



**COMPETITION COMMISSION OF INDIA**

**Case No. 43 of 2017**

**In Re:**

**Shri Arun Mishra  
G-56, Industrial Area, Naini, Allahabad, UP**

**Informant**

**And**

**State of U.P. through Chief Secretary**

**Opposite Party No. 1**

**Shri Desh Deepak Verma,  
Chairman,  
UP Electricity Regulatory Commission**

**Opposite Party No. 2**

**Shri Sanjay Agarwala,  
the then Principal Secretary,  
Government of UP**

**Opposite Party No. 3**

**Shri AP Mishra,  
the then Managing Director,  
UP Power Corporation**

**Opposite Party No. 4**

**M/s KSK Power**

**Opposite Party No. 5**

**M/s Moserbaer Power**

**Opposite Party No. 6**

**M/s Navayuga**

**Opposite Party No. 7**

**M/s India Bulls Power**

**Opposite Party No. 8**

**M/s DB Power**

**Opposite Party No. 9**

**M/s Jindal Power**

**Opposite Party No. 10**

**M/s India Bulls Amravati Power**

**Opposite Party No. 11**

**M/s Lanco Amarkantak**

**Opposite Party No. 12**

**M/s NCC Power**

**Opposite Party No. 13**

**M/s Lanco Vidarbha**

**Opposite Party No. 14**

**M/s East Coast**

**Opposite Party No. 15**

**M/s DB Power through PTC**

**Opposite Party No. 16**

**M/s MB Power**

**Opposite Party No. 17**



**CORAM:**

**Mr. Devender Kumar Sikri**  
**Chairperson**

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

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

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

Appearance:

*For Informant:*

Shri Arun Mishra

*For UP Power Corporation Ltd. (OP-4):*

Shri Rajiv Srivastava, Advocate

**Order under Section 26(2) of the Competition Act, 2002**

1. The present information has been filed under Section 19(1)(a) of the Competition Act, 2002 (hereinafter the 'Act') by Shri Arun Mishra (hereinafter the '**Informant/IP**') against State of U.P. through Chief Secretary (hereinafter the '**Opposite Party No. 1/ OP-1**'), Shri Desh Deepak Verma, Chairman, UP Electricity Regulatory Commission (hereinafter the '**Opposite Party No. 2/ OP-2**'), Shri Sanjay Agarwala, the then Principal Secretary, Govt. of UP (hereinafter the '**Opposite Party No. 3/ OP-3**'), Shri AP Mishra, the then Managing Director, UP Power Corporation Ltd., Lucknow (hereinafter the '**Opposite Party No. 4/ OP-4**'), M/s KSK Power (hereinafter the '**Opposite Party No. 5/ OP-5**'), M/s Moserbaer Power (hereinafter the '**Opposite Party No. 6/ OP-6**'), M/s Navayuga (hereinafter the '**Opposite Party No. 7/ OP-7**'), M/s India Bulls Power (hereinafter the '**Opposite Party No. 8/ OP-8**'), M/s DB Power (hereinafter the '**Opposite Party No. 9/ OP-9**'), M/s Jindal Power (hereinafter the '**Opposite Party No. 10/ OP-10**'), M/s India Bulls



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Amravati Power (hereinafter the ‘**Opposite Party No. 11/ OP-11**’), M/s Lanco Amarkantak (hereinafter the ‘**Opposite Party No. 12/ OP-12**’), M/s NCC Power (hereinafter the ‘**Opposite Party No. 13/ OP-13**’), M/s Lanco Vidarbha (hereinafter the ‘**Opposite Party No. 14/ OP-14**’), M/s East Coast (hereinafter the ‘**Opposite Party No. 15/ OP-15**’), M/s DB Power through PTC (hereinafter the ‘**Opposite Party No. 16/ OP-16**’) and M/s MB Power (hereinafter the ‘**Opposite Party No. 17/ OP-17**’) (OP-1 to OP-17 collectively referred to as ‘**Opposite Parties/OPs**’) alleging contravention of the provisions of Section 3 of the Act. It may be noted that names of the Opposite Parties in the cause title are as per the information provided by the Informant, some of which may not be independent legal entities.

2. As per the information, the Informant is an individual residing at the Industrial Area, Naini, Allahabad, UP. Opposite Parties No. 1 to 4 are the erstwhile government officials of various government departments or companies in the State of UP. The Informant has alleged irregularities in the selection of bidder(s) in one of the tenders floated by UP Power Corporation Ltd. (*i.e.* OP-4) in the year 2013 for purchasing 6000 MW of power. In the said tender, many power generating companies, including OP-5 to OP-17, participated. As per the information submitted by the Informant, it is alleged that the OPs have colluded to rig the bid called by the Government of UP.
3. It is submitted that 18 bidders had participated in the bidding process out of which 16 qualified as bidders. The L-1 bidder, *namely* M/s NSL Power who had bid for a capacity of 300 MW, backed out of the bidding process without any justification. It was also submitted that the L-2 bidder (*namely* M/s ACB Power) offered 390 MW at INR 4.89/- per unit, the L-3 bidder (*namely* M/s Lanco Babanth) offered 423 MW at INR 5.07/- per unit and the L-4 bidder (*namely* M/s RKM Power) offered 350 MW at INR 5.09/- per unit.



4. It is alleged by the Informant that due to ulterior motives, OP-1 to OP-4 attempted to settle the matter as per their wishes and held discussions with the remaining bidders so as to enter into a PPA ('Power Purchase Agreement') with them in respect of the capacity offered by them in their respective bids. OP-1 to OP-4 allegedly pointed out to those remaining bidders that the PPA will be entered into only with those bidders who are willing to match the lower tariff which is below the range of INR 5.09/- per unit.
5. It is further submitted that the L-6 bidder, *namely* M/s Moserbaer *i.e.* OP-6, which had quoted a tariff of INR 5.73 per unit and who was not offered the PPA, had allegedly initiated a plan to manipulate and manage the remaining bids to get the PPA at its quoted price of INR 5.73/- per unit. Allegedly, OP-6 arranged a meeting at Hotel Leela, Gurugram in an attempt to cartelise the whole process of bidding and to secure the PPA at a higher tariff. As per the Informant, the said meeting was attended by Shri Ratul Puri and Shri Raja of OP-6, in person, while Shri Hemant Sahai, Legal Advisor, OP-6 attended the same through video call.
6. It is further averred by the Informant that in the afore-mentioned meeting, OP-6 requested all the bidders to not match the lower tariff as demanded by OP-1 to OP-4. This meeting was allegedly convened within a month of issuance of initial letter of intent to L-2 and L-3 bidders. It is further alleged that OP-1 to OP-4, in order to play with the Public Exchequer, appointed Price Waterhouse Coopers (hereinafter 'PWC') as their consultant for advise after the bids were officially opened and the PPA was offered to L-2, L-3 and L-4 bidders at an acceptable tariff of INR 5/- per unit. PWC allegedly acted as a puppet in the entire episode as it adopted various non relevant benchmarks to design justifications in order to justify the tariff of INR 5.90/- per unit for purchase of power under the tender.



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7. It is further contended that OP-1 to OP-4 colluded with OP-5 to OP-17 and accepted a new higher tariff of INR 5.90/- per unit. They signed the PPA with OP-6 at tariff of INR 5.73/- per unit, which was higher than the previously accepted tariff in March, 2013 and also 15% higher than the bid submitted by L-4 bidder, M/s RKM Power of INR 5.09/- per unit.
8. The purported collusion between the OPs is stated to fall within the purview of Section 3(1) and 3(3)(d) of the Act as it is an agreement amongst association of enterprises or persons engaged in identical or similar trade of goods or provision of services which directly or indirectly results in bid rigging or collusive bidding. The Informant has claimed that this collusive arrangement has made the state exchequer suffer a huge loss of INR 450/- crore per annum.
9. Based on the aforesaid facts, the Informant has prayed the Commission, *inter alia*, that the contravened agreement may be kept in abeyance, subject to the outcome of the Commission's decision and the OPs be restrained from executing the said agreement. An imposition of monetary penalty to the tune of INR 100 crore is also prayed for.
10. The Commission considered the information in its ordinary meeting held on 05<sup>th</sup> September, 2017 and decided to hear the Informant and UP Power Corporation Ltd. (UPPCL), which was arrayed as OP-4 in the information through its former Managing Director Shri A.P. Mishra, in a preliminary conference on 17<sup>th</sup> October, 2017. On 17<sup>th</sup> October, 2017, the Informant as well as OP-4 appeared before the Commission. The Informant argued the matter. However, the learned counsel for OP-4 requested for an extension of time. The Commission acceded to the request and decided to list the matter on 23<sup>rd</sup> November, 2017. On 23<sup>rd</sup> November, 2017 the learned counsel for OP-4 appeared before the Commission. However, none appeared for the Informant. During the hearing, the learned counsel for OP-4 submitted its



written response dated 19<sup>th</sup> November, 2017 before the Commission and undertook to provide an advance copy to the Informant. The Commission thereafter decided to reschedule the preliminary conference on 21<sup>st</sup> December, 2017 and intimated the Informant as well as OP-4. Subsequently, on 15<sup>th</sup> December, 2017, the Informant filed a rejoinder to the written submissions filed by OP-4. On 21<sup>st</sup> December, 2017, OP-4 appeared before the Commission through its learned counsel and argued the matter. However, none appeared for the Informant. The Commission heard the learned counsel for OP-4 and directed him to file OP-4's written submissions, if any, by 05<sup>th</sup> January, 2018.

11. On 19<sup>th</sup> January, 2018, written submissions of OP-4 dated 02<sup>nd</sup> January, 2018 were received wherein it is averred that the Informant had come before the Commission without having full knowledge of the facts and law governing the bid undertaken by OP-4 for supply of 6000 MW base load power to Discoms of U.P. on long term basis. It is submitted that the Informant has only made bald allegations without any concrete information or document to support his allegations. The information is based on concocted facts and unfounded allegations and is misleading in nature against highly placed statutory authorities. It has been pointed out that the Informant's contention of appointment of PWC as the bid consultant is also incorrect as OP-4 appointed Deloitte Touche Tohmatsu India Pvt. Ltd. for the said purpose. Further, OP-4 contended that the Informant, in his rejoinder, has admitted to the jurisdiction of the Appropriate Commission in view of Section 174 of the Electricity Act, 2003, due to which the present information need not be considered by the Commission (CCI) at all. In view of these submissions, OP-4 prayed that the information be dismissed with heavy cost on the Informant.
12. Upon consideration of the material on record, it is apparent that the allegations in the present case pertain to collusive bidding in a tender floated



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by OP-4. The Informant has not only alleged collusion between bidders (OP-5 to OP-17), but also between the bidders and the procurer *i.e.* OP-4 which according to him led to higher tariff in the purchase of power by OP-4.

13. Before taking up the main issue, it is considered necessary to first deal with the preliminary objection raised by the learned counsel for OP-4 in its written submission dated 19<sup>th</sup> November, 2017 and the oral hearing (preliminary conference) held on 21<sup>st</sup> December, 2017. It is submitted that the Commission has no jurisdiction to entertain the present case as the adoption of tariff through bidding process is regulated under Section 63 of the Electricity Act, 2003. It is stated that matters falling within the purview of the Electricity Act, 2003 fall within the exclusive jurisdiction of the Appropriate Commission and as such, the Commission is not empowered to entertain a 'case' arising out of an order passed by an Appropriate Commission (*namely*, Hon'ble Uttar Pradesh Electricity Regulatory Commission) under the Electricity Act, 2003. It is further contended that the Electricity Act, 2003 is a self-contained code and by virtue of Sections 174 and 173 of the Electricity Act, 2003, the same issue cannot be decided by the Commission.
14. It is also submitted that Shri Sanjay Agarwal and Shri AP Mishra, who have been arrayed as OP-3 and OP-4 by the Informant, have demitted office in the months of May, 2017 and April, 2017, respectively. Further, the learned counsel for OP-4 argued that the Informant has not disclosed the reasons of his grievances from the order dated 24.06.2014 passed by the Hon'ble Uttar Pradesh Electricity Regulatory Commission. Finally, it has been claimed that the allegations raised in the information are bald assertions, without any documentary evidence to substantiate them.



15. With regard to the objection raised against the Commission's jurisdiction, it is noted that though the Electricity Act, 2003 is a special legislation governing, *inter-alia*, matters pertaining to generation, transmission and supply of electricity, it cannot be said that all matters arising in the electricity industry will be governed exclusively by the said statute. Various provisions of Electricity Act, 2003 and the policies made thereunder unequivocally expresses the intention of the legislature to promote competition. It is unconceivable that by inserting Sections 174 and 175, the legislature had intended to oust the jurisdiction of the Commission.
16. The learned counsel for OP-4 has specifically relied upon the provisions of Section 173 and Section 174 of the Electricity Act, 2003 to argue that since the legislature has not included the Act, *i.e.* Competition Act, 2002, along with Consumer Protection Act, 1986, Atomic Energy Act, 1962 and Railways Act, 1989, it shows that the intention was to give supremacy to the Electricity Act, 2003 over the provisions of the Act. The Commission has considered these arguments made by OP-4. It is observed that Section 174 of the Electricity Act, 2003 states “[s]ave as otherwise provided in Section 173, the provisions of this Act shall have effect notwithstanding anything inconsistent therewith in any other law for the time being in force or in any instrument having effect by virtue of any other law than this Act”. On the other hand, Section 60 of the Act states that “[t]he provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force.” Thus, apparently both the statutes contain *non-obstante* clauses expressing their supremacy over other statutes. The rules on statutory interpretation and the judicial pronouncements in this regard provides guidance in case of conflict or overlap between two statutes.





17. The latin maxim *generalia specialibus non derogant* suggests that where a general statute and a special statute relating to the same subject matter cannot be reconciled, the special statute ordinarily will prevail. And in case where a subject matter is covered by two statutes, both of which are special, the one enforced on a later date ordinarily prevails. However, these rules of statutory construction are not absolute in nature; rather an attempt should be aimed at, in case of conflicting provisions, to give effect to both the provisions to avoid redundancy. This position has been reiterated by the Hon'ble Supreme Court in *Ashoka Marketing Limited v. Punjab National Bank* [(1990) 4 SCC 406], wherein it was held:

*“The principle which emerges from these decisions is that in the case of inconsistency between the provisions of two enactments, both of which can be regarded as Special in nature, the conflict has to be resolved by reference to the purpose and policy underlying the two enactments and the clear intendment conveyed by the language of the relevant provisions therein. We propose to consider this matter in the light of this principle.”*

18. It is noted that both the statutes under consideration, *i.e.* the Electricity Act, 2003 as well as the Act, are special statutes with designated spheres of operation. The former aims at regulating activities in the electricity industry and the latter aims at promoting competition in every sphere and sector of the economy. The jurisdiction of the Act extends to all sectors of the economy and sectors regulated by sector specific laws such as telecommunication, electricity, petroleum, insurance *etc.* are also included within the ambit of the Act for the competition related matters/issues. To this extent, there is no conflict as both these statutes have their respective and mutually exclusive regulatory regimes. This observation is in sync with the Commission's decision in *Case No. 91 of 2014 (Open Access Users Association vs. Tata Power Delhi Distribution Limited & Ors.)* decided on 29<sup>th</sup> September, 2015 that the mandate of the Commission is to eliminate



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practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India. Sectoral regulators focus on the dynamics of specific sectors, whereas the Commission focuses on functioning of the markets by way of increasing efficiency through competition; their roles being complementary and supplementary as per the common objective of obtaining maximum benefit for the consumers.

19. Thus, the Commission is of the view that there is no issue of conflict of jurisdiction in the present case which cannot be reconciled by adopting harmonious construction between the provisions of the Electricity Act, 2003 and the provisions of the Act. Though Electricity Act, 2003 is a special statute for the purposes of dealing with electricity matters, the Competition Act, 2002 is a special statute for regulating competition in the market. For any competition related matter, the Act is a special statute, mandated to promote and regulate competition in the market. This position has been reiterated in the case of *Telefonaktiebolaget LM Ericsson (Publ) vs. CCI and others*, 2016 (66) PTC 58 (Del), by the Hon'ble High Court of Delhi, wherein the question of jurisdiction of the Commission in a matter related to abuse by an IPR holder was considered. While dealing with the issue of jurisdiction, the Hon'ble High Court of Delhi held that there is no irreconcilable repugnancy or conflict between the Competition Act and the Patents Act, and in the absence of any irreconcilable conflict between the two legislations, the jurisdiction of the Commission to entertain complaints for abuse of dominance in respect of patent rights cannot be ousted.
20. Based on the foregoing, the Commission is of the view that, keeping in view the object and purpose underlying both the enactments viz., the Electricity Act, 2003 and the Act (*i.e.* Competition Act, 2002), it does not appear that the provisions of the Act are in any way superseded by the Electricity Act, 2003, in the context of the facts and allegations under consideration. The



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mandate of the Act is vast and its jurisdiction cannot be perceived to be ousted by the Electricity Act, 2003. Further, the allegations in the present case pertain to alleged bid-rigging among the bid participants which is amenable to the jurisdiction of the Commission under the Act. Thus, the Commission holds that it has jurisdiction to proceed in the present matter.

21. As regards the allegation of big-rigging, the Commission observes that bid-rigging is specifically recognised to be a violation of the Act under Section 3(3)(d) read with Section 3(1) of the Act. Any conduct to be scrutinized under Section 3(3)(d) read with Section 3(1) of the Act requires the parties to an agreement to be engaged in the same trade or area. Only when the parties to such collusive arrangement are horizontally placed, their collusive conduct can be subject to an examination under the provisions of Section 3(3)(d) read with Section 3(1) of the Act. OP-1 to OP-4 cannot be said to be similarly placed with OP-5 to OP-17, who were bidders in the tender floated by OP-4. Thus, the conduct of OP-1 to OP-4 does not fall within the purview of Section 3(3)(d) read with Section 3(1) of the Act along with OP-5 to OP-17.
22. As regards the act of bidders, *i.e.* OP-5 to OP-17, the Commission notes that though they are similarly placed, the Informant has not been able to substantiate as to how and when these bidders colluded or reached an understanding/agreement. Even with regard to an alleged meeting (at Hotel Leela, Gurugram) which was purportedly convened by OP-6 to manipulate the tender process and ask the other bidders not to match the lower proposed tariff, there are no concrete details or substantiating evidence. The attendees whose names are mentioned belong to the same company *i.e.* OP-6. There is no evidence, not even an allegation, with regard to any other bidder (any of the OPs from OP-5 to 17) attending the said meeting in the information submitted by the Informant. Thus, in the absence of any material, no conclusion of collusion can be drawn on the basis of bald allegations.



23. Based on the aforesaid discussion, the Commission is of the *prima facie* view that no case of contravention under Section 3 of the Act has been made out. Accordingly, the information is ordered to be closed forthwith in terms of the provisions contained in Section 26(2) of the Act.
24. The Secretary is directed to inform all concerned accordingly.

Sd/-  
**(Devender Kumar Sikri)**  
Chairperson

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

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

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

New Delhi  
Date: 24/01/2018