Before the Competition Commission of India
Reference No. 01/2011

14.03.2011

Referring Authority:

Maharashtra Electricity Regulatory Commission

OPINION
UNDER SECTION 21 OF THE COMPETITION ACT, 2002

The Maharashtra Electricity Regulatory Commission ("MERC") has filed a Reference under the proviso to sub section (1) of Section 21 of the Competition Act, 2002 on February 1, 2011 seeking opinion of the Competition Commission of India ("the Commission") on a set of issues that arose before the MERC during the course of proceedings in Case No. 13 of 2010, which in view of the MERC may prima facie be in contravention of the provisions of the Competition Act, 2002.

The aforementioned Case No. 13, 2010 was initiated by the MERC pursuant to a Memorandum issued by the Government of Maharashtra on May 7, 2010. The MERC, vide the said Memorandum, was directed by the state government to take suitable measures at the earliest in public interest in respect of the dispute regarding supply of electricity from Tata Power Company Limited to Reliance Infrastructure Limited.

1. FACTS OF THE REFERENCE

1.1 The "MERC" is a State Commission established by the State Government of Maharashtra under Section 17 of the Electricity Regulatory Commissions Act 1998, and functioning as such before the date of coming into force of the Electricity Act, 2003 ("EA 2003") and as such is the State Commission for the purposes of the EA 2003 in terms of Section 82 thereof. The MERC exercises functions and powers as a regulator in the State of Maharashtra with regard to Electricity.

1.2 In the Reference filed on February 1, 2011, the MERC has delineated the proposed decisions with respect to the identified issues, in accordance with the requirements of Section 21 of the Competition Act, 2002. The issues and the decisions proposed by the MERC in the Reference are presented below:

a) Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Generation Business?

> *"..as per the criteria laid down for the identification of the relevant geographic market, the market for Generation Business is the entire country, since the conditions of competition for supply of goods or demand of goods is distinctly homogenous throughout the country, and considering the absence of any regulatory trade barriers."*

b) Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Distribution Business?

> *"..as per the criteria laid down for identification of the relevant geographic market, the market for Distribution Business is the Mumbai distribution licence area, since the conditions of competition for supply of*

goods or demand of goods is distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas, considering the regulatory trade barriers and specific licence conditions."

c) Whether the following decision is contrary to the Competition Act, 2002 for determining whether TPC or RInfra can be said to be a dominant position in the Generation Business?

"It is obvious that neither TPC nor RInfra can be said to have a dominant position in the Generation Business in the relevant market."

d) Whether the following decision is contrary to the Competition Act, 2002 for determining whether TPC or RInfra can be said to be a dominant position in the Distribution Business?

"In terms of consumer reach and connectivity, RInfra could be said to be in a dominant position". And "On the parameter of power purchase cost, TPC has access to sufficient quantity of own generation at the present moment, and the average cost of power procurement of TPC is lower than that of RInfra. Also, on the parameter of tariff, TPC could be said to be in a dominant position in the relevant market for the Distribution Business."

1.3 The facts of the case as stated in the Reference are that the Mumbai region of the Maharashtra state has four distribution licensees to distribute electricity within the areas specified in their respective licences. The licensees are: a) Brihan Mumbai Electricity Supply and Transport Undertaking ("BEST"), b) Reliance Infrastructure Ltd. (Distribution business),("RInfra–D"), c) The Tata Power Company Ltd. (Distribution business) ("TPC-D"), and d) Maharashtra State Electricity Distribution Co "). Ltd. ("MSEDCL").

1.4 In Mumbai Island City of South Mumbai area (Island city, approx. from Colaba to Sion & Mahim), TPC-Distribution and BEST of the Mumbai Municipal Corporation are authorised under their respective licences to distribute electricity in retail to consumers. In Mumbai Suburbs of North Mumbai and Suburban areas, (From Bandra to Dahisar, Mira, Bhayander & Chunabhatti to Mankhurd and Vikhroli) TPC-Distribution, RInfra are authorised under their respective licences to distribute electricity in retail to consumers. In remaining parts of Mumbai Suburbs i.e. Kanjurmarg onwards to Mulund, MSEDCL is authorised under its licence to distribute electricity to retail consumers. MSEDCL is the sole Distribution Licensee in the remaining part of Maharashtra except Mula Pravara area of Ahmadnagar district.

1.5 The entire city of Mumbai consists approximately of 44 lakh consumers. The total demand in the city of Mumbai is 3281 MW peak demand (including MSEDCL's Mumbai Suburban demand).

1.6 The statistics relating to the number of consumers served by the aforesaid four entities are 30.30 lakhs by RInfra, 9. 80 lakhs by BEST and 1.63 lakhs by TPC (this figure of TPC as per the Reference is growing as consumers are switching to TPC from RInfra in Mumbai Suburbs); and 2.59 lakhs by MSEDCL in the part of Mumbai suburban area.

1.7 The statistics relating to the existing Peak Demand at Generation-Transmission Interface of the aforesaid four entities are 1575 MW of RInfra, 925 MW of BEST, 602 MW of TPC (including about 160 MW due to migration of consumers), 179 MW of MSEDCL in the part of Mumbai suburban area (i.e. Kanjur, Bhandup and Mulund).

1.8 The statistics relating to the number of low end consumers (largely domestic consumers with less than 300 units consumption) served by the aforesaid four entities are 22 lakhs by RInfra, 6 lakhs by BEST, negligible by TPC, and 25,000 by MSEDCL in the part of Mumbai suburban area (i e Kanjur, Bhandup and Mulund).

1.9 As per the latest procurement data furnished in the Reference, TPC Distribution is procuring 647 MW from its own generating stations, BEST is procuring 932 MW from TPC through long term Power Purchase Agreement (PPA) and RInfra procures 500 MW from its own generating station, 200 MW from TPC and 875 MW from other sources.

1.10 Increased energy procurement from external sources by RInfra on short term basis has increased its power purchase cost and consequently the retail tariff of RInfra has witnessed a sharp increase. Owing to the tariff differential between RInfra and TPC –D, bulk subsidizing consumers have been shifting to TPC –D in huge numbers. As per the Reference dated August 2, 2010, 60,000 consumers have shifted to TPC-D in the first nine months of operationalisation of open access.

1.11 The Memorandum issued by the Government of Maharashtra, based on which Case No. 13/2010 was initiated by the MERC has been set aside by the Hon'ble High Court of Judicature at Bombay vide a judgment dated January 18, 2011 on a Writ Petition No. 71 of 2011 filed by Tata Power Company Ltd on May 19, 2010. In the said judgment, the Hon'ble High Court held that the memorandum issued by State Government was ultra vires and would have to be quashed and set aside. MERC would be at liberty to consider whether a case has been made out for the exercise of its statutory or regulatory powers independent of the Memorandum dated 7 May 2010.

1.12 Pursuant to the aforesaid High Court Judgment issued on January 18, 2011, TPC vide its letter dated January 25, 2011 put RInfra on notice that it (TPC – Generation) will discontinue 198 MW capacity with effect from 00:00 hrs on February 2, 2011. In the said letter TPC further mentioned that if RInfra has requirement of power, TPC-Generation can offer supply from Unit 6 (whose capacity is contracted by TPC-D and which is presently shut down for scheduled maintenance) at regulated rate till March 31, 2011.

1.13 As per the Reference, in the aforesaid proceedings of Case No 13 of 2010, RInfra has alleged that TPC attempted to perpetuate its unassailed dominant and monopolistic position in regard to bulk supply of electricity within the city and suburbs of Mumbai. RInfra has stated that it is aggrieved with TPC's unwillingness to contract electricity of the quantum of 500 MW after the passage of the judgment of the Hon'ble Supreme Court dated 6th May 2009 in Civil Appeal No 3510/11 of 2008, holding that TPC being a generating company cannot be directed under Section 23 read with Section 86(1)(b) of the EA 2003 to supply electricity to a particular distribution licensee in absence of a contract (power purchase agreement).

1.14 Further, RInfra has alleged that TPC has emerged as the monopoly so far as supply of electricity to Mumbai consumers is concerned, after the Hon. Supreme Court's judgment dated 8th July 2008 in Civil Appeal No. 2898 of 2006, holding that TPC-D was entitled to supply electrical energy in retail, directly to all consumers within its area of supply, as stipulated in its licences, thereby confirming TPC-D as a distribution licensee for the entire city of Mumbai (excluding the areas served by MSEDCL); RInfra's contention is that it has a legitimate expectation of being supplied with electricity by TPC to meet its consumers demand in view of supply of electricity by TPC to RInfra for the past 80 years and in view of certain assurances made by TPC to RInfra.

1.15 It has also been alleged by RInfra that it was deprived from putting up additional generation capacity due to certain actions of TPC and was led to believe that TPC would continue to supply electricity to RInfra for the purpose of supply to consumers in Mumbai. RInfra has sought appropriate orders directing TPC to enter into a PPA with RInfra for 600 MW including 100 MW from TPC' s Unit No 8 at regulated rates.

1.16 As per the Reference, TPC, in their submissions, pointed out that of the entire installed generation capacity in India of 1,63,000 MW, its share is only a minuscule at 3,000 MW. Tata Power is an insignificant player. In the merchant power market it trades 1.3 billion units out of 60 billion units traded in India in the short term market, and in distribution segment TPC being a new entrant is facing competition for the first time.

1.17 TPC has further submitted that post EA 2003, there were no hurdles for RInfra to set up new capacity. In last 7 years RInfra did not set up a single MW capacity. Every Distribution licensee is to mandatorily have a long term PPA for meeting the requirements of its consumers. There is no obligation on RInfra to off-take power from TPC. From the year 2003 till 2006 Tata Power pursued with RInfra to sign a Long term PPA with a "take or pay" obligation with Tata Power; RInfra continued to evade the issue on one pretext or the other.

1.18 It has been submitted by TPC that as a prudent step, Tata Power in order to minimize its business risk tied up 800 MW with BEST while keeping 477 MW for its own requirements (i.e TPC Distribution), still keeping options of 500 MW for RInfra. RInfra instead of securing the available 500 MW chose the litigation path to insist it's right on Tata Power's generation capacity without any commercial PPA as required under the EA 2003.

1.19 TPC further added that there was a troublesome commercial relationship between the parties. Given Tata Power's growing requirement for its own retail consumers (ie. TPC Distribution), Tata Power has decided to sever relation with RInfra. TPC had accommodated RInfra and asked them to arrange for its own power from 1st April 2010. RInfra's failure casts burden on its consumers and Tata Power is not responsible for present state of affairs of RInfra. Tata Power had no role and authority in preventing capacity creation by RInfra.

1.20 It has been further alleged by TPC in the Reference that by preventing Tata Power from expanding its retail business and network expansion RInfra has actually abused its dominance as a distribution licensee. By seeking to apply cross subsidies, RInfra is seeking to prevent consumer choice being exercised.

2. INQUIRY INTO THE REFERENCE

In order to form an opinion on each of the decisions proposed by MERC, the issues placed before the Commission need to be examined in light of the facts and figures provided by MERC in the Reference, the relevant provisions of the Competition Act, 2002 and in the context of the evolving market dynamics in the electricity sector in India.

2.1 Relevant Market for Electricity Generation Business

2.1.1 The relevant provisions of the Competition Act, 2002 are as follows:

Section 2 (r) of the Competition Act, 2002 defines "relevant market" as *"the market which may be determined by the Commission with reference to the relevant product market or the relevant geographic market or with reference to both the markets;"*

As per **Section 2(s)** of the Act, *"relevant geographic market means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas;"*

Section 2(t) of the Act defines the "relevant product market" as *" a market comprising all those products or services which are regarded as interchangeable* *or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use;"*

As per Section 19 (7) of the Act, the factors that are to be considered by the Commission while defining the relevant product market are:

(a) Physical characteristics or end-use of goods;
(b) Price of goods or service;
(c) Consumer preferences;
(d) Exclusion of in-house production;
(e) Existence of specialized producers;
(f) Classification of industrial products.

Further, as per Section 19(6) of the Act, the factors that are to be considered by the Commission while defining the relevant geographic market are:

(a) Regulatory trade barriers;
(b) Local specification requirements;
(c) National procurement policies;
(d) Adequate distribution facilities;
(e) Transport costs;
(f) Language;
(g) Consumer preferences;
(h) Need for secure or regular supplies or rapid after-sales services.

2.1.2 Electricity is characterized by the technical features of 'non-storability' and 'non – substitutability for end users'. The EA 2003 defines Electricity as "electrical energy – (a) generated, transmitted, supplied or traded for any purpose or (b) used for any purpose except the transmission of a message." Electricity so defined and in terms of its technical characteristics, is not interchangeable with any other product (in view of the volumes under consideration). However, the electricity business is segmented into generation, transmission, distribution and retail supply, each stage/segment of the supply chain being characterized by distinct competitive dynamics and governed by different regulatory requirements. Therefore electricity markets at the different stages of the supply chain cannot be clubbed together as a single relevant product market for electricity.

2.1.3 In the Reference, the Generation business has been described separately. For reasons discussed below, the relevant product market for generation business will encompass generation as well as wholesale supply of electricity. The supply side in the wholesale electricity market comprises the Central Generating Stations, State Generating Stations, Independent Private Producers and Surplus Captive Power producers; while the demand side is represented by licensed distributors, traders, SEBs and bulk consumers (the Electricity Act 2003 allows generators to supply directly to bulk consumers (> 1 MW) apart from the licensees). Traders play a role in the wholesale market both in the demand as well as in the supply side by playing on trading margins. Demand for bulk power is thus met out by all the supply side participants in the wholesale supply market. Therefore, **"Generation and Wholesale supply of electricity"** constitutes one separate relevant product market.

2.1.4 The scope of the geographic market for generation and wholesale supply of electricity has to be defined keeping in view the extant legal and regulatory framework for generation and the actual trends and patterns in wholesale transaction of electricity in the country. The EA 2003 put in place a liberalized framework for power generation in India. There is no license requirement for setting up a power generating plant post EA 2003. Section 7 of the Act states that

> *"Any generating company may establish, operate and maintain a generating station without obtaining a licence under this Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of section 73."*

As per Section 9 of the EA, 2003,

> *" notwithstanding anything contained in this Act, a person may construct, maintain or operate a captive generating plant and dedicated transmission lines*
>
> *Provided that the supply of electricity from the captive generating plant through the grid shall be regulated in the same manner as the generating station of a generating company."*

2.1.5 The Eleventh Plan envisaged capacity addition of 78,700 MW, of which 32,032 MW has been achieved till 31 December, 2010 and projects with a capacity of 30,725 MW are under construction. Four Ultra Mega Power Projects, i.e. Sasan in Madhya Pradesh, Mundra in Gujarat, Krishnapatnam in Andhra Pradesh and Tilaiya in Jharkhand have been transferred to the identified developers and are at different stages of implementation.

2.1.6 The energy generated from a generating station can be sold anywhere in the country, using open access provisions in the transmission grid. The generator's supply domain is not restricted to the state in which it is located; it can cater to distribution companies/traders/retail consumers (>1 MW) across the country Several private sector generating stations are selling their power on merchant basis and through the power exchange, to various entities even outside the state in which they are located. There is no compulsion on the procurers also to meet their demand from the generating stations situated in their respective states or regions

2.1.7 The Central Government has notified Competitive Bidding Guidelines (CBG) for Case I type (independent of location and fuel) and Case II type (location and fuel specific) Under Case I type bidding process, the generating station can be located anywhere in the country and power can be supplied at the interconnection point specified by the procurer. As per the Reference, in the State of Maharashtra, MSEDCL has tied up around 5025 MW of capacity through long term PPA, based on Case I type bidding process. RInfra has also undertaken the process to procure power on medium term (up to 7 years) and long term basis under Case I type competitive bidding process.

2.1.8 The integration of the regional grids and continued augmentation in transmission capacity of the inter-state transmission network has paved the way for the generators to provide secure and regular supply to remote purchasers According to the Economic Survey 2010-11, the capacity of the transmission network is about 22,400 MW. The existing network connects the northern, western, eastern and north eastern regions in synchronous mode operating at the same frequency and the southern region in asynchronous mode. This has enabled inter-regional energy exchanges of about 38,000 million units in 2010-11(till November 2010). Power generators can now contractually serve distant consumers using the integrated transmission infrastructure. Owing to the open access provisions in inter-state transmission, 18,218 transactions took place in 2009-10 at inter-state level. The Central Transmission Unit reportedly has received 225 applications from private developers for long-term open access amounting to 1,62,898 MW.

2.1.9 The rapidly developing transmission system at the inter-state level has been a key factor in the evolution of electricity trading in the country. Trading has been recognized as a distinct activity in the EA 2003.The CERC has so far granted 47 inter-state trading license, of which 38 were in existence as on December 31, 2010. The table below gives the year wise details of electricity trading by licensed inter-state traders, in terms of volume and price.

Electricity Trading

Period	Volume of Electricity traded (MUs)	Weighted average sale price (Rs/kwh)
2005-06	14,188.8	3.23
2006-07	15,022.74	4.51
2007-08	20,964.77	4.52
2008-09	21,916.92	7.29
2009-10	26,819.15	5.26
2010-11 Up to 31st Oct, 2010	18,150.04	5.17

Source Economic Survey 2010-11

2.1.10 It is therefore observed that due to the enabling legislations, improvement in inter-state transmission infrastructure and organized power trading, the wholesale market for electricity in India is in the process of evolving into an integrated, multi buyer, multi-seller framework from state specific single buyer model Nevertheless, the wholesale/bulk electricity market in India is still dominated by long term contracts, more than 90% of the power generated in the country being transacted through long term power purchase agreements (PPAs) between generators and purchasers. Long term PPAs are considered preferred mode for capacity contracts in order to secure stability in both demand and supply, which is particularly important for the non-storable nature of electricity Such contracts also ensure predictability of prices for both producer and purchaser, thus creating a conducive environment for investment. However, the long term PPAs are not geographically bound. Less than 10% of the wholesale power is traded in the short term markets, trading margins are regulated by the Central Electricity Regulatory Commission. As can be seen in the table above, the volume of inter-state transaction through trading is many times more than the quantum of power which is under dispute in the current case.

2.2 Relevant Market for Electricity Distribution Business

2.2.1 Under the current legislative structure, Distribution of Electricity is a licensed business. There is no separate mention of license for retail supply in the Electricity Act, 2003. The accepted practice is that the incumbent distribution licensee supplies to retail consumers as part of the distribution license to form a combined Distribution and Retail Supply Licence. Thus, the relevant product market for distribution business is 'Distribution and Retail Supply of Electricity'.

The Electricity Act, 2003 defines distribution licensee as follows:

> *"distribution licensee means a licensee authorized to operate and maintain a distribution system for supplying electricity to the consumers in his area of supply"*

Distribution system is defined as:

> *"distribution system means the system of wires and associated facilities between the delivery points on the transmission lines or the generating station connection and the point of connection to the installation of the consumers"*

2.2.2 International experience suggests that competition in the electricity sector is typically introduced in phases. The state owned integrated entities are first unbundled into separate generation, transmission and distribution entities. Private investment is encouraged in generation and a competitive multi-buyer, multi-seller framework is created in the wholesale market of electricity as the next step The distribution, transmission infrastructure is usually retained as a monopoly to avoid duplication of assets; however certain segments of the distribution business such as retail supply have scope for introducing competition. Reform efforts at the retail end have therefore largely focused on the separation of the wires/infrastructure business and the retail supply business, and introduction of competition in the retail segment with regulated tariffs in the natural monopolies.

2.2.3 In India the distribution licensee is defined to pursue a unified activity comprising owning of wires as well as retail supply. The Act does not envisage separate retail supply licensees as observed in some other countries. The EA, 2003 created a competitive framework for distribution of electricity, by offering options to consumers, through the provisions of open access and multiple licensees in the same area of supply. In case of open access, the Act has given the State Commissions discretion for introduction of open access in phases, subject to conditions as specified by the Commissions. The relevant provisions of the Act are as given below:

> *" " open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission;"*

> *"The State Commission shall introduce open access in such phases and subject to such conditions, (including the cross subsidies, and other operational constraints) as may be specified within one year of the appointed date by it and in specifying the extent of open access in successive phases and in determining the charges for wheeling, it shall*

have due regard to all relevant factors including such cross subsidies, and other operational constraints:.."

2.2.4 Open access implies that consumers within the supply area of a distribution licensee can secure power even from sources other than the incumbent licensee. There can be direct commercial relationship between a bulk consumer and a generating company without any commercial engagement of distribution licensee and only the transmission and wheeling charges with surcharge would be regulated.

2.2.5 The other key provision of the EA 2003 with respect to competition in distribution is that of multiple licensees in the same area of supply through their independent distribution systems. In case of multiple distribution licensees, the relevant provision of the Act is:

> *"Provided also that the Appropriate Commission may grant a licence to two or more persons for distribution of electricity through their own distribution system within the same area, subject to the conditions that the applicant for grant of licence within the same area shall, without prejudice to the other conditions or requirements under this Act, comply with the additional requirements (including the capital adequacy, credit-worthiness, or code of conduct) as may be prescribed by the Central Government, and no such applicant who complies with all the requirements for grant of licence, shall be refused grant of licence on the ground that there already exists a licensee in the same area for the same purpose:..."*

2.2.6 The market of 'distribution and retail supply of electricity' comprises of end users/retail consumers on the demand side and the supply side is represented by distributing companies, generators and traders. The EA 2003 enables the retail consumers (> 1 MW) to buy electricity from any of these three groups of suppliers. Distribution companies obtain distribution license for a particular territory, develop, operate and maintain distribution networks in the licensed territory. Any supplier of electricity, be it a generating company, trading company or another distributing company, can cater to retail consumer using the distribution networks, paying appropriate wheeling charges to the respective distribution licensee. Retail tariffs for distribution licensee are fixed by regulatory commissions on basis of Annual Revenue Requirements (ARRs) of distribution licensees.

2.2.7 The scope of geographic market for distribution and retail supply of electricity in the present case needs to be determined in the above context. As we are given to understand by the information detailed in the Reference, the Mumbai region of the Maharashtra state can be sub-divided into three distribution license areas –

a) Mumbai island city – served by Brihan Mumbai Electricity Supply and Transport Undertaking ("BEST") and TPC –D

b) Mumbai suburb (except Mulund and Bhandup) – served by Reliance Infrastructure Ltd (Distribution business), ("RInfra–D") and TPC-D

c) Mumbai Suburb (Mulund & Bhandup) - served by Maharashtra State Electricity Distribution Co. Ltd. ("MSEDCL")

2.2.8 As per the Reference, while M/s BEST, RInfra-D, and MSEDCL operate within specific distribution licence areas allocated to them, distinct from each other, TPC-D, on account of its historical background and the Supreme Court judgment delivered on 8th July, 2008, is licensed to distribute power in the entire Mumbai region excluding all areas served by MSEDCL.

2.2.9 The MERC, in their Reference, has pointed out that distribution being a licensed activity only licensee is authorized to operate within the territory specified in its license. It now remains to be examined whether the conditions of competition prevailing in the three distribution license areas are homogeneous or not. The Section 42(3) of the Electricity Act, 2003 states that local authorities engaged in the business of electricity distribution are exempt from open access obligations,

> *"Where any person, whose premises are situated within the area of supply of a distribution licensee, (not being a local authority engaged in the business of distribution of electricity before the appointed date) requires a supply of electricity from a generating company or any licensee other than such distribution licensee, such person may, by notice, require the distribution licensee for wheeling such electricity in accordance with regulations made by the State Commission and the duties of the distribution licensee with respect to such supply shall be of a common carrier providing non-discriminatory open access ."*

2.2.10 MERC, being the State Commission in Maharashtra has issued Regulations in accordance with the above provision. Regulation No. 19 of MERC Regulations, 2005 mentions that the open access provisions shall not apply to a 'local authority' engaged in the business of distribution of electricity. Further, in the Reference to the Commission dated August 2, 2010, the MERC mentioned, *"due to a statutory exemption granted to BEST under Section 42(3) of the EA 2003, BEST is not liable or responsible to provide its distribution network access to TPC or any consumer to receive power from TPC or anybody else, unlike the scheme of changeover of consumers from RInfra to TPC with the use of RInfra's existing distribution network."* TPC-D however can cater its customers in the overlapping area of its license with the BEST through its own distribution network being the parallel licensee. In the area served by MSEDCL, a monopoly situation prevails in absence of any parallel distribution licensee. On the other hand, in the Mumbai suburb (common supply area of RInfra and TPC-D), under the current regulatory framework specified by MERC vide its order dated October 15, 2009, **any and all** consumers are permitted to changeover to TPC, as TPC is also a distribution licensee in the same area of supply.

2.2.11 The three distribution areas within the Mumbai region therefore cannot be clubbed into a homogenous relevant geographic market for distribution of electricity. Rather, each licensed distribution areas should be looked at as a distinct relevant geographic market, the boundaries of the markets being co-terminus with the territory specified in the respective licenses.

2.3 Dominance of TPC or RInfra in the Generation Business

2.3.1 In the Competition Act, 2002, "dominant position" has been defined in Explanation (a) to Section 4 -

"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"

Further, as per Section 19(4) of the Act,

"the Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely:—

(a) market share of the enterprise;
(b) size and resources of the enterprise,
(c) size and importance of the competitors;
(d)economic power of the enterprise including commercial advantages over competitors,
(e)vertical integration of the enterprises or sale or service network of such enterprises;

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2.3 Dominance of TPC or RInfra in the Generation Business

2.3 1 In the Competition Act, 2002, "dominant position" has been defined in Explanation (a) to Section 4 -

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(a) market share of the enterprise;
(b) size and resources of the enterprise,
(c) size and importance of the competitors;
(d)economic power of the enterprise including commercial advantages over competitors,
(e)vertical integration of the enterprises or sale or service network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry

2.3.2 Dominance of an enterprise is essentially to be assessed within the defined relevant market. The relevant market in the present context is 'Generation and Wholesale supply of electricity in India'.

2.3.3 The total electricity generating capacity in the country stood at 170,228.86 MW as on 31st January 2011. As per the Reference, TPC's total installed generation capacity is 2027 MW in Mumbai and around 950 MW in other parts. RInfra's total installed generation capacity is 500 MW near Mumbai and around 1033 MW in other parts. Therefore, each firm enjoys an insignificant market share in the relevant market.

2.3.4 Further, in the rapidly evolving structure of the wholesale market post EA, 2003, demand for wholesale electricity of a distribution company/trader/retail bulk consumer can be met by multiple sellers, i.e., generators/surplus captive producers/traders, not only from the respective state or region but from across the country. The integrated transmission network has enabled inter-state exchange in electricity as elucidated earlier. Even the spikes in peak demand can be met from the short term power market. In such a scenario and in an all India wholesale market, neither of the enterprises can be said to be in a position where they enjoy or exercise market power.

2.4 Dominance of TPC or RInfra in Distribution Business

2.4.1 Dominance of an enterprise in a relevant market needs to be assessed in totality, taking into account all possible factors that may enable or constrain it to operate independently of the competitive forces or affect its consumers, competitors or the relevant market in its favour. The relevant market here is 'Distribution and Retail Supply of Electricity in Mumbai Suburbs (excluding areas served by MSEDCL'

2.4.2 Let us first examine the question of dominance of RInfra, which is the incumbent in the relevant market. As has been brought out in the Reference, in terms of consumer base, RInfra is way ahead of TPC-D, which so far is the only competing firm in the relevant market RInfra caters to a consumer base of 30.30 lakh, as compared to 1.63 lakh consumers served by TPC-D (this includes consumers in the BEST area). If the consumer base is taken as the measure of market share, RInfra enjoys a majority share. Moreover, the existing peak demand at Generation-Transmission Interface for RInfra is 1575 MW whereas the corresponding figure for TPC-D stands at 602 MW. In terms of both the parameters, RInfra enjoys significant market share.

2.4.3 Further, being the distribution licensee, RInfra owns the majority of low transmission network of distribution infrastructure in the relevant geographic market. The size of their distribution network and customer base has enabled them to leverage economies of scale.

2.4.4 However, the large distribution network owned by RInfra has to be seen against the open access provisions extended to any and all including even consumers with less than 1 MW load by MERC. Under the current regulatory framework specified by MERC under its order dated October 15, 2009, **any and all** consumers in the areas of supply of RInfra are permitted to changeover to TPC, as TPC is also a distribution licensee in the same area of supply. TPC enjoys the benefit of lower input cost of power which gets reflected in lower retail tariffs in comparison to RInfra. About 60,000 consumers as per the Reference have already changed over to TPC and are receiving retail supply of electricity from TPC by using the distribution system of wires of RInfra on payment of wheeling charges etc. Large number of high load subsidizing consumers have switched from RInfra to TPC-D to gain from the tariff differential between the two.

2.4.5 When looked in conjunction with RInfra's disproportionately large number of low usage subsidized consumers, high power purchase cost and consequent high tariff, it cannot be said that RInfra enjoys significant market power in the relevant market. The very fact that owing to its high tariff, consumers are shifting to TPC-D corroborates the inability of RInfra to affect its consumers, competitors or the relevant market in its favour.

2.4.6 TPC is a recent entrant in the relevant market of Distribution and Retail Supply of Electricity in Mumbai Suburbs (excluding areas served by MSEDCL). As per the Reference, TPC has a retail consumer base of 1.63 lakh, which includes consumers served in the Mumbai Island city also. The existing peak demand at Generation-Transmission interface for TPC is 602 MW. The corresponding figures for RInfra in the relevant market are 30.30 lakh and 1575 MW respectively. Therefore, in terms of the parameters of consumer base, TPC's market share is less than 5% and in terms of peak demand, TPC's market share is less than 30%, which is significantly less than RInfra.

2.4 7 Owing to its vertically integrated structure, the distribution arm of TPC, i.e., TPC-D has access to low cost power generated by its own generating stations. Further, the distribution losses of TPC are substantially lower at 0.6% against more than 10% of RInfra, due to its High Tension Network in distribution infrastructure. These factors, coupled with the customer base comprising predominantly of the high power consuming subscribers with negligible consumers of subsidized class enable TPC to offer power to the retail customers at tariff rates lower than that offered in the relevant market by its competitor RInfra, which in absence of long term power purchase agreements, has been procuring power at higher cost through short term arrangements. As a result, about 60,000 consumers have already changed over to TPC and are receiving retail supply of electricity from TPC by using the distribution system of wires of RInfra on payment of wheeling charges etc.

2.4 8 However, whether TPC is in a dominant position in the relevant market which enables it to operate independently of competitive forces, need to be examined not in isolation but concurrently with the evolving market structures for wholesale and retail supply of electricity in the country. The recent levelised tariffs discovered in Case I and Case II bidding in the states and in the Ultra Mega Power Projects are lower than the power generation cost of TPC in most of the cases. In the Reference, it has been mentioned by the MERC that the prices discovered by RInfra for medium term power purchase through competitive bidding process for future supplies are lower than the power generation cost of TPC under the present regulated structure. The durability of relative commercial advantage of TPC on account of lower power input cost need to be assessed in the light of price discoveries in the wholesale electricity market and specifically the price discovered by RInfra for medium term power purchase.

2.4 9 Further, open access in the distribution network and the usage of inter-state transmission network as common carrier, provide the retail consumers (>1 MW) the choice to procure power from any source in the wholesale electricity market.

However, open access provision to retail consumers with less than 1 MW consumption allows choice among parallel distribution licensees in their area.

2.4.10 Therefore, the alleged commercial advantage currently enjoyed by TPC on account of comparatively lower power input cost cannot be seen as durable in the context of the developments in the wholesale/generation electricity markets. The situation prevailing in the relevant market encapsulates the process of evolution of competitive market structures in the power sector including regulatory challenges such as tariff rebalancing as also the impact of business strategies of the players in the relevant distribution and retail supply market.

3 OPINION OF THE COMMISSION

The Commission, based on an examination of the facts referred to in the Reference and the developments in the market structures in electricity in light of the provisions of the Competition Act, 2002, offers the following opinion on the decisions proposed by MERC with respect to the issues that arose during the course of proceedings in Case No 13 of 2010 as below:

3.1 **Issue** - Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Generation Business?

> *"..as per the criteria laid down for the identification of the relevant geographic market, the market for Generation Business is the entire country, since the conditions of competition for supply of goods or demand of goods is distinctly homogenous throughout the country, and considering the absence of any regulatory trade barriers."*

The Commission, taking into consideration the current organizational structure of electricity markets and the extant regulatory framework, defines the relevant product market as 'generation and wholesale supply of electricity market'. Further, with the advent of power trading, robust inter-state transmission system and statistics corroborating actual inter-state transactions in the wholesale market for electricity, the Commission concludes that the geographic scope for 'Electricity generation/ wholesale electricity market' is national or Pan India.

The Commission opines that the decision proposed by the MERC that the relevant geographic market for electricity generation (and wholesale supply) is the entire country is in accordance with the Competition Act, 2002.

3.2 **Issue** - Whether the following decision is contrary to the Competition Act, 2002 for determining the relevant market for Distribution Business?

> *"..as per the criteria laid down for identification of the relevant geographic market, the market for Distribution Business is the Mumbai distribution license area, since the conditions of competition for supply of goods or demand of goods is distinctly homogenous and can be distinguished from the conditions prevailing in the neighboring areas, considering the regulatory trade barriers and specific license conditions."*

In view of the facts and circumstances mentioned in the Reference, the Commission defines the relevant product market as 'distribution and retail supply of electricity'. Further, the three distribution areas within the Mumbai region are characterized by different competitive conditions and hence cannot be unified into a homogenous relevant geographic market for distribution of electricity. Rather, each licensed distribution area should be looked at as a distinct relevant geographic market, with the boundaries co-terminus with the territories specified in the respective licenses. In the context of the present case, the relevant geographic market is the Mumbai suburbs (excluding areas served by MSEDCL).

The Commission opines that the decision proposed by the MERC on the relevant geographic market for distribution business is not in accordance with the Competition Act, 2002.

3.3 **Issue** - Whether the following decision is contrary to the Competition Act, 2002 for determining whether TPC or RInfra can be said to be a dominant position in the Generation Business?

"It is obvious that neither TPC nor RInfra can be said to have a dominant position in the Generation Business in the relevant market."

Upon evaluation of the current structure of the electricity generation and wholesale supply in the country, taking a holistic view of the factors laid down in Section 19(4) of the Competition Act, 2002 and in view of the definition of dominant position in the explanation to Section 4 of the Act, the Commission is of the opinion that neither TPC nor RInfra is in a dominant position in the relevant market for "Generation and wholesale supply of electricity in India".

The Commission opines that the decision proposed by the MERC regarding the dominance of RInfra or TPC in the relevant market of generation and wholesale supply is not contrary to the Competition Act, 2002.

3.4 **Issue** - Whether the following decision is contrary to the Competition Act, 2002 for determining whether TPC or RInfra can be said to be a dominant position in the Distribution Business?

"In terms of consumer reach and connectivity, RInfra could be said to be in a dominant position". And "On the parameter of power purchase cost, TPC has access to sufficient quantity of own generation at the present moment, and

the average cost of power procurement of TPC is lower than that of RInfra. Also, on the parameter of tariff, TPC could be said to be in a dominant position in the relevant market for the Distribution Business."

Dominance has to be assessed within the meaning of Section 4 and Section 19(4) of the Competition Act, 2002 Upon consideration of the facts and circumstances in totality in the relevant market of distribution and retail supply in Mumbai suburb (excluding areas served by MSEDCL) and evolving structural changes leading to competition in the electricity markets, the Commission is of the opinion that neither of the enterprises, i.e., TPC and RInfra is in a dominant position in the relevant market.

The Commission opines that the decision proposed by MERC on dominance of TPC and RInfra in the relevant market for distribution and retail supply of electricity is not in conformity with the provisions of the Competition Act, 2002.

Secretary is directed to inform the MERC accordingly.

Certified True Copy

SP Gahlaut 28/3/2011

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