

**BEFORE THE COMPETITION COMMISSION OF INDIA**

CASE NO. DGIR/2008/IP/158 RTPe NO.19/2008

Dated: 31.05.2011

In Re : Suomoto case by MRTPC

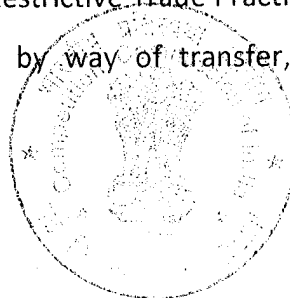
Against

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

..... Opposite Parties

**FINAL ORDER**

Consequent upon the repeal of Monopolies and Restrictive Trade Practice Act ('MRTP Act'), the instant case has been received on 04.03.2010 by way of transfer, under Section 66 (6)

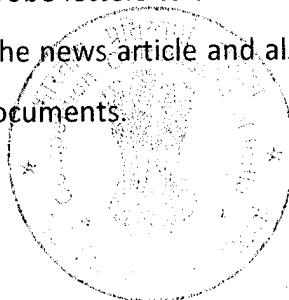


Competition Act, 2002 (hereinafter referred as "the Act"), from the erstwhile Monopolies and Restrictive Trade Practice Commission ("MRTPC").

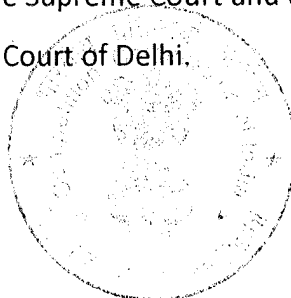
### Facts of the Case

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

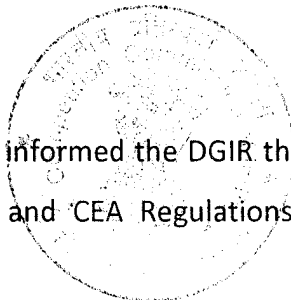
- 2.1 The present case had been taken up by the MRTPC *suomoto* on the basis of a news report/article published in the newspaper namely Hindustan Times dated 08.04.2008.
- 2.2 According to the above referred news article in 'Hindustan Times', the Six Member Electricity Consumer Advocate Committee (ECAC) noted that most meters, installed in Delhi by the three Electricity Distribution Companies namely North Delhi Powers Ltd ("NDPL"), BSES Yamuna Power Limited ("BSES Yamuna") and BSES Rajdhani Power Limited ("BSES Rajdhani"), (collectively referred to as the 'Opposite Parties' or 'Discoms'), tested by Bangalore's Central Power Research Institute ("CPRI") under the aegis of Public Grievance Cell, Department of Power- Government of Delhi ("PG Cell") were found to be running fast. The margin of error was 2.5%, much more than the acceptable 0.5%.
- 2.3 The MRTPC was of the view that the running of the Electronic Power meters faster than the permissible limit was unjustified and imposed additional cost on the consumer and amounted to restrictive trade practice as defined under Section 2 (o) of the MRTP Act. The MRTPC after taking *suomoto* cognizance of the aforesaid news report, vide its order dated 24.06.2008 directed the Director General of Investigation and Registration, MRTPC ("DGIR") to investigate the matter and submit preliminary investigation report.
- 2.4 The DGIR initiated the investigation against the above mentioned three electricity distribution companies and issued probe letters to them seeking their comments on the allegations leveled against them in the news article and also asked the Opposite Parties to furnish certain information and documents.



- 2.5 NDPL and BSES Rajdhani filed their replies before the DGIR on 19.07.2008 and 21.07.2008 respectively. BSES Yamuna did not file any response to the notice of the DGIR.
- 2.6 In the aforesaid reply, it was contended by the NDPL that the news article, on the basis of which the investigation was initiated, was contrary to the facts. NDPL submitted that after the publication of the aforesaid news item, the Government of NCT of Delhi (Department of Power) and Public Grievance Cell had issued a clarification on the aforesaid news item stating that the news item in the newspaper is "contrary to the facts and deliberations made in meeting of ECAC held on 29.03.2008." The impression that Government agrees that most of the power meters in Delhi are running fast was misleading.
- 2.7 It was also submitted by the NDPL to the DGIR that earlier also the MRTPC had issued notices against it on 12.08.2005 and 30.09.2005 on the basis of some newspaper reports, seeking diverse and general information, which were duly replied by NDPL. The above notices were also challenged by it in the Hon'ble High Court of Delhi vide WP(C) No. 23449/2005. In the aforesaid writ petition, MRTPC had given an undertaking to withdraw the impugned notices with liberty to seek information only on specific complaints of the consumers. Acting on such undertaking, NDPL withdrew that writ petition.
- 2.8 NDPL further submitted that the issue of fastness of meters is no longer *res integra* in view of the judgment of Hon'ble Supreme Court in Suresh Jindal vs. BSES Rajdhani Power Ltd. (2008) 1 SCC 341 and the MRTPC can only entertain specific complaints of individual consumers. It was also submitted that the notice issued by the DGIR was against the spirit of the order of Hon'ble Supreme Court and contrary to the stand taken by the MRTPC before the Hon'ble High Court of Delhi.

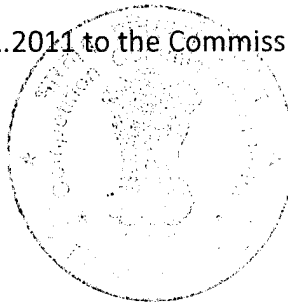


- 2.9 BSES Rajdhani Power Ltd. vide its reply dated 21.07.2008 reiterated the submissions made by NDPL.
- 2.10 DGIR issued subsequent probe letter dated 01.05.2009 to NDPL and BSES Rajdhani for furnishing complete information in continuance of its earlier letter dated 08.07.2008. NDPL reiterated its earlier contentions and submitted that electronic meters installed by it are in compliance with legal framework and specifications mentioned in the regulations and, therefore, no cause of action arose against it. Jurisdiction of DGIR was also challenged by NDPL with the prayer to withdraw the notices issued against it. A similar stand was also taken by BSES Rajdhani Power Limited vide its letter dated 21.05.2009.
- 2.11 DGIR also sought reply from PG cell. The PG Cell replied that meters installed by all three Discoms were tested and out of 1323 meters tested by CPRI, it was found that 87% meters had been operating on the plus side, resulting in huge financial gain to companies. PG cell further informed the DGIR that although the consumers are entitled to procure BIS (Bureau of Indian Standard) approved meters after getting them tested by Discoms but the Discoms were not encouraging and supporting this practice.
- 2.12 DGIR also sought comments from Delhi Electricity Regulatory Commission ("DERC") and Central Electricity Regulatory Commission ("CERC") on the submissions made by the PG Cell.
- 2.13 CERC vide its letter dated 03.06.2009 informed the DGIR that the matter of installation and correctness of meters at the consumer's premises did not come within its jurisdiction. Section 55 of Electricity Act, 2003 authorizes Central Electricity Authority ("CEA") for notification of regulations on installation of meters and CEA has already notified regulations in this regard.
- 2.14 DERC vide its letter dated 06.05.2009 informed the DGIR that the regulations issued by CEA on meters should be followed and CEA Regulations, 2006 on Installation and



Operation of Meters refer to BIS standards for their accuracy limits. Meters in question were purchased and installed by the Discoms.

- 2.15 DGIR also inquired with the approved manufacturers of meters regarding the reasons for the inaccuracies. The replies by all manufacturers were on similar lines and they have stated that the meters manufactured by them are as per specifications prescribed by BIS and BIS permits error both on the positive as well as the negative side but within the specified accuracy limit. The meters have a load curve and the accuracy of the meters is different for different load points. It has also been submitted by the manufacturers that they are selling meters to the Discoms through open tendering process.
- 2.16 DGIR filed a preliminary investigation report dated 16.06.2009 before the MRTPC with an application seeking interim *ex parte* order against the Discoms in the matter. DGIR also pointed out in its report that significant number of meters which were tested were running on positive side. Further, the Discoms by installing such meters were adopting deceptive and unfair methods which amounted to unfair trade practice in contravention of the provision of section 36A of the MRTP Act. The report also concluded that the said unfair trade practice has an inherent effect of causing loss to the consumers.
- 3 At this stage the matter was transferred to this Commission under Section 66 (6) of the Act. The Commission considered the matter in its ordinary meeting held on 23.11.2010 and after having formed an opinion under Section 26 (1) of the Act that there exists a prima facie case, referred the matter to the Director General ("DG") for investigation.
- 4 DG, after receiving the direction from the Commission, investigated the matter and submitted the report dated 24.01.2011 to the Commission.

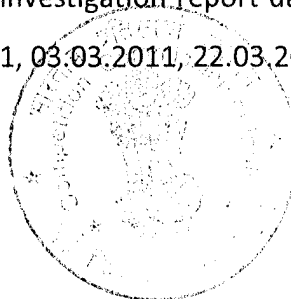


### **Findings of DG Report**

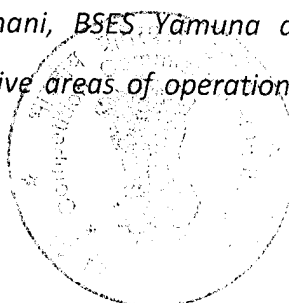
- 5 The DG in its investigation report has pointed out that the only issue for investigation in this case is fastness and accuracy of electric meters. The DG reported that the similar issue has already been dealt, in detail, in investigation report submitted in Case No. 6 of 2009. As per DG report, the issue in the instant case has emanated before MRTPC from the press report published in the Newspaper 'Hindustan Times' dated 08.04.2008. The informant in Case No. 6 of 2009 has also made the same news item the basis for filing the information. The issue in the instant case is similar to the issue already investigated by the DG in Case No. 6 of 2009. As per the report of the DG, the investigation conducted by the DG in Case No. 6 of 2009 has covered the allegation alleged in the instant case and the allegation leveled were found valid and true in the investigation by the DG.
- 6 DG has also observed that investigating the same allegation which has already been established against the same parties i.e., NDPL, BSES Yamuna and BSES Rajdhani would mean re-investigating the charges which have already been held to have been established.
- 7 The DG has concluded in its report that the decision taken in Case No. 6 of 2009 by the Commission has direct bearing on the issue which was the subject matter of investigation with the office of DGIR, MRTPC in the present case. The DG has requested in his report that the issue involved in the instant case may be considered in the light of the decision in Case No. 6 of 2009.

### **Discussion**

- 8 The Commission considered the investigation report dated 24.01.2011 filed by the DG in its meetings held on 01.02.2011, 03.03.2011, 22.03.2011 and 24.04.2011.



- 9 The Commission has carefully gone through the investigation report filed by the DG and observed that the DG has not conducted any fresh investigation in the instant case and has relied upon the investigation earlier conducted by him in case no. 6 of 2009. After going through the DG report in this case and the DG report filed in case no. 6 of 2009, the Commission noted that the allegations which were investigated by the DG in case no. 6 of 2009 were based upon the reports of two newspapers namely The Hindu dated 14.05.2005 and Hindustan Times dated 08.04.2008. In both the news reports it had been alleged that the electric meters installed by Opposite Parties in Delhi were running on the faster side. The instant matter is also based upon the same report of news article published in Hindustan Times dated 08.04.2008.
- 10 It is also observed that in case no.6 of 2009, the NDPL, BSES Yamuna and BSES Rajdhani had filed their respective replies to the DG report and they were also heard in extenso by the Commission. Therefore, as the issue involved in the present matter is squarely covered in case no. 6 of 2009, this case is being disposed off on the basis of the DG report in the instant case, the DG report in case no. 6 of 2009, the replies filed by the Opposite Parties in case no. 6 of 2009 and the ratio propounded in that case and there is no need to launch into fresh inquiry for the disposal of the instant matter.
- 11 With this view, the findings of DG in case no 06 of 2009, relevant to the instant case, are reproduced herein below:
- a. *“the relevant market in the instant case would mean relevant product market comprising of distribution and supply of electricity and allied facilities like metering and reading of meters, billing etc. and relevant geographic market comprising of the areas of operations of the three companies-BRPL, BYPL and NDPL determined subsequent to privatization of DVB”..*
  - b. *“as on date, BSES Rajdhani, BSES Yamuna and NDPL enjoy position of monopoly in their respective areas of operation. The distribution and supply*



*functions are not segregated because of the prevalent state of licensing conditions. Thus, it may be said that as per the provisions of explanation (a) to Section 4(2), the three Discoms are enjoying dominant position in their respective areas of operations”.*

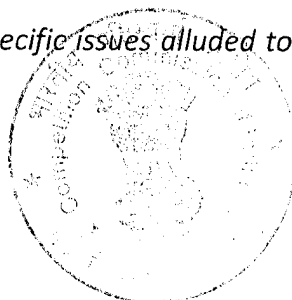
c. *“ the fact that the Discoms are supplying electricity to the consumers through meters, which are not correct, tantamount to imposing unfair conditions in sale of electricity and consequently abuse of their position of dominance in terms of provisions of Section 4(2)(a)(i) of the Competition Act,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

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

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

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

14 It is noted that in case no. 6 of 2009 the comments of DERC were sought and it had replied to the Commission that *“specific issues alluded to by the petitioner accusing the*





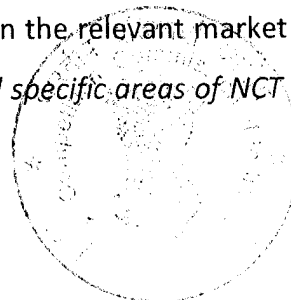
*Discoms of abuse of their dominant position may be looked into by the CCI in terms of Competition Act, 2002". Therefore, after considering the opinion of DERC and mandate given to the Commission under the Act, it was held that there is no overlap between DERC and Competition Commission of India, in terms of the jurisdiction in this case. The Commission accordingly proceeded to deal with the issues relating to competition.*

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

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

- 16 The Commission in case no. 06 of 2009, after taking into consideration the provisions of Section 19(5), Section 19(6), Section 19(7), Section 2(r), Section 2(s), Section 2(t) of the Act, the provisions of Electricity Act, 2003 and on the basis of the various other regulatory provisions, has held that relevant market in the present case is *distribution & supply of electricity in the licensed areas of respective Discoms in Delhi.*

- 17 On the issue of dominance of Discoms in the relevant market the Commission observed that *"three Discoms have been assigned specific areas of NCT (Delhi) for distribution and*

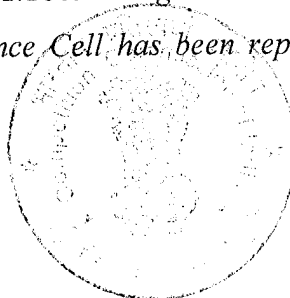


*supply of electricity. As per the prevailing licensing conditions and given the present stage of regulatory reforms, the retail supply of electricity is restricted to the Discoms and in the present case the Discoms are the only licensees for distribution of electricity in their respective areas with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

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

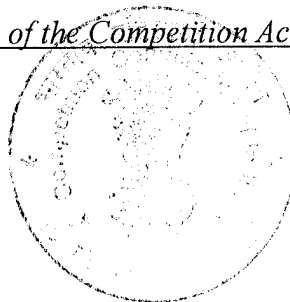
*"16.5 The unfair condition in the instant matter relates to overcharging the consumers due to fast running of meters.*

*16.6 While finding the Discoms indulging into this kind of abuse the DG has based his conclusion on the data of test results of meters conducted by Central Power Research Institute (CPRI), Bangalore, under the aegis of Public Grievance Cell constituted by Government of NCT of Delhi. This data was provided to the DG by Public Grievance Cell on 18.12.2009 alongwith their submissions. Though the data obtained from Public Grievance Cell has been reproduced in the DG report, the*

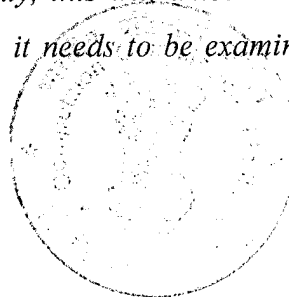


document containing the submissions and test results has not been made part of DG report.

- 16.7 As per DG report, out of total 2014 meters tested by CPRI in the period July, 2007 till 30.11.2009, 1847 meters had positive errors and only 167 meters had negative errors. The DG has noted that 91.7 % of the meters tested showed positive errors, while only 8.3 % meters have shown negative errors. DG has also further noted that out of 2014 meters tested till 30.11.2009 a total of 96 meters (4.76 %) have shown positive error of more than 2.5%, exceeding the maximum permissible error limit prescribed for Class-1 meters. It is also borne out from the DG report that after regulations of Central Electricity Authority (CEA) were published in March, 2006, the Bureau of Indian Standards (BIS) published IS 15707 : 2006. According to new Indian Standards, the maximum permissible error for the meters having accuracy of Class 1.0 (which are meters generally used by the domestic consumers) shall be  $\pm 2.5\%$  under on site conditions.
- 16.8 The DG has concluded that since overwhelming percentage of meters tested have shown positive errors this is against the principle of normal distribution curve. In view of these facts the DG report concludes that there is substance in the allegation that the meters installed by the Discoms have an upward bias in measurement of electricity.
- 16.9 Based upon the analysis of the data supplied by Public Grievance Cell the DG has come to the conclusion that fast running of meters results in inflated bills for the consumers. In the end the DG has come to the following conclusion:-  
“The fact that the Discoms are supplying electricity to the consumers through meters, which are not correct, tantamount to imposing unfair conditions in sale of electricity and consequently abuse of their position of dominance in terms of provisions of section 4(2)(a)(i) of the Competition Act, 2002.”

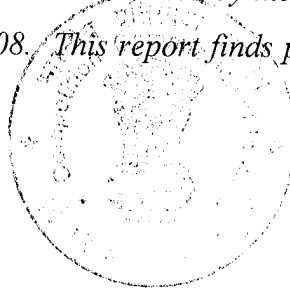


- 16.10 On the other hand, the Discoms have contended that DG has relied on test results supplied by Public Grievance Cell but that report has not been shared with the Discoms and hence, findings of the DG are against the principle of natural justice.*
- 16.11 It has been further contended that the report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



*case there is sufficient evidence to establish such unfair practice which tantamount to an abuse of dominant position by Discoms.*

- 16.15 It is evident that DG has based his finding solely on the data of test results of meters of aggrieved consumers provided by the Public Grievance Cell constituted by the Government of NCT (Delhi). These tests were conducted by CPRI, Bangalore, under the aegis of Public Grievance Cell. It is also noted that this data is compilation of test results conducted during the period running from July, 2007 to November, 2009, on the complaints of those consumers who suspected that their meters were running fast. A total of 2014 meters were tested during this period.*
- 16.16 It is seen from DG's report that NDPL has a consumer base of approximately 11 lakhs consumers whereas, BYPL and BRPL together supply electricity to 31 lakhs consumers in Delhi. Furthermore, out of total consumer base of approximately 42 lakhs, only 2014 meters have been tested in a span of around 2 ½ years. This constitutes a miniscule of total consumers and is less than 0.1%. The size of the test results is too small, and in view of this it is difficult to take it as a representative sample of the large consumer base in Delhi. Moreover, it is also clear that the compilation of test results is not on account of any random sampling which had been undertaken by CPRI. In this test drive commencing from July, 2007, the meters of only those consumers were tested who were suspecting their meters to be running fast. Therefore, the test results compiled by CPRI cannot be taken to be representative sample so as to draw a conclusion that more than 90% of the meters in Delhi are running on positive side. Similar view was expressed by the Committee constituted by the Ministry of Power in its report submitted in September, 2008. This report finds place as Annexure F in the DG report.*



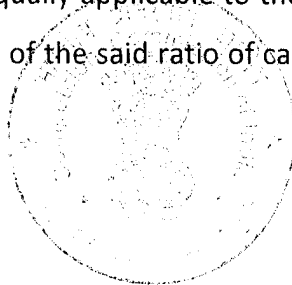
*16.17 It is also borne out from the examination of said test results reproduced in DG report that out of 2014 meters tested till November, 2014, only 96 meters (0.76%) have been found to be erring on positive side beyond permissible limit of  $\pm 2.5\%$  specified by BIS for Class 1 meters. This number is insignificant considering the fact that total consumers in Delhi are more than 40 lakhs. Furthermore, it is not discernible from the DG report that out of 96 meters showing error beyond the permissible limit how many of them were tested before May 20, 2009 when section 4 of the Act came into force. The report is also silent about the fact that how many meters out of 96 defective meters were replaced by the Discoms before the date of enforcement of the Act. As regards those meters which were found running on the positive side, but within permissible limit, it is manifestly clear that no fault can be found on this account because they were running within the accuracy limit stipulated by BIS, and they are deemed to be correct meters in terms of regulations framed by CEA.*

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

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

### **Decision**

**20** In view of the above discussion, the Commission is of the considered view that since the issue involved in the instant case is same as has already been disposed off by the Commission vide its detailed order in case no. 6 of 2009, the ratio propounded in the case no. 6 of 2009 is equally applicable to the facts and allegations of the present case. Therefore, on the basis of the said ratio of case no. 6 of 2009, the Commission does not



find any violation of either Section 3 or Section 4 of the Act by the Discoms and conclusions drawn by the DG in case no. 06 of 2009 cannot be accepted. In view of the above findings the matter relating to this information is disposed off accordingly and the proceedings are closed forthwith.

21 Secretary is directed to inform the parties accordingly.

Sd/-  
Member (G)

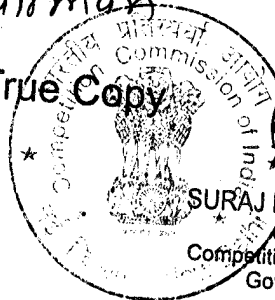
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