluded that the OP group was holding a dominant position in the '*market of financing of rural electrification projects in India under RGGVY/DDUGJY schemes*'.

5.27 Although the Informant proposed a slightly different upstream (first) relevant market, it was contended that even in the alternate market defined by the DG, the OP group holds a dominant position. Further, it was alleged that the OP group has undisputed high degree of power in comparison to its competitors (consultancy firms) and consumers (Discoms). The Informant also relied on DG's observation regarding REC's strength as the nodal agency in the first relevant market.

5.28 In this regard, the OP has submitted that approvals of DPRs are required at various levels and that checks and balances ensure that REC cannot favour its subsidiary in an anti-competitive manner. The final approving authority is the IMMC pursuant to which funds are sanctioned for a particular project. It was further stated that had OP group been in a position to affect the market in its favour, all DPRs submitted by the OP would have been approved. Further, the OP contended that its customers exercise enormous countervailing power to constrain its behaviour. The OP further averred that despite REC being the parent company, it has an insignificant market share in the Secondary Market proposed by them. It was also averred that in the market for financing of electrification projects, REC is one of the financial institutions and there are commercial banks and other financial institutions such as PFC, IFCI and IIFCL that lend funds to the sector. It was argued that



REC and OP's operations are not linked in a manner that can create synergies or confer market power to OP group. REC finances power project without the presence of RECPDCL and RECPDCL provides consultancy services independent of REC's involvement. Further, the OP refuted DG's assessment of entry barriers stating that any financial institution or bank can act as a lender to Discoms/ State Utility boards for development of electrification projects and, thus, there are low barriers to entry in the market for financing of electrification projects.

- 5.29 The Commission has considered the observations of the DG, submissions made by the Informant and the OP in this regard on the basis of which it will now assess the dominance of OP group. Since the allegation in the present case is whether OP group has leveraged its position in the first relevant market to enter, or protect the second relevant market, its dominance needs to be determined in the first relevant market as delineated above, *i.e.* 'market for financing of projects under rural electrification schemes in India'.
- 5.30 The Commission notes that there have been several rural electrification schemes introduced by Government of India as has also been observed by DG in its investigation, such as - Pradhan Mantri Gramodaya Yojana (PMGY), Kutir Jyoti Program (KJP), Minimum Needs Program (MNP), Accelerated Rural Electrification Program (AREP) and Rural Electricity Supply Technology Mission (REST). However, these schemes were unsuccessful on account of the fact that village electrification was left to the state electricity boards, which were in bad financial health and not in a position to provide sufficient funds for such schemes.
- 5.31 Further, such schemes/programmes were not implemented on top priority basis and thus, need for a more comprehensive scheme arose that could ensure development of rural electrification infrastructure and increase the viability of rural electricity infrastructure by covering all BPL families.



Therefore, the Government of India under the National Electricity Policy launched RGGVY, merging all other existing schemes, with an aim to electrify all villages and provide accessibility to electricity to all households in rural areas over a period of four years. Hence, it is apparent that during the relevant period, there was only one flagship scheme at the central government level *i.e.* RGGVY for rural electrification projects which is now subsumed under DDUGJY since 2014.

- 5.32 It is further noted that financing of the rural electrification projects under RGGVY consists of two components: 90% capital subsidy is provided by the Central Government and the remaining 10% is either self-funded by the Discoms/State Utilities or is availed as a loan from financial institutions including REC. It is imperative to clarify that these two components, *i.e.* capital subsidy and loan component are different and non- substitutable from each other as already explained while dealing with the argument relating to fungibility of grants and loan in the earlier part of this order. However, considering that the OP group (through REC) has a role in both these sub-segments of the first relevant market, the Commission has clubbed these two components under the first relevant market to avoid complexity and has assessed OP group's position in these two sub-markets separately.
- 5.33 It is observed that the role of REC in financing of rural electrification projects under the RGGVY would be the determining factor in the assessment of OP group's dominance in the first relevant market. As per the information provided by the OP, out of the total loan component sanctioned under RGGVY projects (*i.e.* Rs. 5,960.17 Crore) during the period 2009-10 to 2014-15, REC has lend loan of Rs. 3,304.23 Crore; which works out to be around 56% of the total loan component. Further, the DG investigation has revealed that in cases where financing has not been carried out by REC, the same was self-funded by the Discoms/states themselves. In this regard, the Commission is of the view that the self-funded portion (*i.e.* cases where the



10% component was funded by the State Discoms themselves) cannot be considered as part of the relevant market since the same does not amount to provision of service. Thus, excluding all such projects where 10% was self-funded by the State Discoms, the facts reveal that majority of the projects, *i.e.* projects where loan component has been taken from financial institutions, the State Discoms have only approached REC. This implies that REC held a 100% market share for financing the 10% loan component and there was apparently high dependence of consumers on REC.

5.34 As far as the 90% capital subsidy component is concerned, the same is provided by the Central Government through REC. Further, as per the scheme, the Discoms become eligible to receive 90% subsidy component only once the project is approved under RGGVY. It is also noted that REC is involved in administering the said subsidy component, developing a dedicated web portal for submission of DPRs and for maintaining the MIS of projects, monitoring guidelines, compliances *etc.* under the scheme. It is observed that the project is approved at various levels. As per the OP's submissions, the DPR prepared is sent for approval to State utilities and then it is forwarded to State Level Committees for scrutiny. It is pertinent to note that thereafter it is sent to REC which after vetting DPRs against the RGGVY parameters, forwards it to the IMMC for approval. It is apparent from the given facts that REC is an important clearing window for any project to be approved as it is the recommending authority. Thus, it necessarily follows that if REC does not recommend a particular project, the same will not reach the final stage for approval by IMMC. Given these facts, it is evident that REC not only facilitates disbursement of 90% capital subsidy component, but also plays a pivotal role in deciding whether a project will be approved or not, thereby being eligible or not for getting 90% subsidy.



- 5.35 From the aforesaid discussion, the Commission is of the view that the OP group holds a dominant position in both the components of the first relevant market.
6. Having ascertained the dominant position held by OP group in the first relevant market, the Commission will now deal with the issues related to abuse of dominant position in the present case. On a careful consideration of the matter, the Commission is of the opinion that in order to arrive at a decision, the following issues need to be determined in the instant matter:

**Issue I:** Whether the OP group has leveraged its position in the first relevant market to enter into or protect the second market *i.e.* ‘market for preparation of DPRs for projects under rural electrification schemes in India’ in violation of Section 4(2)(e) of the Act; and

**Issue II:** Whether the conduct of OP group has resulted into denial of market access to other consultancies who are the competitors of RECPDCL in the second relevant ‘market for preparation of DPRs for projects under rural electrification schemes in India’ in violation of Section 4(2)(c) of the Act.

Both these issues are dealt with by the Commission in the following paragraphs. As the observations and findings of the DG, the submissions of the Informant and RECPDCL with regard to abuse of dominant position have been elucidated in detail in the earlier part of this order, the same are not reproduced here for the sake of brevity.

***Issue I: Leveraging of Dominant Position (Section 4(2)(e) of the Act)***

- 6.1 It has been pointed out in the DG Report that within one year of its starting preparation of DPRs *i.e.* in 2013-14, RECPDCL bagged 79 DPRs out of 189 DPRs prepared by the consultants, thus securing a high market share of 41.79



%. Further, the DG collected responses from various competitors as well as consumers/ Discoms that had availed consultancy services from RECPDCL to assess whether REC was leveraging its position to influence the consumers to award the work to its subsidiary *i.e.* RECPDCL or not. The DG observed that the State Discoms were not able to justify their preference in awarding the consultancy work to RECPDCL on nomination/single tender basis. Thus, the DG concluded that REC's dominance in rural electrification financing was directly translating into the award of consultancy work by the PIAs to RECPDCL. In the absence of any evidence to support the contrary, the DG relied on these circumstantial evidence to establish that REC group was using its position of dominance in the market of financing of rural electrification projects in India under RGGVY/DDUGJY to protect the market for consultancy services for rural electrification projects under RGGVY/DDUGJY in India in violation of Section 4(2) (e) of the Act.

- 6.2 The Informant endorsed the above stated findings of the DG. As per the Informant, the DG has rightly pointed out the high market share secured by RECPDCL relating to preparation of DPRs in its initial year of operation. It was alleged that there is no explanation regarding how RECPDCL managed to get such a high market share without any prior experience when there are other existing competitors in the market with proven prior experience. This, as per the Informant, was only possible because of the leveraging by REC as a group.
- 6.3 The Informant contended that the percentage of sanctioned project cost was higher in case of Discoms awarding work to RECPDCL as a consultant as compared to a situation where any other consultant is appointed by a Discom. In this regard, the Informant refuted the submissions of the OP that Medhaj's average sanctioned cost per DPR was Rs.130.45 crore whereas OP's average sanctioned cost per DPR was Rs. 84.78 crore stating that such comparison is based on the cumulative figures for the period 2009-10 to 2014-15 which is



a misleading period since RECPDCL entered into the market of DPR preparation only in the year 2013-14.

- 6.4 The OP, however, has pointed out that the evidence relied upon by the DG does not lead to the conclusion that REC was leveraging its position to support RECPDCL. It was averred that the close associational link required between two markets to establish a case of leveraging is absent in the present case as the two markets exist independently of each other. Further, the OP stated that it is not dominant in the second relevant market by virtue of REC's dominance in the primary market.
- 6.5 It was further averred that the DG has not demonstrated any "use" of alleged dominant position by the REC group from one relevant market to enter or protect the second relevant market. It was also submitted that the 'circumstantial evidence' highlighted by the DG does not amount to satisfying the requirements for leveraging abuse to be made out.
- 6.6 It has been stated that out of all the competitors of RECPDCL who have participated in rural electrification projects and were questioned by the DG, only one namely 'Medhaj' supported the allegation of the Informant, but it did not furnish any documentary evidence in support of its claim. In addition, no customer of RECPDCL complained of OP's conduct, hence, making it clear that neither the Informant, nor any competitor, provided any evidence of establishing that the relationship between RECPDCL and REC had resulted in additional works being allocated to RECPDCL on nomination basis. Further, since the decision as to whether a DPR is to be prepared in-house or outsourced to a consultant is taken by the PIA, no adverse conclusions could be drawn against REC or RECPDCL for such decision making process.
- 6.7 The Commission has considered the aforesaid findings of the DG and the submissions of the parties on the issue of leveraging. The leveraging doctrine



applies when a firm has sought to use its dominance in one relevant market to enter into or protect the second market without competing on merits in that market. In the instant case, the DG's investigation reveals that RECPDCL garnered a significant share of the secondary relevant market in the first year of its operation, *i.e.* 2013-14. It also brings out the fact that award of DPRs during the period of investigation was mainly on nomination basis.

- 6.8 Before digging into the conduct of OP group under this issue, the Commission considers it apposite to lay down the basic tenets on which any case of leveraging under Section 4(2)(e) of the Act is to be tested. Section 4(2)(e) of the Act states that *[t]here shall be an abuse of dominant position under sub-section (1), if an enterprise or a group uses its dominant position in one relevant market to enter into, or protect, other relevant market.* Thus, to establish a case for leveraging under the Act, there should be a conduct on the part of the dominant enterprise/group to demonstrate the use of dominant position to enter into or protect another relevant market. The ensuing paragraphs will analyse, in general as well as in specific context of the present case, whether the facts and evidence show the existence of any such conduct.
- 6.9 To establish abuse, every contravention under Section 4 of the Act requires 'use' of the dominant position in an anti-competitive manner. Thus, it is of utmost relevance that the evidence gathered by the DG be evaluated to ascertain whether there has been a 'conduct' on the part of OP group which can be termed as 'use' of dominant position.
- 6.10 In this regard, the Commission notes that the DG has relied upon the responses of various competitors and consumers of RECPDCL to conclude that OP group was using its dominant position in the first relevant market to ensure that DPR work was awarded to RECPDCL in the second relevant



market. Such work was awarded on nomination basis, the reason for which, as per the DG was not sufficiently explained by the Discoms/consumers.

- 6.11 The Commission, therefore, looked into the evidence relied upon by the DG to examine whether the conclusions so drawn are in accordance with the responses of the aforesaid parties or not.
- 6.12 According to the Mr. Gunjan Tripathi, Director of Medhaj Techno Concept Private Limited, since the CEO of RECPDCL is the head of RGGVY, unequal advantages were given to RECPDCL when Discoms had to take a decision regarding consultancy services. It was further stated that RECPDCL had more access to REC's resources and the employees in REC offices were doing business development for OP.
- 6.13 According to Mr. M.P. Eshwar, CMD of Instrumentation Ltd. Kota, Discoms prefer to award consultancy work to RECPDCL as it would entail faster approvals and a high sanctioned DPR cost. When it was questioned whether he was aware of any instance where REC had leveraged its position in rural electrification to support OP, he stated that he was not aware of any such instance.
- 6.14 Similarly, Mr. Kulbushan Tikoo, MD, N-Arc Consulting Private Limited, denied knowledge of any such instance where REC had leveraged its position in rural electrification to support OP. Further, he had stated that RECPDCL was being engaged by Discoms on nomination basis for consultancy work.
- 6.15 Having considered the aforesaid statements made by the competitors of OP, the Commission is of the view that there is no clear evidence on record to infer that the OP group leveraged its dominant position to ensure awarding of work to OP. During deposition before the DG, the representative of Instrumentation Ltd. Kota had merely stated that the Discoms prefer to award consultancy work to RECPDCL as it would entail faster approvals and a high



sanctioned DPR cost. Though one of the competitors of OP, Medhaj, alleged that REC was leveraging its dominant position, no documentary evidence has been provided by it to support its allegation. It is further noted that none of the competitors have stated that OP group was leveraging its dominant position. To further assess the conduct of OP group, the responses of the Discoms who are the consumers of OP's services, have also been taken into account by the Commission.

- 6.16 As per the State Discom of Jharkhand, Jharkhand Bijli Vitran Nigam Limited (JBVNL), the work was awarded to RECPDCL by way of tendering / competitive bidding route in a fair manner pursuant to the Board's order/resolution.
- 6.17 The Discoms of Rajasthan, Jaipur Vidyut Vitran Nigam Limited (JVVNL), Jodhpur Vidyut Vitran Nigam Limited (JDVVNL) and Ajmer Vidyut Vitran Nigam Limited (AVVNL) where RECPDCL was awarded the maximum number of DPRs (28 out of 79), were examined by the DG. Mr. B.S Meena, Superintending Engineer, JVVNL, stated that there was a requirement of preparing DPRs on the basis of actual field surveys as per the letter dated 28.07.2010 written by Finance Minister to the then Minister of Power. On the basis of the said letter, REC instructed the Government of Rajasthan to meet such requirement. Mr. B.S. Meena stated that since there was no other consultant in the State of Rajasthan who was having experience of undertaking GPS based field survey with knowledge of geographical features of the State except OP, the work was allotted to it. In his testimony, he had highlighted the expertise of RECPDCL to be the deciding factor for awarding DPR work to it. Further, the representatives of AVVNL stated that the work was awarded to RECPDCL since JVVNL is the nodal agency for all Discoms in the State for RGGVY/DDUGJY and it was its direction to give DPR work to OP, it being a government company.



- 6.18 The Chhattisgarh Discom, State Power Distribution Company Limited, stated that due to the inordinate delay in preparation of DPRs during the 10<sup>th</sup> and 11<sup>th</sup> five year plan by the then implementing agencies *viz.* NTPC, NHPC & PGCIL, there were delays in the sanctioning of electrification projects and thus, habitants of various districts were deprived of the benefit for a long time. Further, the Discoms stated that during a work-shop held on 16.04.13 at New Delhi for formulation of DPRs under the 12<sup>th</sup> Plan, it was gathered that OP, which is a CPSU had the expertise in preparation of DPRs under the RGGVY. Also, the award of DPR work to RECPDCL by Rajasthan Discoms for carrying out extensive field surveys was taken into account by the Chhattisgarh Discom while choosing RECPDCL for awarding work on a single tender basis.
- 6.19 The UP Discom stated before the DG that for the 11<sup>th</sup> plan, the DPR and PMC work was awarded to RECPDCL through tender and for the 12<sup>th</sup> plan; the same work was awarded to RECPDCL as extension of previous tender at the same cost.
- 6.20 According to Hubli Electricity Supply Company Limited, Karnataka, the DPRs were given to RECPDCL as per the directions issued by the State Level Distribution Reforms Committee Meeting chaired by the Chief Secretary to Government on 5<sup>th</sup> September 2013. As per the reply of CESC, Karnataka, the work for preparation of DPR was awarded to RECPDCL without calling tender as per the directions of Government of Karnataka. Some other Discoms in Karnataka also stated that the work was awarded on nomination basis on the directions of the Government of Karnataka. When the Chief Secretary, Karnataka, was asked by the DG to provide the details regarding the basis of award of DPR/ TPI/ PMC by the Discom, the Chief Secretary stated that the work was awarded to RECPDCL to ensure speedy implementation of the scheme. The Discoms of Assam and Manipur did not



furnish any specific response for choosing RECPDCL for awarding DPR work on nomination basis.

- 6.21 The Commission has examined the responses of the Competitors and Discoms. The Commission is of the opinion that awarding of work on nomination basis cannot be termed as anti-competitive as such. Some of the Discoms *e.g.* those based in Rajasthan and Chhattisgarh have justified award of work to RECPDCL on the basis of expertise. The Discom of Jharkhand has stated that they awarded the DPR work to RECPDCL on the basis of fair competitive process. Moreover, none of the Discoms have levelled any allegation regarding REC's influence on them for awarding DPR work to the OP.
- 6.22 On the basis of aforesaid, the Commission is of the considered view that the evidence on record does not reveal any explicit 'conduct' on the part of the OP group to show that it was influencing the decision of the State Discoms in the second relevant market by using its dominant position in the first relevant market.
- 6.23 The Commission, however, is mindful of the fact that even in the absence of direct or explicit evidence revealing anti-competitive conduct, there could be a possibility of abuse of dominant position by an entity. Therefore, to ascertain whether such possibility of 'use' of dominant position by OP group can be inferred in the present case, the Commission has analysed the data available on record. Thus, in the following paragraphs, the Commission has evaluated the data related to DPRs in terms of rejection rate as well as amount sanctioned to see if such data is indicative of any anti-competitive conduct on the part of the OP group in the second market. The Informant has alleged that the success rate of sanctioning of DPRs in terms of numbers as well as in terms of applied project cost versus approved is higher in case of DPRs being prepared by RECPDCL *vis-à-vis* through other agency. Thus, the



Commission looked into the percentage of DPRs approved/rejected, both in terms of numbers as well as value, prepared by various consultancies, including RECPDCL. Since RECPDCL started preparing the DPRs for RGGVY only in the year 2013-14, it is necessary to assess the effect of the OP's entry on the competitive landscape in the downstream market for that period only. Hence, Table A below depicts the comparative figures for DPRs prepared by various consultancies and DPRs approved/rejected for the year 2013-14 and Table B depicts the percentage of the approved amount for DPRs for the year 2013-14.

*Table A: Depiction of % age rejection of DPRs prepared by various consultancy companies for 2013-14*

	No. of DPRs Prepared	Approved DPRs in 2013-14	Rejected DPRs in 2013-14	% rejection (round figure)
<b>RECPDCL</b>	93	79	14	<b>15</b>
<b>Medhaj</b>	76	63	13	<b>17</b>
<b>Aks Construction Pvt. Ltd.</b>	13	12	1	<b>8</b>
<b>Instrumentation Ltd.</b>	25	19	6	<b>24</b>
<b>ERDA</b>	8	7	1	<b>13</b>
<b>MECON</b>	8	4	4	<b>50</b>
<b>WAPCOS</b>	5	5	0	<b>0</b>
<b>PIAs</b>	141	84	57	<b>40</b>



**Table B: Percentage of approval of DPRs in amount for the year 2013-14**

	Submission of DPR in Rs. Crore	Approval of DPRs in Rs. Crores	%age of approved (up to second decimal point)
<b>RECPDCL</b>	9859.78	5735.20	<b>58.17</b>
<b>Medhaj</b>	16923.07	7318.22	<b>43.24</b>
<b>Aks Construction Pvt. Ltd.</b>	4329.34	2454.51	<b>56.69</b>
<b>Instrumentation Ltd.</b>	3777.51	719.94	<b>19.06</b>
<b>ERDA</b>	840.834	524.03	<b>62.32</b>
<b>MECON</b>	1975.09	280.26	<b>14.19</b>
<b>WAPCOS</b>	1379.84	715.52	<b>51.86</b>
<b>PIAs</b>	11706.62	5858.70	<b>50.05</b>

- 6.24 It is observed from Table A that the percentage of rejection of DPRs in case of RECPDCL is 15%. In case of Medhaj, though the percentage of rejection is slightly higher (17%), the same is not disparate to infer any preferential treatment accorded to RECPDCL. Moreover, in terms of numbers, the number of rejected DPRs prepared by Medhaj (13) is lesser than that of RECPDCL (14). Further, the figures stated in Table B underscores the fact that the value of DPRs prepared by Medhaj (Rs. 16923.07 crore) is much higher than that of RECPDCL. Also, the value of DPRs approved for Medhaj (Rs. 7318.22 crore) is also higher than that of RECPDCL.
- 6.25 It is further observed that percentage of rejection of DPRs in case of Aks Construction Private Limited is 8%, which is lower than the percentage of rejection in case of RECPDCL. The Commission is cognizant that Aks Construction Private Limited is not a very big player in terms of number of DPRs prepared but in terms of value of DPRs prepared, it is the third highest player having prepared DPRs worth Rs. 4329.34 crore.



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- 6.26 Further, for other players, namely Instrumentation Ltd., ERDA, WAPCOS, the percentage of rejection is not significantly different from RECPDCL. Though such small players may not be appropriate for comparison, the data with regard to them at least shows that the percentage of rejection of DPRs prepared by them was not contrasting enough to substantiate the allegation of leveraging on the part of REC to favour its subsidiary *i.e.* RECPDCL.
- 6.27 Evidently, in case of PIAs, the percentage of rejection of DPRs is excessively higher than RECPDCL in 2013-14. However, since PIAs are the Discoms which are the consumers in the present case, any self-provision of services ought not to be considered as provision of services in the market for preparation of DPRs. The level of expertise would differ in case of DPRs prepared by consultancy firms and those prepared by PIAs in-house which may possibly be the reason for the high rate of rejection for the DPRs prepared by such PIAs. Therefore, it may not be appropriate to take into account the rejection rate of DPRs for PIAs as the same does not amount to provisioning of services in the market.
- 6.28 Further, to analyse the reasons for high rejection rate in case of PIAs and MECON in comparison to RECPDCL, the Commission analysed the information regarding the reasons assigned by REC for recommending rejection/approval of different projects (DPRs) submitted by the State Discoms. From the information submitted by the OP group on 23.11.2015, it is observed that most of the DPRs were rejected for not being in accordance with the approved methodology.
- 6.29 In this regard, the Commission note that by virtue of it being the nodal agency for a scheme designed to cater to the needs of a specific section of society *i.e.* rural, the recommendation regarding propriety of any proposed DPR being in accordance of the approved methodology appears to be a part of the duties assigned to it. The same cannot be construed as an expression of



influence to manipulate the decision of the Discoms in the absence of any evidence to the contrary. Further, such DPRs, which were not recommended by REC, were not only prepared by other consultancy firms, but also by RECPDCL. It is also observed that 3 out of 4 of the DPRs for MECON were rejected on grounds of a pending CBI enquiry and thus no *malafide* can be attributed to REC for rejection of such DPRs. Further, for PIAs, the rejection was mostly on account of DPRs not being in line with the approved methodology. This further strengthens the earlier observation regarding the difference in the level of expertise in case of DPRs prepared by consultancy firms and those prepared by PIAs in-house which may be the reason for such a high rate of rejection for the DPRs prepared by such PIAs.

- 6.30 The Commission further notes that there is nothing on record which shows that the DPRs prepared by RECPDCL were getting faster approvals in comparison to its competitors. Therefore, looking at the totality of facts, it does not follow that REC was giving any undue preference to its subsidiary, *i.e.* RECPDCL at the stage of recommendation of DPRs.
- 6.31 From the foregoing analysis, it follows that the statements made by the competitors and the consumers/ Discoms recorded by the DG do not establish that OP group was giving directions or influencing the Discoms to give DPR work to RECPDCL. Though one of the competitors, Medhaj has alleged that RECPDCL was getting unequal advantages because of its affiliation with REC, it did not provide any evidence in support of such allegation. Similarly, the Informant has also not been able to give any evidence in this regard as well. Further, the data available on record also does not indicate that OP group was favouring its subsidiary while recommending the DPRs.
- 6.32 Thus, it is apparent that there is no evidence on record either to show that REC has leveraged its dominant position in the first relevant market to enter into or protect the second relevant market or to show that REC has given any



assurance to Discom's that their decision to appoint RECPDCL as a consultant for the preparation of DPRs would lead to approval of the project. Further, as noted earlier, there is nothing on record which shows that the DPRs prepared by RECPDCL were getting faster approvals in comparison to its competitors. Moreover, it cannot be lost sight of that various State Discoms have explained that their decisions of awarding the DPR work to RECPDCL were based on either RECPDCL's expertise in conducting GPS field surveys required in preparation of DPRs or based on instructions given by their respective State Governments, none of which is indicative of REC's role in their decision to award the work to RECPDCL. Further, not even a single Discom has alleged any influence on them by REC or OP group for awarding DPR work to OP.

- 6.33 The Commission is, therefore, of the view that there is no concrete evidence on record to establish that OP group has leveraged its dominant position in the first relevant market to enter into or protect the second relevant market. Therefore, the allegation of violation of the provisions of Section 4(2) (e) of the Act does not stand established.

***Issue 2: Denial of Market Access (Section 4(2) (c) of the Act)***

- 6.34 Abuses as specified in the Act fall into two broad categories; exploitative (excessive or discriminatory pricing) and exclusionary (denial of market access). One of the grievances of the Informant in the present case is that RECPDCL, which is operating in the second relevant market, has got a considerable number of DPRs because of the backing by its parent company, REC, right from the initial year of its entry in 2013-14 as compared to its competitors. The same, as per the Informant, has resulted in the decrease of market share for its competitors in the preparation of DPRs and thus, led to the denial of market access to OP's competitors.



- 6.35 The DG considered the number of DPRs awarded to RECPDCL in comparison to other consultancy firms and concluded that market access to the consultancy firms has been denied after the entry of OP to the extent of the DPR work awarded to RECPDCL on nomination basis.
- 6.36 The OP refuted the findings of the DG stating that the denial of market access can be occasioned only in the market in which the entity is dominant and since, RECPDCL is not dominant in the second market, the exclusion cannot be seen in the second relevant market. The OP has submitted that DG has incorrectly stated that on its entry, the market for consultancy services was denied to its competitors as OP's market share falls considerably when other consultancy services are considered. Further, out of 378 DPRs prepared under the RGGVY, PIAs themselves prepared 177 DPRs, OP prepared 80 DPRs and Medhaj prepared 69 DPRs. Accordingly, it has been stated that a large part of the market for consultancy services in power projects is contestable and thus, there cannot be a finding of denial of market access.
- 6.37 As per Section 4(2) (c) of the Act, there shall be an abuse of dominant position under sub-section (1), if an enterprise or a group *indulges in* practice or practices *resulting in* denial of market access in any manner. Any conduct under Section 4(2) (c) of the Act requires an establishment of two components—*firstly*, there should an indulgence in a practice (s) *i.e.* there should be a conduct; and *secondly*, that the conduct should have resulted in a denial of market access *i.e.* anti-competitive effect/distortion in the market in which denial has taken place.
- 6.38 RECPDCL has asserted that denial of market access has to be occasioned to a competitor in the same relevant market in which the incumbent is dominant by placing reliance on the COMPAT'S order dated 02.05.2014 in *M/s. Fast Way Transmission Pvt. Ltd. and ors. vs. M/s Kansan Newa Pvt. Ltd. & anr.* In this regard, the Commission notes that this question of law is *sub-judice*



and pending in the Hon'ble Supreme Court. However, notwithstanding such pendency, the Commission would deal with this issue in the following paragraphs.

- 6.39 The Commission has already analysed OP group's conduct at length while dealing with the previous issue relating to Section 4(2)(e) of the Act and the same does not require reiteration here. Suffice it to say that the evidence on record does not show that the OP group was indulging in any conduct to favour its subsidiary in the second relevant market.
- 6.40 The second element in the enquiry of a case under denial of market access is with regard to the anti-competitive effect/distortion in the market because of such conduct. The Commission notes that the DG has primarily relied upon the award of DPRs on nomination basis to RECPDCL. During 2013-14, RECPDCL was awarded 70 DPRs on nomination basis out of total 189 DPRs prepared by the consultants *i.e.* 37% of the total market. Further, the market share of RECPDCL in the second market, including all DPRs prepared by it for 2013-14, is approximately 40%. The Commission notes that although the entry of RECPDCL in the second market has led to a reduction in the market share for the other consultancy firms, the market was nevertheless contestable. The responses from the Discoms (*i.e.* the consumers of RECPDCL) have clearly revealed the reasons for their preference for appointing RECPDCL. Thus, in the absence of a conduct on the part of OP group, the reduction in the market share for some of the players cannot be relied upon to infer anti-competitive conduct on the part of OP group. Further, the data submitted by RECPDCL depicts that the percentage of DPRs prepared by it has decreased in the year 2015-16 to approximately 36% which further weakens the allegation regarding denial of market access. With more than 60% market shared by the other consultancy firms and in absence of any evidence regarding OP group's influence on the Discoms' decision to



follow the nomination route, the Commission is of the view that contravention of Section 4(2)(c) cannot be made out in the instant case.

- 6.41 Thus, the evidence on record is not sufficient to establish that REC, as the nodal agency for implementation of the RGGVY scheme and as one of the appraising authorities of rural electrification projects under the scheme, exercised undue influence on the PIAs or meted out any discriminatory treatment to the competitors of its subsidiary RECPDCL in order to enter into or protect the relevant market of preparation of DPRs.
- 6.42 However, before parting with this order, the Commission notes that the DG has given its observations and findings on the issues regarding conflict of interest which requires consideration. The investigation has highlighted a structural issue that exists in the rural electrification segment *i.e.* RECPDCL, being the subsidiary of REC, has been able to get the benefit of preference *vis-à-vis* its competitors in the second relevant market. In this regard, the DG has discussed various aspects regarding the conflict of interest that has emerged in the present case.
- 6.43 The DG has stated that prior to 08.04.2015, the CEO of RECPDCL was the same person who happened to be the ED of RGGVY in REC. Further, in the IMMC meeting held on 19.02.2015 wherein the projects for 06 states were approved under DDUGJY scheme, CEO of RECPDCL was present along with other delegates which is evident from the minutes of this meeting.
- 6.44 Also, as per the finding of the DG, on 10.06.2009 an agreement was executed between Meghalaya State Electricity Board and RECPDCL, which was signed by an official of REC on behalf of RECPDCL. The DG also observed that the permanent employees of REC are deployed and posted in RECPDCL on a secondment basis to look after the work of RECPDCL. In view of the



aforementioned linkages between REC and RECPDCL, the DG concluded that there was a case of conflict of interest.

- 6.45 In this regard, the OP submitted that there is no conflict of interest, given the checks and balances in place to ensure that projects are approved after proper scrutiny. It was also claimed that the CEO of RECPDCL is not responsible for the appointment of consultancy service providers, nor does the CEO has the power to sanction and disburse funds. The OP also highlighted the deposition of the CEO of RECPDCL wherein he explained that the ED of REC has no powers to sanction funds under the RGGVY and that RECPDCL functions as an independent authority. It was averred that these statements have not been considered by the DG. It was stated that the DG has failed to appreciate that RECPDCL is a wholly owned subsidiary of REC and letters demonstrating such fact cannot be construed anti-competitive. Further, the OP has stated that the DG has failed to gather any evidence to establish that RECPDCL received informational advantages in respect of projects as a result of it being REC's subsidiary.
- 6.46 The factual matrix of the instant case and the evidence brought on record by the DG bring out that the allocation of contracts for preparation of DPRs for rural electrification projects under the RGGVY scheme during the period of investigation was largely based on the preference of the PIAs/State governments for RECPDCL. The revealed preference of the PIAs for RECPDCL, in multiple instances, was attributable to the association between REC and RECPDCL. RECPDCL, by virtue of being perceived as an extension of REC, enjoyed net competitive advantages *vis-à-vis* its competitors.
- 6.47 The case brings into sharp focus the issue of level playing field in a mixed public/private market getting disturbed as a result of structural advantages enjoyed by a public provider and the consequent bias of the public buyers in



favour of such public provider. Though such structure-induced distortions do not violate the letter of the competition law, they are not in accordance with the spirit of competitive neutrality.

- 6.48 In order to ensure healthy competition, all enterprises, irrespective of their public or private ownership, must be able to operate on a level playing field consistent with the principles of competitive neutrality. REC, as the nodal agency for implementation of a flagship programme of the Government of India in rural electrification, acts as an instrument of the central government. It is entrusted with such key responsibilities as implementing the guidelines for the flagship programme in rural electrification, appraisal and recommendation of projects, inspection of projects funded by the scheme and disbursement of funds etc. On the other hand, it is engaged in the commercial activity of preparation of DPRs for projects under the same flagship programme through its wholly-owned subsidiary RECPDCL. While the market of preparation of DPRs for rural electrification projects is open to public and private consulting firms, it can yield competitive outcomes only when all the firms get fair opportunity to compete on merit and allocation of the contracts by the PIAs is ownership-neutral. It is widely recognized that in markets where public and private entities compete, competitive neutrality warrants reform in governance arrangements and removal of conflict of interest to reduce the scope of ownership-linked advantages *ex ante*.
- 6.49 In view of the foregoing and in order to promote and maintain trust of the market participants in REC as an impartial referee in the DPR appraising mechanism as also to facilitate competitively neutral allocation of contracts by the PIAs, the Commission is of the opinion that it is incumbent upon REC to put in place adequate safeguards in the appraisal processes and to remove any perceived, potential, or actual conflicts of interest caused by its association with RECPDCL.



7. However, in the absence of any evidence on record to indicate abusive conduct by OP group, the Commission is of the opinion that the preferential advantage to RECPDCL given by Discoms appears to be a consequence of the structure in the market and the same cannot be taken as the basis to infer abuse on the part of OP group.
8. In view of the above discussion, the Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made out against the OP group and the matter is ordered to be closed forthwith.
9. The Secretary is directed to inform the parties accordingly.

**Sd/-**  
**(S. L. Bunker)**  
**Member**

**Sd/-**  
**(Sudhir Mital)**  
**Member**

**Sd/-**  
**(Augustine Peter)**  
**Member**

**Sd/-**  
**(U. C. Nahta)**  
**Member**

**Sd/-**  
**(Dr. M. S. Sahoo)**  
**Member**

**Sd/-**  
**(Justice G. P. Mittal)**  
**Member**

New Delhi  
Date: 05/05/2016