



COMPETITION COMMISSION OF INDIA

Case No. 75 of 2017

In Re:

Prem Prakash
Industrial Area, Khurai Road
Bina, Sagar District
Madhya Pradesh – 470113

Informant

And

Airport Authority of India
Department of Structure
Operational Offices
Gurugram Road
New Delhi - 110037

Opposite Party No. 1

Power Grid Corporation of India Ltd.
Corporate Centre
Saudamini, Plot No. 2
Sector 29, Gurugram
Haryana – 122007

Opposite Party No. 2

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member



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

1. Shri Prem Prakash (**‘Informant’**) has filed the present information under Section 19(1)(a) of the Competition Act, 2002 (**‘Act’**) against Airport Authority of India (**‘AAI’**) and Power Grid Corporation of India Ltd. (**‘PGCIL’**) (AAI and PGCIL together referred to as **‘Opposite Parties’**) alleging contravention of the provisions of Section 4 of the Act.
2. The Informant is an individual residing at Bina, Madhya Pradesh. He runs an engineering testing laboratory and provides testing services. The laboratory of the Informant is stated to be accredited as per ISO/ISE-17025 by the Accreditation Commission for Conformity Assessment Bodies (**‘ACCAB’**). ACCAB is claimed to be an accreditation body similar to National Accreditation Board for Testing and Calibration Laboratories (**‘NABL’**), which provides accreditation services in India.
3. AAI is a *‘miniratna’* central public sector enterprise constituted under a statute and is, *inter alia*, engaged in construction, modification and management of passenger terminals, development and management of cargo terminals, air traffic services, passenger facilities, *etc.* at various airports in India.
4. PGCIL is a *‘navratna’* central public sector enterprise and is a listed company since 2007. It is engaged in transmission of electricity throughout India.
5. The primary grievance of the Informant concerns the policy/guidelines of the Opposite Parties that require testing of construction materials to



be done only by laboratories which are accredited by a full member MRA [Mutual Recognition Arrangement] of International Laboratory Accreditation Cooperation (**ILAC**)/ Asia Pacific Laboratory Accreditation Cooperation (**APLAC**)/ International Accreditation Forum ('**IAF**'). Such stipulation has been alleged as a contravention of Section 4 of the Act.

6. The brief facts and allegations relating to AAI are summarised as under:
 - 6.1. AAI is the only public sector enterprise created by the Government of India for construction and operation of airports, runways, terminal buildings, taxiways, *etc.* The job/work of AAI is not transferable to any other organization. For the purpose of its in-house requirements, AAI has a separate civil engineering department consisting of civil and structural engineers to undertake structural design of passenger and cargo terminals, aircraft hangers, runways, *etc.* For maintaining the quality of the material being used in its constructions, AAI purchases laboratory services including many specialised tests, which are not purchased by other organisations such as friction value, pavement classification number, marshal stability test, *etc.*
 - 6.2. As per letter dated 3rd June, 2016 of AAI, the Informant was conveyed that AAI empanels only those laboratories which are accredited by NABL. The Informant wrote in response on 7th July, 2016 to AAI that as per ISO/IEC-17025, any accreditation body which operates its system as per ISO/IEC-17011 can accredit a laboratory. Additionally, NABL is not a part of Department of Science and Technology, as has been falsely



propagated by it. The Informant insisted AAI to amend its guidelines that require testing only from NABL accredited labs.

- 6.3. Thereafter, AAI reviewed its guidelines on empanelment of material testing laboratories and issued Technical Instruction dated 17th August, 2016. The relevant modification in the instruction reads as follows:

“The laboratory shall have accreditation as per ISO/IEC-17025 from any accreditation body having an MRA (Mutual Recognition Arrangement) with International Laboratory Accreditation Cooperation (ILAC)/ International Accreditation Forum (IAF) such as National Accreditation Board for Testing & Calibration Laboratories (NABL) etc. The relevant documents of the accreditation body shall be submitted by the laboratory to be empaneled, along with other necessary documents.”

- 6.4. Pursuant to an RTI application filed by the Informant, AAI, *inter alia*, informed that it has no document of ISO or Government of India that mandates accreditation bodies to have ILAC/IAF membership for running accreditation program in India. Hence, according to the Informant, this is an unfair imposition as AAI does not have any scientific basis or justification for insisting testing only from NABL accredited labs.

7. The brief facts and allegations relating to PGCIL are summarized as under:

- 7.1. PGCIL is a Government Company which has monopoly over developing the infrastructure for inter-state power transmission system. The market for construction and operation of inter-state



transmission lines and sub-stations in next four years is estimated to be around INR 1,00,000 crore. This suggests that PGCIL is a dominant entity in this sphere. To further portray the dominance of PGCIL, reliance has been placed upon information available on the website of PGCIL and Ministry of Power.

- 7.2. For maintaining the quality of construction of inter-state transmission lines and sub-stations, PGCIL purchases laboratory services for testing the material being used for executing its projects. It purchases the laboratory services from engineering colleges, polytechnics as well as private testing laboratories. With respect to private testing laboratories, PGCIL has imposed an unfair eligibility condition that these laboratories should be accredited by NABL.
- 7.3. Pursuant to a representation by the Informant, PGCIL *vide* its letter dated 31st July, 2015, *inter alia*, informed that:

“...in addition to already accepted labs/institutions working with POWERGRID, Third Party Labs accredited by any agency which operates in accordance with the requirements of ISO/IEC 17011, having full membership & MRA of ILAC /APLAC are acceptable to provide testing/calibration services to POWERGRID”.

- 7.4. According to the Informant, quality of testing does not bear any relation with the membership of ILAC /APLAC. PGCIL does not mention any basis for this unfair condition requiring that private laboratories must be accredited by full member of ILAC/APLAC. In support, the Informant has quoted the erstwhile Competition Appellate Tribunal (‘COMPAT’) order dated 4th February, 2014 passed in Appeal No. 03 of 2013/395,



titled *Accreditation Commission for Conformity Assessment Body Pvt. Ltd. v. Quality Council of India and Ors.*, which clarified that *anybody would have the authority to act as accrediting body provided such body has the necessary infrastructure.*

- 7.5. ILAC/APLAC/IAF are foreign private bodies and are not present in India. Pursuant to the RTI applications of the Informant, Bureau of Indian Standards (BIS) and Quality Council of India (QCI) have confirmed that they do not possess documents with respect to legal identity, constitution and physical addresses of ILAC/APLAC.
8. The Informant has thus, alleged that by imposing the condition requiring testing through NABL accredited labs or labs having full membership of ILAC/ APLAC/ IAF, the Opposite Parties have put the laboratory of the Informant and other accreditation bodies out of competition. He has further alleged that this restrictive eligibility condition for private testing laboratories has been imposed by the Opposite Parties to facilitate/ protect the monopoly of NABL.
9. The Informant has contended that the market for “laboratory services required for maintaining quality in construction of transmission lines/ sub-stations in India” should be the relevant market for examining the alleged abuses against PGCIL. In respect of AAI, the market for “laboratory services required for maintaining quality in construction of runways/ airport/ taxiway, etc. in India” should be the relevant market. It has been contended that both AAI and PGCIL are dominant in the respective relevant markets.



10. The Informant has alleged that AAI and PGCIL have abused their dominant position by insisting that testing in relation to their respective construction projects, would be done only by laboratories which are accredited by a full member MRA of ILAC/ APLAC /IAF.
11. The Commission has considered the information and other material available on record.
12. At the outset, the Commission notes that the same Informant had earlier filed an information bearing Case No. 41/2016, alleging abuse of dominant position by PGCIL on a similar count. After hearing the parties in a preliminary conference, the Commission had closed the matter and passed an order dated 21st September, 2016 under Section 26(2) of the Act. Aggrieved thereof, the Informant had filed an appeal before the erstwhile COMPAT (Appeal No. 67 of 2016) and this was dismissed *vide* order dated 9th March, 2017 stating as under:

“14. It is quite clear that in order to determine dominant position, relevant market needs to be determined within which a certain entity is considered dominant. In the instant case it is an admitted fact that the Appellant offers laboratory testing services for construction material in India whereas the Respondent, PGCIL is engaged in transmission of electricity. These two are entirely different areas of services rendered by the Appellant and the Respondent. Neither the Appellant has in its information made a case that the Respondent, PGCIL is engaged in providing laboratory services for testing of construction material nor the Commission or the Appellant have made a mention to that effect. The Appellant himself is engaged in providing laboratory services for testing of construction material and his allegations are in relation to these services alone. The Commission in its discussion on delineation of the relevant market has examined three possibilities and finally narrowed down the market delineation to ‘laboratory services for testing construction material in India’. We agree with the Commission’s delineation



of the relevant market. If the Respondent does not operate within the relevant market as delineated by the Commission, it cannot be said to be in dominant position and consequently abusing it. Neither the information nor the appeal memo nor oral arguments advanced on behalf of the Appellant made a case under Section 3 (4) of the Act suggesting that there was a vertical relationship between the Respondent and the Appellant; the facts also do not support an assessment that there is such a relationship. The argument on behalf of the Appellant that the Respondent could be considered as a consumer only when he paid for a service, is an unsustainable argument. It is quite clear that the Respondent has been taking the services of the Appellant between 2011-2014 and even now prepared to take those services if its conditions were met. There is no doubt that the Respondent is in the nature of a consumer of laboratory testing services for construction material. It is an admitted fact that in order to lay power lines the Respondent outsources construction work and from time to time in order to keep a check on the quality of civil work mandates testing of construction material used in various civil works by third party labs which are accredited by NABL or which could be accredited by any other agency which has a full membership of ILAC/APLAC and a MRA with these organizations. It is a different issue that in India only NABL has a full membership. There is no doubt that several other construction agencies within the government and outside are comfortable with accreditation provided by simply an Associate Member as distinguished from full member who may not have a MRA but the Respondent should have liberty in deciding the standards of quality of work which they expect from their contractors and if full membership and MRA with ILAC/APLAC is considered as an important parameter, we should have no objection to the Respondents adopting that practice. In any case since the Respondent does not operate within the relevant market, the Respondent cannot be said to be dominant in the relevant market and therefore, abusing its dominant position by enforcing a conduct on its downstream partners. The Appellant has himself in his rejoinder stated that PGCIL is engaged in the business of transmitting power and laying power lines across India. Thus, there is no common course of business between the two entities involved in this case and it could not be said that PGCIL exercised any dominant position in the relevant market delineated by the Commission about which the Appellant nurses a grievance.



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15. *If the Appellant is not in a position to secure a market for its services from the Respondent that is not the end of the world. The Appellant offers testing services for construction material which is a very wide canvass of business within the territory of India and it cannot be said that PGCIL is the only agency or a significant part of the potential market in the Country. It appears that the Appellant has not been able to fully appreciate the finer nuances of the Competition Act in terms of delineation of relevant markets and determination of dominant position and its abuse. By referring to Section 19 (4) (g) of the Act, first of all, the Appellant has erred in assuming that a government company by its very nature is dominant. Secondly, he needs to recognize that Section 19 (4) of the Act is with reference to dominant position as defined in Section 4 of the Act which means that relevant market is the determining factor. Having established that PGCIL does not operate in the relevant market the Appellant has no case to prosecute that PGCIL has abused its dominant position.*

16. *Learned Senior Counsel for the Respondent also referred us to an earlier case decided by this Tribunal where ACCAB which is the associate member of ILAC and the present Appellant's lab accreditation agency had filed against NABL. The case specifically dealt with the relevant market which was provision of accreditation services in India. In view of the distinction in the context of relevant market, the case has no bearing on the present case except to show that the issue of NABL's abuse of dominance has already been addressed in an earlier litigation.*

17. *In view of the above discussion we conclude that the Appellant has not been able to make out a case of dominance and its abuse against the Respondent, PGCIL. The Commission has not erred in deciding that the Respondent, PGCIL is not dominant in the relevant market and therefore, decided to close the information under Section 26 (2) of the Act. Consequently, the appeal is dismissed."*

13. The earlier order of the Commission as well as that of the erstwhile COMPAT in appeal, clearly bring out the fact that PGCIL does not operate in the same market as the Informant does and is instead, a



consumer of laboratory services. Every consumer/procurer must have the freedom to exercise its choice freely in procurement of goods and services and such a choice is sacrosanct in a market economy as the consumers are best placed to evaluate what meets their requirements and has a competitive advantage. Further, while exercising the choice, they are free to stipulate standards for procurement and the same cannot be held to be anti-competitive.

14. The allegations in the instant information against PGCIL are substantially similar to those levelled earlier by the same Informant in Case No. 41/2016. The Commission sees no merit in re-examining the same issue, particularly when nothing new has been brought out against PGCIL.

15. As regards AAI, the Commission observes that AAI is also a consumer of laboratory services. The Informant has sought to define the relevant product market as *laboratory services required for maintaining quality in construction of runways/ airport/ taxiway, etc.*, and has alleged abuse by AAI in this market. The Commission is, however, of the view that the product market definition of the Informant is very narrow and does not capture the market reality. In fact, this definition appears to be tailor made to project that AAI is a dominant enterprise. It is observed that a large company cannot be held to be dominant unless it is shown to meet the standards prescribed under the Act having due regard to the factors laid down in Section 19(4) of the Act. The relevant issue to be addressed in the instant case is whether there are labs which can service only construction projects of AAI. No material has been brought on record to suggest the existence of labs that could service only AAI. On the contrary, the Informant himself claims that his lab is capable of testing construction materials used in the projects of PGCIL as well as of AAI.



A perusal of the correspondence relied upon by the Informant at pages 39 to 41 of the information shows his claim that all laboratories accredited in accordance with ISO/IEC-17025 are at par and can provide the impugned testing services. If that is the case, then there is no need to distinguish testing labs on the basis of services required in relation to airport infrastructure. The relevant market in the instant case is hence, the “*market for laboratory services for testing construction materials in India*”. It is relevant to note that on similar facts and circumstances, market delineation and analysis of the Commission in another case involving PGCIL *i.e.* Case No. 41/2016, has been upheld by the erstwhile COMPAT.

16. The Commission notes that on the same lines, AAI is also not a supplier in the market for laboratory services for testing construction materials in India. Instead, AAI is a consumer of laboratory services and testing services availed by it do not constitute a significant part of the potential market in the country, as there are many other customers availing these services. As a buyer, AAI does not appear to enjoy dominant position and has every right to choose from amongst the various available options to meet its requirement. Accordingly, no case of contravention of the provisions of Section 4 of the Act is made out against AAI. Moreover, on a similar set of allegations in Appeal No. 67/2016, the erstwhile COMPAT has already affirmed that there was no *prima facie* case of abuse of dominant position.
17. In view of the foregoing, the Commission is of the view that no case of contravention of the provisions of Section 4 of the Act is made out against the Opposite Parties in the present case. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.



18. The Secretary is directed to inform all concerned accordingly.

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

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

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

**New Delhi
Date: 27/02/2018**

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