



COMPETITION COMMISSION OF INDIA

(Case No. 88 of 2013)

In Re:

Wardha Power Company Limited

... Informant

And

Western Coalfields Limited

... Opposite Party No. 1

Coal India Ltd

... Opposite Party No. 2

QUORAM:

Mr. Ashok Chawla
Chairperson

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M.L.Tayal
Member

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

Mr. S.L. Bunker
Member

Present: M/s DMD Advocates for informant.



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

That the present information was filed under Section 19(1) of the Competition Act, 2002 (the Act) alleging the violation of Section 4 of the Act by the Opposite party no. 1 & 2 [OP 1 and 2].

2. The informant being involved in the business activity of power generation operates a 540 MV power plant at Warora in the State of Maharashtra. For the power plant to operate at 80% Power Load Factor ("PLF"), the informant estimated the requirement of about 2,26,000 MTs of E grade coal per annum. The coal allocation to the informant for power generation was in accordance with the terms permitted by the Standing Linkage Committee under the New Coal Distribution Policy 2007 and the Guidelines of the Government of India relating to supply of coal on Cost Plus basis. For the purpose of supply of coal, the informant entered into three separate Fuel Supply Agreements ("FSA") dated 3.4.2012 for supply of coal from Urdhan OC (RCE), Ukni Deep OC and Bellora Naigaon Deep OC mines (which were specified cost plus mines). The total quantity of coal to be supplied under the aforesaid agreements was 1,625,000 MTs on annual basis. The informant and OP no. 1 were in correspondence for execution of another FSA for balance quantity of 635,000 MTS on annual basis.
3. The OP no. 1 was a company entirely owned and controlled by OP no. 2. According to the information, the OPs enjoyed monopoly and dominance over production and supply of coal in India and abusing their dominant position. The OPs delayed the execution of



the FSAs and forced the informant to enter into one sided, anti-competitive FSA under which the informant had no bargaining power or power to negotiate and in the absence of an alternative option for procurement of coal, the informant was compelled to accept one sided terms and conditions stipulated by the OPs in the FSAs.

4. A Letter of Assurance (LoA) was issued to the informant initially whereby the OPs agreed to supply 2.28 MTs of Coal per annum to the informant at the cost plus price or notified price (whichever was higher). Thereafter, at the time of notice of availability of mines on cost-plus basis and inviting applications, it was agreed/represented by OPs that the coal would be supplied at the price of cost plus 12% Internal Rate of Return (IRR) (i.e. price per MT of coal which yields IRR of 12% on the entire investment at 85% of capacity utilisation covering the entire life of the mine or 20 years whichever is less).
5. The informant, a power generating company had to procure coal for its plants from subsidiaries of OP2 (including OP1). The informant is aggrieved by the various clauses of the FSA as well as acts and omissions of the opposite parties thereunder. It has alleged the abusive conduct of the OPs on the basis of the following:-
 - a. In FSAs, the OPs unilaterally linked the contract price of coal to the notified price and also introduced the concept of fixed mark up on the notified price which then becomes the contract price whereby the contract price was substantially



jacked up beyond cost plus 12% IRR which defeated the whole concept of cost plus method of coal supply/linkage.

- b. OPs excessively increased the price of coal for supply to the informant from Rs 1613 per MT to Rs 2177 per MT (both exclusive of taxes) without there being justification for the same.
- c. OPs unilaterally inserted a provision in the FSAs to the effect that the informant was obliged to furnish additional Bank Guarantee(s) to the tune of Rs. 183.53 Crores, equivalent to amount of entire investment of OPs in the subject mines. When the OPs were getting their entire investment back with IRR of 12% in the form of coal there was no justification for guarantee of entire investment.
- d. OPs refused to execute FSA(s) for supply of remaining 6,35,000 MTs of coal unless the informant furnished additional Financial Risk Bank Guarantee(s) to the tune of Rs 233.36 Crores equivalent to the entire investment of OPs in the subject mines.
- e. OPs resorted to discriminatory pricing between the informant and other purchasers. The OPs were discriminating against the informant *vis-à-vis* other power generating companies, in as much as they were charging the informant nearly double of what was being charged to the



other power generating companies. The OPs were charging the informant Rs. 2746 per MT (inclusive of tax) whereas they were charging the other power generating companies Rs 1403 per MT (inclusive of tax).

- f. In the LoA, there was no provision for providing a Financial Risk Guarantee by the informant. However, at the time of execution of the FSA, the provision of Financial Risk Guarantee was unilaterally incorporated by the OPs. The amount of Financial Risk Guarantee required to be given under FSA was the total amount of capital expenditure on the subject mine. There was no justification for this kind of guarantee. Even if such a guarantee could at all be justified, the said guarantee cannot include the entire investment in the subject mine.
6. Based on the above averments and allegations, the informant has made several prayers to the Commission, including-
- a. To initiate an investigation on the abuse of dominant position by OPs on the basis of the facts and grounds stated in this information;
 - b. To declare that OP1 has abused its dominant position as a producer and supplier of coal as a result of such abuse has caused loss and injury to the informant;



- c. To impose penalty as may be appropriate keeping in view the willful and deliberate abuse of dominant position by OP1.
 - d. To direct OP1 to undertake the modification of the agreement
 - e. To give a finding on the losses/damages suffered by the informant due to the anticompetitive conduct of the OPs
 - f. To direct OP1 to return the Financial Risk Guarantees of Rs 183.53 crores furnished by the informant and to further direct OP1 to execute the FSAs for the balance quantity of coal of 635,000 MTs without insisting informant to furnish the additional Rs 233.63 crores of such Financial Risk Guarantees.
 - g. To direct the OPs to function in a manner as may be specified by the Commission in order to ensure freedom of trade carried on by the participants in the market and to protect the interest of the consumers.
 - h. To pass, cease and desist order against the OPs stopping them from indulging in anti-competitive activities.
7. Since the FSAs were signed for supply of coal and informant has set-up and operates a thermal power generation plant, so, the



relevant product market would be 'production and sale of non-coking coal for thermal power generation' and since OPs were supplying the coal for the whole of country which means that the relevant geographic area would be entire India. Thus, the relevant market would be "production and sale of coal for thermal power generation in India".

8. The informant is a power generating company that procures coal for its plants from OPs. The informant is aggrieved by the various clauses of the FSAs as well as acts and omissions of the OPs thereunder. It has alleged the abusive conduct of the OPs on the basis of legal, regulatory and the policy regime in the entire area of production and distribution of coal in India. By virtue of Coal Mines (Nationalization) Act, 1973, coal mines were taken over by the Central Government. Subsequently, on creation of OP2 in the year 1975, the same were vested in it. OP2 (including its subsidiaries) is consequently having a statutory monopoly in the production and sale of non-coking coal in India. As such, the OPs were the sole and dominant players in the market of sale of non-coking coal for power generation in India as the entire production and distribution of coal in India is in the hands of OP & its subsidiaries. Otherwise also the Commission has already found the OP2 (alongwith its subsidiaries) in a dominant position in some of the earlier cases, viz. Cases No. 03/2012, 11/2012, 59/2012. 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.

9. It is pertinent to mention that the Commission also ordered investigations against OP2 and its subsidiaries for their alleged anti-competitive conduct in similar Cases no. 05/2013, 07/2013, 37/2013 and 44/2013.
10. In view of the foregoing discussion, the Commission is of the opinion that *prima facie* case was made out against OPs for investigation for contravention of section 4 of the Act and it is a fit case to be investigated by DG.
11. The DG is directed to investigate the matter as directed above. In case, 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.
12. 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.



13. The Secretary is directed to send a copy of this order to the office of the DG.

New Delhi
Date: 22/01/2014

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Geeta Gouri)
Member

Sd/-
(Anurag Goel)
Member

Sd/-
(M.L.Tayal)
Member

Sd/-
(Justice (Retd.) S.N. Dhingra)
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