

**BEFORE THE
COMPETITION COMMISSION OF INDIA
CASE NO. 06/2009
DATE OF DECISION: 11.05.2011**

IN THE MATTER OF

Shri Neeraj Malhotra, Advocate,
E-25,LGF,Jangpura Extension,

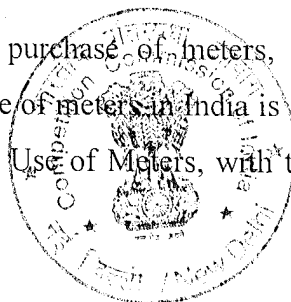
..... Informant

- (1) North Delhi Power Limited
- (2) BSES Rajdhani Power Limited
- (3) BSES Yamuna Power Limited

..... Opp. Parties

Supplementary to the Majority Order

1. While concurring with the main conclusions of Majority Order this supplementary has been prompted by the allegation of the informant that the Discoms in Delhi have used their dominant position in their licensed area to foreclose competition in the meter market. The Majority Order considered one product market the distribution and retail supply of electricity on the consideration that meters and other accessories are part of that business market. Regulation 35 of the Delhi Electricity Supply Code issued by DERC under Sec. 55 of the Electricity Act, modifies the picture and brings to focus and for enquiry two markets: i) distribution and retail supply of electricity and ii) meter market.
2. Meter related activities include purchase of meters, testing, installation, sealing and reading of meters. Use of meters in India is governed by Section 55 of the Electricity Act, 2003 – Use of Meters, with the proviso that “the



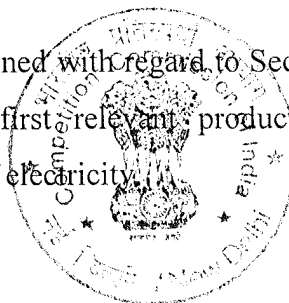
licensee may require the consumer to give him security for the price of a meter and enter into an agreement for the hire thereof, unless the consumer elects to purchase a meter”. In Delhi, Regulation 35 of Delhi Electricity Supply Code and Performance Standard Regulations, 2007 stipulates, “The consumer, if so desires, may procure a meter conforming to the regulations issued by the authority under Section 55 of the Electricity Act and the licensee shall test, install and seal the meter.”

3. Regulation 35 issued by DERC thus permit consumers to buy their own meters or opt for meters supplied by the Distribution Companies for which security deposit is collected and rental paid. While installation, testing and sealing of meters are to be done by the DISCOMs themselves as part of their licensed activity, in so far as retail supply of meters are concerned, DISCOMs are not the sole providers and consumers through regulatory provisions are given the choice to procure meters from the open market. It is the consumer choice that prompts us to consider the market for meters as a distinct market and not as an integral part of the market for ‘distribution and retail supply of electricity’. In other words, it draws a distinction between the markets for retail supply of electricity and the instrument of measuring consumption. This Supplementary Order is to examine dominance of Discoms in the meter market and its alleged abuse.

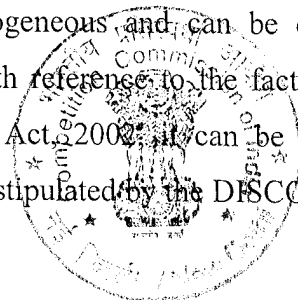
4. The issues for determination are same as stated in the Majority Order:
 1. Determination of relevant product/geographical market
 2. Determination of dominance
 3. Abuse of dominance

Determination of Issue No.1

5. Relevant product market is defined with regard to Section 2(r) and 2(t). The Majority Order defined the first relevant product market namely the distribution and retail supply of electricity.



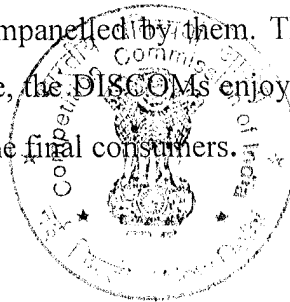
6. As per the regulations of CEA and DERC, electricity has to be supplied through meters conforming to BIS approved standards, i.e., IS 13779:99 in case of the domestic consumers or IS 14697:99 for the bulk consumers. This being a regulatory requirement, meters conforming to these standards can only be substituted with each other. No other category of meters can be considered as possible substitutes. Hence, only BIS approved meters constitute the relevant product market.
7. Further, the competitive conditions prevailing in the retail market where end users are purchasing meters differ from the conditions that prevail in the wholesale/bulk market where DISCOMs are purchasing the meters through an international competitive bidding process from the meter manufacturers. Therefore, though the characteristics of the meters transacted remain same with the same end-use, the market for BIS approved meters in the current circumstances could be split in two distinct segments – Wholesale/bulk market of BIS approved meters and Market for Retail supply of BIS approved meters to end consumers.
8. The market for ‘retail supply of BIS approved meters’ is the relevant product market in the current case as the issue under examination is the alleged foreclosure of competition in this market by abusive practices of the DISCOMs.
9. Section 2(s) defines the relevant geographic market. The Majority Order defines the relevant geographic market for the first product as the licensed area of the Discoms. In the case of meters, in Delhi, meters can be procured from either the respective DISCOMs or from their approved manufacturers/vendors only. This implies that the conditions of competition in a particular license area are determined by the respective DISCOMs which are distinctly homogeneous and can be distinguished from other license areas. Further, with reference to the factors laid down in Section 19(6) of the Competition Act, 2002, it can be said that there are local specification requirements stipulated by the DISCOMs, there may arise need



for after-sales service and it may not be economical for individual consumers to procure meters from distant markets. In view of these factors, the relevant geographic market for retail supply of meters would be restricted to the licensed distribution area of the DISCOMs.

Determination of Issue No.2

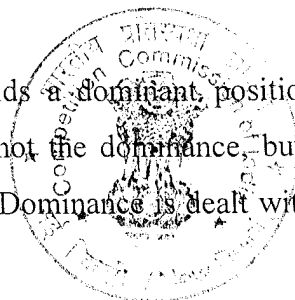
10. As observed in the Majority Order dominance of Discoms in the distribution and retail supply of electricity market is statutorily established. In the market for meters, purchases of meters by Discoms are all-India. This market is competitive as there are about 200 meter manufacturers in the country. No facts and evidences are brought on record in the DG's report to demonstrate that the Discoms in Delhi account for a large share of the country-wide sale of meter manufacturers to establish their dominant position.
11. Discoms procure and install meters for the consumers from an empanelled list of manufacturers/vendors. Consumers can purchase directly from this empanelled list or from the Discoms. Dominance of Discoms in the meter market is attributed to the restricted purchases of BIS meter from the panel.
12. It is essential to assess dominance in terms of the factors listed in Section 19(4) of the Competition Act, 2002. As borne out in the evidences gathered by the DG, the DISCOMs virtually control the entire market share within their areas of operation in supply of BIS approved meters. This is cogently substantiated by the following figures. Only 1 customer in the case of NDPL out of the customer base of 11 lakh, only 49 in case of BRPL out of customer base of 16 lakh and only 68 customers in case of BYPL out of a customer base of 15 lakh consumers have procured meters from the approved vendors of manufacturers empanelled by them. This makes it amply clear that in terms of market share, the DISCOMs enjoy dominance in the supply of BIS approved meters to the final consumers.



13. With the exclusive licensing and regulations entitling DISCOMs for testing, sealing and installing the meters, they enjoy distinct commercial advantages over the approved vendors/manufacturers.
14. The current composition of supply sources of meters by the end consumers and given the structure of electricity markets where open access yet remains to be operational, consumers' dependence on the DISCOMs is beyond dispute.
15. Given that the entry of a particular vendors/manufacture of meters in a licence area is contingent upon the respective DISCOM's approval and keeping in view the low level of awareness among consumers of their right to buy meters from the open market, there are entry barriers in the retail supply of meter market.
16. The DG report avers that the low level of awareness of end consumers as regards Regulation 35 have enabled the Discoms to operate independently of market forces.
17. Based on the above analysis, it can be stated that the Discoms enjoy a dominant position in the market for supply of BIS approved meters to the end consumers in Delhi.

Determination of Issue No. 3

18. Are the Discoms indulging in 'Abuse of Dominance' (AoD) in the meter market? Having concluded on the dominance of the Discoms in the market for meters, it is now to be examined whether by any of their conduct or practice they have abused their dominant position leading to distortion of market or foreclosure of competition.
19. The fact that an enterprise holds a dominant position is in itself not a contravention of the law. It is not the dominance, but its abuse, which is prohibited in the law. Abuse of Dominance is dealt with in Section 4 of the



Competition Act and the allegation under consideration is with respect to the contravention of Section (4)(2)(a)(i) and (ii), which state that

“there shall be an abuse of dominant position if a dominant enterprise or group directly or indirectly imposes unfair or discriminatory (i) condition in purchase or sale of goods or service; or (ii) price in purchase or sale (including predatory price) of goods and services.”

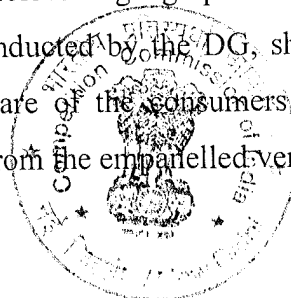
20. The informants allegation of violation of Sec (4) is with regard to i) unfair condition in the purchase of meters sold by the Discoms and ii) unfair condition in the supply of electricity on account of the presence of fast running of meters.

21. Further, it has been alleged that competition in the meter market has been foreclosed by the Discoms, which amounts to contravention of Section 4(2) (c) of the Competition Act, which states that

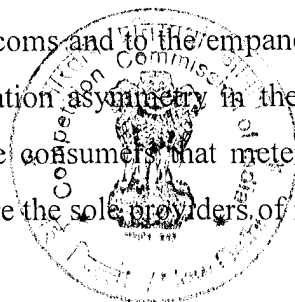
“there shall be an abuse of dominant position if a dominant enterprise or group, indulges in practices resulting in denial of market access (in any manner)”

22. Central to the argument of AoD (u/s Sec 4) by the Discoms is that of consumer choice and its exercise which is allegedly lacking. Evaluating the role and requirement of ‘consumer choice’ in the meter market is necessary to establish AoD.

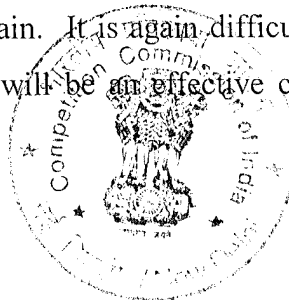
23. Regulation 35, permits consumers to procure meters from any manufacturers as long as they conform to the BIS approved standards. The actual purchase pattern of meters in the three relevant geographic markets in Delhi, as revealed by the investigation conducted by the DG, shows that in each of these areas only a miniscule share of the consumers purchase their own meters, and these purchases are from the empanelled vendors.



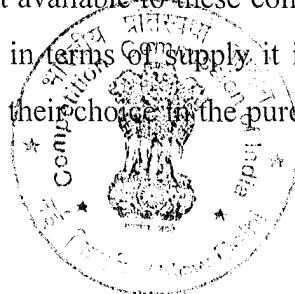
24. The survey conducted by the DG indicates that consumers are not aware of the possibility of buying the meters directly from the market or about the existing enabling regulations. It was found that less than 20% of the users are aware that they can purchase the meter from an independent vendor/agency other than Discoms.
25. The low level of awareness amongst the consumers, according to DG, can be attributed to the inadequate efforts made by the Discoms for educating the consumers regarding the existing regulations and their right to buy meters conforming to the BIS approved standard, i.e., IS 13779:99. Till the investigation conducted by DG, the websites and publicity campaigns were stating that a consumer may procure a meter only through vendors certified by the licensee, which amounts to distortion of the regulatory provisions. A list of such certified vendors was displayed on some of the websites. When there are as many as 200 licensed manufacturers of the BIS approved meters in the country and 10 of them have been given license to manufacture meters in Delhi itself, the lists posted on the website was restricted to only select manufacturers/vendors, say 4 in some cases.
26. In the Connection forms posted on the websites of the NDPL, BRPL and BYPL, choice of meter did not feature at the time of the investigation. The forms displayed on the websites on November 19, 2010 also did not specifically mention the options open to consumers. It is however, shown in the forms submitted by the Discoms before the Commission.
27. The factors enumerated in the preceding paragraphs, substantiate the fact that despite regulatory provisions, the consumers are unable to exercise their choice as the market is restricted to the Discoms and to the empanelled list specified by the Discoms. The prevalent information asymmetry in the market leads to the widely held presumption among the consumers that meters and electricity are bundled products and the Discoms are the sole providers of it.



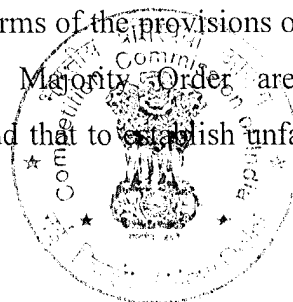
28. Nevertheless, it is important to examine whether given a choice, the consumers would have opted for purchasing their own meters. Consumer decisions are guided by several considerations, which inter-alia include, price, preference, convenience, specifications, quality and reliability, after-sales service etc.
29. Firstly, bulk purchase by the Discoms enables them to get a discount on the price of meters. It is unlikely that individual purchases will be entitled to such discounts. There is no denying that a consumer buys or has the incentive to buy the meters from the market if there is a price or quality differential between the two sources, i.e., Discoms and other vendors/manufacturers and only if the differential is wide enough to cover for any transaction cost that a consumer will need to incur from buying from the market rather than the supplier of electricity. No such facts pertaining to price differential has been brought on record. It cannot be conclusively stated that consumers will gain from lower prices in the market if they are given the choice to switchover from Discom to the manufacturers/vendors.
30. Secondly, a consumer pays a nominal rental if the Discom fixes the meter. The meter rental is a part of the fixed cost in a tariff schedule. A part of security deposit collected from consumer is also towards cover of cost of meter purchase. The meters are listed on the asset register and the Discom gets the benefit of depreciation. The pricing of meters, the cost of services are all part of rate fixation and tariffs are finalized by DERC. In the present case, if the consumer purchases the meter on his own, he does not get any rebate in the fixed monthly charges or upfront deduction in the first bill for cost of meter as per the information available in the public domain. It is again difficult to conclusively state that consumer's choice in meters will be an effective choice due to cost differential.



31. The issue whether a consumer will exercise his choice is also guided by several other conditions including that of convenience and maintenance. If a meter burns down when the Company provides for it, then for the first burn-out it is replaced free of cost by the company. For the next burn-out the consumer is required to pay for the meter. However, there is no mention that similar facility will be available to the consumer in case he purchases the meter on his own. The fact that the right to test, install and seal the meters lie with the Discom, as per the existing regulations too adds to the convenience quotient for consumers for buying the meters from the Discom rather than getting it from vendors/manufacturers. It is also feared that consumers may face procedural hassles and delay in getting the meter tested and sealed in case of procurement of meters from open market.
32. The DG's conclusion however, that the practices followed by the three Discoms amounts to abuse of dominant position wherein they have indirectly imposed unfair conditions on the purchase of meters by making the consumers believe that meters are to be bought mandatorily from the Discoms as part of the electricity supply may perhaps be a rather simplistic approach. The absence of information as regards consumer choice cannot be categorized as abuse of dominance.
33. All evidence proves to the point that consumers do not gain from purchasing on their own. Discoms by including the price within the tariff and by providing certain additional facilities as free testing and free first burn out replacement tend to dampen consumer initiatives.
34. The NCR region consists largely of household consumers and commercial establishment. Open Access is not yet available to these consumers. In terms of quantum of electricity consumed and in terms of supply it is very unlikely that consumers will be inclined to exercise their choice in the purchase of meters.



35. The informant has additionally alleged that the Discoms have through their conduct restricted the market for meters and denied access of the NCR meter market to eligible manufacturers other than the handful of specified manufacturers/vendors. Competition has been hindered through erection of entry barriers. Foreclosure of competition was examined in the light of existing 200 meter manufacturers in the country. The argument that listing on website provides publicity only to a few manufacturers is not a sufficient ground to suggest foreclosure. Empanelment does not deny other manufacturers entry in the meter market of Discoms as the list of vendors is revised at regular intervals. Vendors are selected on the basis of competitive bidding. An all India meter market in which large number of manufacturers catering to the needs of Discoms all over the country makes the market competitive.
36. On the basis of the facts and the analysis outlined it is difficult to establish that Discoms are indulging in foreclosure of competition in the meter market of the NCR region.
37. There is one further issue that this supplementary would like to comment on namely, on the issue of fast running meters which relates to meter functioning and servicing of meters that falls in the domain of distribution and supply of electricity business. The Commission in their Order u/s 26(i) had specifically mentioned that the investigation examine the matter of fast running reports as it is matter of long standing public concern.
38. Fast running meters result in inflated bills for the consumer. For the Discoms it shows up as lower commercial and transmission & distribution losses. Consumers may end up paying more than what they are consuming.
39. The Majority Order on the aspect of fast running meters observed that on the basis of the facts and circumstance of the case it cannot be said that the Discoms have abused their dominant position in terms of the provisions of section 4 of the Act. While the observations of the Majority Order are valid, in this supplementary Order we only wish to add that to establish unfair practice under



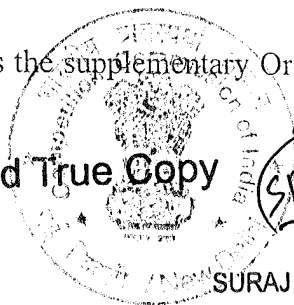
the Competition Act it has to be shown that the fast running meters are beneficial to Discoms.

40. Discoms maintain that all fast running meter complaints are examined and rectified if found inaccurate on testing. They also contend that in a regulated market where tariffs are fixed by the DERC no gains accrue to them from fast-running meters as it is eventually adjusted while fixing tariffs.

41. In the light of foregoing discussion this supplementary Order comes to the conclusion that no case of violation of Section 4 of the Act is established even in the relevant meter market.

42. In view of the above findings the supplementary Order is in effect in agreement with the Majority Order.

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26/5/2011
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