COMPETITON COMMISSION OF INDIA

Case No.65/2011

Dated: 08.12.2011

Information filed by:

M/s Bajrang Steel and Alloys Pvt Ltd.
Unit-I, (Induction and Furnace Division)
Plot No. 31, Goibhanga, Kalunga,
Rourkela, Orissa

Information against:

Western Electricity Supply Company of Orissa
Reg. Office Bhubaneswar, Orissa

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

The information in the present matter was filed on 07.10.2011 by M/s Bajrang Steel & Alloys Pvt. Ltd. (hereinafter referred to as "Informant") under section 19 of the Competition Act, 2002 (hereinafter referred to as "the Act") against the Western Electricity Supply Company of Orissa Ltd. (hereinafter referred to as "Opposite Party") for its alleged anti-competitive practices and abuse of dominant position.

2. The facts and allegations in the case, in brief, are as under:

2.1. The Informant is a consumer of electricity provided by the Opposite Party in the State of Orissa. As per the allegations, the Informant has no other

option except to avail supply and distribution of electricity from the Opposite Party only and therefore enjoys a dominant position within the meaning of section 4 of the Act.

2.2. The Informant has alleged that its agreement dated 28.04.2005 (as a consumer) with the Opposite Party is violative of the provisions of Section 3 and 4 of the Act. As per the Informant, the consumers of the other states are in a better position as compared to it, since charges of electricity are lower there as compared to Orissa.

2.3. The Informant has also submitted that the Opposite Party has inserted a clause in the conditions of supply of electricity whereby the rebate has been given only for one year, whereas initially the agreement was entered for the supply of electricity for five years.

2.4. The Informant has further contended that its agreement with the Opposite Party and the above conditions imposed by the Opposite Party has resulted into an anti-competitive activity which is covered under section 3 & 4 of the Act. The Informant has further alleged that since it is not free to select a service provider, its agreement with the Opposite Party has also caused barriers to the new entrants for the supply of electricity from the other neighbouring states.

3. The Commission considered the matter in its meeting held on 18.10.2011 and decided to give an opportunity to the Informant to explain its case. On 08.11.2011, Mr. S. K. Sharma, and Mr. C.M. Sharma, Advocates appeared on the behalf of the Informant and sought adjournment. On their request, the matter was adjourned for 08.12.2011. On 08.12.2011, the counsel appeared on behalf of the Informant and sought further adjournment. However, the request of the informant was declined and the Commission decided to dispose of the case on merits.

4. The Commission has carefully considered the information and the documents annexed thereof as filed by the Informant. The Commission feels that in order to deal with the allegations mentioned in the information; it would be pertinent to have a look, in brief, at the electricity sector in the State of Orissa.

4.1 Orissa was the first State in India to have undertaken reforms and restructuring in the power sector. The main objective of the reform was to unbundle generation, transmission and distribution and to establish an independent and transparent Regulatory Commission in order to promote efficiency and accountability in the Power Sector. Orissa State Electricity Board which was looking after generation, transmission and distribution of power was unbundled. In order to implement the reforms, in the first phase, two corporate entities namely Grid Corporation of Orissa Limited (GRIDCO) and Orissa Hydro Power Corporation Limited (OHPC) were established. GRIDCO was incorporated under the Companies Act, 1956 to own and operate the transmission and distribution systems. Similarly OHPC was incorporated to own and operate all the hydro generating stations in the State. The State Government enacted the Orissa Electricity Reform Act, 1995 which came into force with effect from 01.04.1996.

4.2 Subsequently in order to privatize the distribution functions of electricity in the State, four distribution companies namely Central Electricity Supply Company of Orissa Limited (CESCO), North Eastern Electricity Supply Company of Orissa Limited (NESCO), Southern Electricity Supply Company of Orissa limited (SOUTHCO) & Western Electricity Supply Company of Orissa Limited (WESCO) were incorporated under the Companies Act, 1956 as separate corporate entities. Later on, through a process of bidding, the distribution companies were privatized in 1999. While WESCO, NESCO and

SOUTHCO came under the control of BSES group of companies, CESCO came under the control of AES. However, the license of the erstwhile CESCO has been revoked w.e.f. 01.04.2005 and now the affairs of the Central Zone Electricity Distribution and Retail Supply Utility are controlled by Central Electricity Supply Utility of Orissa (CESU).

4.3 The Commission notes that Government of India has enacted the Electricity Act, 2003 which provides for non-discriminatory open access in transmission and distribution and supply of electricity and through which competition has been sought to be introduced in the distribution sector. Section 42 of EA Act, 2003 provides for open access in distribution sector. As per provisions of Section 42(3), 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 .

4.4 The Commission also notes that the Central Electricity Regulatory Commission has been entrusted with the responsibility of open access in transmission while State Regulatory Commissions like Orissa Electricity Regulatory Commission (OERC) have been vested with the responsibility of Open Access in distribution.

4.5 The Commission observes that the relevant market in the present matter is the market of supply and distribution of electricity in the State of Orissa. Since at present the DISCOMS in the state of Orissa enjoy a status of

statutory monopoly in their respective areas of operation, therefore, the four Discoms in the state of Orissa may be said to be dominant in their respective geographical areas.

4.6 The Commission also observes that in respect of the four DISCOMS who are operating in their respective licensed areas in the State of Orissa, tariffs are determined from time to time by the Orissa State Electricity Commission in exercise of powers conferred to it by the Electricity Act, 2003. The role of OERC inter-alia is also to protect the interest of consumers, and promote competitiveness. The consumers like the informant in the areas of WESCO may also request for electricity from other utilities as per the regulations framed by CERC/OERC for open access as per Electricity Act.

5. In view of the above, the Commission feels that on the issue of rebates, subsidies and tariffs, the Commission may not be the appropriate forum, since CERC and OERC are the sectoral regulators in place and the informant may approach them with its grievances.
6. On the issue of access of electricity from other utilities also, the consumers like the informant in the areas of WESCO may always request for electricity from other utilities from other areas as per the rules and regulations framed by CERC/OERC for open access as per Electricity Act, 2003.
7. There is no evidence put forth by the informant, which suggests that WESCO has denied it an opportunity to avail access to other utilities provided it fulfils the criteria laid down in the Electricity Act, 2003 and regulations thereof. No evidence has also been laid down to the effect that due to the actions of the discoms in the instant case, any harm has been caused to competition in the market.

8. In view of foregoing, the Commission holds that no *prima facie* violation of Section 4 of the Act is made out in the case.

9. The Commission further holds that no case of *prima facie* violation of the provisions of Section 3 of the Act is also made out in the matter as the agreement between the informant as consumer and WESCO as provider of electricity is a subject matter which is not covered under the provisions of section 3 of the Act. The agreement between the informant and WESCO cannot be said to be of the nature of section 3(3) since they are not operating at the same horizontal level providing similar kinds of goods or services. Further, the impugned agreement cannot also be said to be violative of provisions of section 3(4) of the Act because the informant as consumer cannot be said to be a part of the supply or production chain in the market of supply and distribution of electricity.

10. In view of the foregoing discussion, the Commission is of the considered view that the allegations made in the information do not fall within the mischief of either section 3 or section 4 of the Act and the information does not provide basis for forming a, *prima facie* opinion for referring the matter to the Director General (DG) to conduct the investigation. The matter is therefore, liable to be closed at this stage forthwith.

11. In view of the above discussion, the matter relating to the information is hereby closed under Section 26 (2) of the Act.

12. Secretary is directed to inform the Informant accordingly.

Sd/-
Member (R)

Sd/-
Member (GG)

Sd/-
Member (G)

Sd/-
Member (AG)

Sd/-
Member (T)

Sd/-
Chairperson

Certified True Copy

S.P. GAHLAUT
ASSISTANT DIRECTOR
Competition Commission of India
New Delhi

11/01/2012