Case No. 37/2013

In Re:

West Bengal Power Development Corporation Limited
Through Mr. Amit Bhattacharya,
Company Secretary & GM(F&RA)
Address: Bidyut Unnayan Bhaban,
3/C, L.A. - Block, Sector III,
Salt Lake City, Kolkata - 700098. Informant

And

1. Coal India Limited
Head Office: 10, Netaji Subhas Road,
Kolkata, West Bengal - 700001.

2. Eastern Coalfields Limited
Sanctoria, P.O. Dishergarh,
Dt. Burdwan,
West Bengal

3. Bharat Coking Coal Limited
Koyala Bhawan, Koyla Nagar,
Dhanbad - 826005.

4. Mahanadi Coalfields Limited,
Jagriti Vihar, Burla,
District Sambalpur,
Orissa - 768020. Opposite Parties

CORAM:

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. M. L. Tayal
Member

Mr. Justice S. N. Dhingra (Retd.)
Member

Mr. S. L. Bunker
Member

Order under Section 26(1) of The Competition Act, 2002

The Informant filed this information under section 19(1)(a) of the Competition Act, 2002 (the '**Act'**) against OP1 and its subsidiaries (collectively referred to as '**CIL subsidiaries'**) in respect of violation of provisions of the Competition Law. The Informant alleged that OP1 and its subsidiaries were dominant in the relevant market of sale of coal, due to the fact that coal mines were nationalized by the Central Government vide Coal Mines (Nationalisation) Act, 1973 and the Opposite Party and its subsidiaries were the only supplier of coal in India. The abuse of this dominant position was alleged on the basis of different clauses of fuel supply as well as the practices adopted by the Opposite Parties.

2. The Informant contended that it operated five power plants in State of West Bengal viz. (i) Kolaghat Thermal Power Station, (ii) Bakreshwar Thermal Power Station, (iii) Sagardighi Thermal Power Station, (iv) Bandel Thermal Power Station, and (v) Santaldih Thermal Power Station, generating 3860 megawatt of electricity, fulfilling 56% of energy demand in the State of West Bengal. Out of its total coal requirement of 18.60 million metric tons for purposes of power generation, it purchased bulk of its coal i.e. about 14.60 million metric tons of coal from OP2 to OP4. After the introduction of New Coal Development Policy by Ministry of Coal, Government of India, Fuel Supply Agreements (FSAs) were mandated to be executed between subsidiaries of OP1 and their consumers having demand of more than 4200 tonnes per annum. The Informant entered into agreements with OPs 2 to 4 during the year 2009. The FSAs were standard agreement with identical terms and conditions and no opportunity of negotiation was allowed to the informant with regard to the FSAs. The Informant contended that these agreements had a lock-in period of 20 years with no supply side substitutability open to the Informant.

3. The informant pointed out that clauses 3.1.2, 3.2 and 3.5 of the FSAs indicated separate fixed quotas of Annual Contracted Quantity (ACQ), earmarked for above said power plants of the Informant, but despite that CIL

subsidiaries i.e. OP2 to 4 herein, kept supplying short quantity to some power plants and over supplied to other power plants of Informant, leading to difficulties in stocking and management of coal. Despite several letters written by the Informant to the OP2 to 4, the situation was not remedied.

Abuses alleged by the Informant

1. The Informant stated that clauses 4.1, 11.2.2, 4.6.2 and 9.1 of the FSAs provided for issuance of credit notes in the event of deviation by OPs from declared grade of coal and for stones of more than 250 mm size. Since the quality of coal blocks supplied was not in conformity with the FSAs, and CIL subsidiaries also supplied oversized coal blocks mixed with huge boulders, (which caused a lot of damage to different equipments i.e. unloading and conveyor systems, power plants etc.). OPS were supposed to issue credit notes but no credit notes were issued in favour of the Informant as per the agreement. Lower grade coal affected the production capacity of the power plants and led to increased coal consumption. The fuel/oil consumption for these power plants also increased as a result of low grade coal supplied by CIL Subsidiaries. The conduct of the OPs was abusive of dominant position.

2. Clause 3.3.1 of the FSAs provided that in case the CIL subsidiaries were not able to supply the scheduled quantity of coal from its own sources, it could supply balance coal from alternate sources and the additional transportation cost of such supply from other sources was to be borne by the informant. The supply from the alternate sources could be at any delivery point at the sole discretion of CIL subsidiaries. The clause was thus one sided and abusive of dominant position.

3. Clauses 3.6, 3.11.1(iii) and 12 of the FSAs dealt with deemed supply of coal i.e. quantity of coal though not supplied by CIL subsidiaries to the Informant due to failure of the Informant to pay dues, but counted as supplied. The deemed delivery quantity was also taken into

consideration by OPs for calculation of penalties arising due to short lifting and ACQ. Clauses 3.6, 3.11.1(iii) and 3.12 provided for calculation of performance incentive for proper supply and compensation for short lifting. The incentives were being calculated by OPs not only on the basis of actual quantity of coal supplied to each plant but also on the basis of deemed supply under the agreement. Thus, even when total quantity of coal supplied to the Informant fell below total ACQ, OP3 claimed performance incentive for plants which received coal over its individual ACQ in this manner and compensation for plants which received lesser then individual ACQ. As a result, performance incentive of 2.17 crores for year 2009-10, Rs. 132 crores for 2010-11 and Rs. 5.77 crores for 2011-12 was claimed. OP2 claimed a compensation of Rs. 52.16 crores, despite the fact that it also failed to supply the total ACQ.

4. On the basis of above facts, the Informant alleged abuse of dominant position by the OPs who held dominant position in the relevant market of supply of coal to thermal power plants in India.

5. The relevant product market in this case would be 'sale of coal to thermal power plants.' Coal was not substitutable or interchangeable product with any other product/raw material in coal based thermal power plants. The power plant of the Informant being a thermal power plant, could use only coal for production of electricity. Coal based electricity was about 86% of the total electricity generated in India. The relevant geographic market would be India as the conditions for supply of coal to thermal power plants throughout India were homogenous. Hence, the relevant market under section 2(r) of the Act in this case was 'sale of coal to thermal power plants in India'.

6. It is apparent from information that the OP1 held a dominant position under section 4 of the Act in the relevant market since it holds about 82% of coal supply market in India. Further, the coal mines were nationalized under Coal Mines (Nationalization) Act, 1973 and all mines were taken over by Government of India and Coal India Limited was established in 1975 to

manage and run coal mines. It is apparent that the informant was totally dependent on OPs for supply of coal, the main raw material for generation of electricity. Taking advantage of their dominant position, the OPs were allegedly not adhering to the terms and conditions in the Fuel Supply Agreements and conducting themselves in a manner detrimental to the interest of the informant. The terms and conditions of FSA also show it being heavily loaded in favour of opposite parties. Since the consumer had no alternative and was dependent upon the OPs, the conduct of the OPs needs to be investigated for alleged contravention of the provisions of the Act.

7. It is noticed that the OP1 was prima facie held to be dominant in the same relevant market, in Case No. 3/2012, Case No.11/2012 and Case No. 59/2012 filed against the OP1 and its subsidiaries. The Commission was also of the opinion that there existed a *prima facie* case of abuse of dominance under section 4 of the Act under similar circumstances in these cases for directing the DG under section 26(1) of the Act to cause an investigation to be made into the matter. The DG had already filed investigation reports in the above said cases. In Case nos. 5/2013 and 7/2013, the Commission was of prima facie view that the Coal India Limited was taking undue advantage of its dominant position as a sole supplier of coal to thermal power plants in India and DG was directed in these two cases also to investigate the anti-competitive conduct of OP1 under section 26(1) of the Act.

8. In view of above, the Commission is of the opinion that the present case was a fit case for investigation into the allegations made by the informant about violation of provisions of Competition Act.

9. The Secretary is directed to send a copy of this order to the office of the DG. The DG shall investigate the matter about violation of the provisions of the Act. In case the DG finds that the OPs have acted in contravention of the provisions of Act, it shall also investigate the role of the persons who at the time of such contravention were in-charge of and responsible for the conduct of the business of the company so as to fix responsibility of such persons under section 48 of the Act. The DG shall give opportunity of hearing to such

persons in terms of section 48 of the Act. The report of DG be submitted within 60 days from receipt of the order.

10. Nothing stated in this order shall tantamount to final expression of opinion on merits of the case and the DG shall conduct investigation without being swayed in any manner whatsoever by the observations made herein.

New Delhi
Date: 05.07.2013

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Dr. Geeta Gouri)
Member

Sd/-
(M. L. Tayal)
Member

Sd/-
(S. N. Dhingra)
Member

Sd/-
(S. L. Bunker)
Member