



COMPETITION COMMISSION OF INDIA
(Combination Registration No. C-2021/03/824)

Date: 17 March 2022

Proceedings against Tata Power Company Limited under Section 43A of the Competition Act, 2002

CORAM:

Mr. Ashok Kumar Gupta
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Order under Section 43A of the Competition Act, 2002

Appearances during the hearing:

**For Tata Power
Company Limited**

Mr. Sajan Poovayya, Senior Advocate with Ms. Raksha Agrawal, Mr. Vaibhav Choukse, Ms. Aditi Khanna, Advocates and Mr. Ashish Kumar, representative of the Tata Power Company Limited

1. This Order shall dispose the proceedings under Section 43A of the Competition Act, 2002 (**Act**), initiated against Tata Power Company Limited (**Acquirer/TPCL**), in relation to the acquisition of 51% of equity share capital of Western Electricity Supply



Company of Orissa Limited (**WESCO**) by TPCL from Grid Corporation of Odisha Limited (**GRIDCO**), hereinafter referred to as **WESCO Combination** or **Combination**.

2. The WESCO Combination was notified to the Competition Commission of India (**Commission/CCI**) by TPCL on 30 March 2021 under Section 6(2) of the Act. The Commission, in its meeting held on 7 June 2021, approved the WESCO Combination under Section 31(1) of the Act without prejudice to the proceedings under Section 43A of the Act.

Background

3. On 25 November 1998, WESCO was incorporated as a 100% subsidiary of GRIDCO. WESCO is engaged in the distribution of power in the licensed areas of Rourkela, Burla (Sambalpur), Bhawanipatna (Kalahandi), Bolangir and Bargarh in the State of Odisha (**Licensed Areas**). On 1 April 1999, 51% of equity share capital in WESCO and the management thereof, was transferred to BSES Limited (Now R-Infra Limited), through competitive bidding process. By way of an order dated 4 March 2015 passed under Section 19 of the Electricity Act, 2003 (**Electricity Act**), the Odisha Electricity Regulatory Commission (**OERC**) revoked the license of R-Infra Limited, managing WESCO and appointed the Chairman cum Managing Director of GRIDCO as the administrator for the operation and management of WESCO Utility under Section 20(1)(d) of the Electricity Act.
4. During the financial year 2020-21, OERC initiated the process of sale of 51% of equity share capital of WESCO through a competitive bidding process and issued a request for proposal (**RFP**) inviting bidders. The RFP laid down qualifications, technical and financial criteria (collectively referred to as the **Eligibility Criteria**), based on which, a successful bidder was to be selected. TPCL submitted the bid for WESCO and was selected as the successful bidder by OERC.



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5. Thereafter, OERC issued a Letter of Intent (**LOI**) to TPCL and directed it to submit an acceptance to the LOI within 7 days from the issuance of LOI and comply with the conditions of RFP, i.e., submit a performance guarantee, deposit the consideration amount and execute the transaction documents within 15 days from issuance of LOI (hereinafter, **Acquirer Obligations**). As per the terms of the LOI, in case TPCL failed to comply with the Acquirer Obligations, OERC could encash the bank guarantee. Further, such failure could also result in TPCL being disqualified as the successful bidder, and OERC could forfeit the bid security submitted by TPCL (unless it received an extension of time for the same). TPCL followed OERC directions, gave its acceptance to LOI and deposited the consideration and performance guarantee. Thereafter, OERC passed a Vesting Order and the transaction documents, namely, Share Acquisition Agreement (**SAA**), Shareholders' Agreement (**SHA**), Bulk Power Transmission Agreement (**BPTA**) and Bulk Supply Agreement (**BSA**), were executed. The timeline of the events in the WESCO Combination are summarised in the table below:

Serial No.	Events	Timeline
1.	Initiation of bidding process by OERC	14 August 2020
2.	Submission of bid by TPCL	14 September 2020
3.	Issuance of LOI by OERC	3 December 2020
4.	Acceptance of LOI by TPCL	6 December 2020
5.	Payment of consideration	22 December 2020
6.	Passing of Vesting Order by OERC	28 December 2020
7.	Applicability of Vesting Order	1 January 2021
8.	Execution of SAA	7 January 2021
9.	Execution of SHA	7 January 2021
10.	Execution of BPTA	Not executed before filing
11.	Execution of BSA	2 February 2021
12.	Filing of notice with the Commission	30 March 2021 (C-2021/03/824)



Initiation of Proceedings before the Commission under Section 43A of the Act

6. During the assessment of the WESCO Combination, the Commission noted that all the steps of the WESCO Combination had been completed and the combination had been consummated before filing of the notice. It was noted by the Commission that TPCL should have filed the notice for approval of the Commission on the acceptance of the LOI; however, it proceeded to consummate the Combination without doing so. Thus, the Commission was of the *prima facie* view that TPCL had not only failed to give notice of the combination within the stipulated time under Section 6(2) of the Act but also consummated the same before giving notice to the Commission in contravention of the provisions of Section 6(2) read with Section 6(2A) of the Act. Hence, the Commission decided to issue a Show Cause Notice (SCN) to TPCL under the provisions of Section 43A of the Act.

7. Accordingly, on 5 July 2021, the SCN was issued to TPCL under the provisions of Section 43A of the Act read with Regulation 48 of the Competition Commission of India (General) Regulations, 2009, to explain, in writing, within 15 days of receipt of such communication as to why it should not be found to be in contravention of the Act and why a penalty should not be imposed on it in terms of the provisions of the Section 43A of the Act. TPCL, after taking due extension of time, submitted its response to the SCN on 9 August 2021, with a request for a hearing in the matter. The Commission considered the request and allowed the same. Subsequently, the arguments of the authorised representatives of TPCL were heard on 12 January 2022.

Submissions of TPCL

8. In response to the SCN, TPCL, *inter alia*, submitted that the WESCO Combination is different from a typical commercial transaction as it is end-to-end regulated by OERC. It was submitted that the entire process of sale of the WESCO was regulated and governed by the provisions of Section 20 of the Electricity Act, which empowered the Appropriate Electricity Regulatory Commission (in this case, OERC) to select the bidder and vest the WESCO in terms of Section 21 of the Electricity Act. Thus, TPCL undertook the



transaction pursuant to a bidding process initiated by OERC under Section 20 of the Electricity Act after revocation of the distribution licence of the licensee under Section 19 of the Electricity Act, and thereafter, a Vesting Order was passed by OERC vesting the WESCO in its favour upon compliance of all the conditions as prescribed in the RFP.

9. TPCL submitted that it believed that OERC had the exclusive jurisdiction to regulate 'combinations' in the electricity sector. In this regard, the learned counsel for TPCL pointed out that Section 60 of Electricity Act empowers OERC to issue appropriate directions if, in its opinion, such acquisition / combination will cause an adverse effect on competition (**AEC**) in the electricity market in India. Further, reference was made to Sections 173, 174 and 175 of the Electricity Act which, *inter alia*, state that the provisions of the Electricity Act shall have an overriding effect, except in cases pertaining to provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989. Basis the foregoing, it was averred that the legislature had not put the Act amongst the statutes whose provisions were to prevail over the provisions of the Electricity Act, and therefore, exclusive jurisdiction was provided to the sectoral regulator, i.e., OERC, in the matter concerning competition in the electricity sector.
10. Further, to support the argument of exclusive and overriding jurisdiction of OERC, reliance was placed upon the judgement dated 16 February 2017, passed by the erstwhile Hon'ble Competition Appellate Tribunal (**COMPAT**) in Appeal No. 33 of 2016, titled *Anand Prakash Agarwal v. Dakshin Haryana Bijli Vitran Nigam Limited (Anand Prakash Case)*, wherein, while considering the conflict between the Electricity Act and the Act in the context of Section 174 and Section 175 of the Electricity Act, it was observed as follows:

“18.9 Thus, in the case of a conflict between the provisions of the Electricity Act and the Competition Act, the former will override because Section 174 of the Electricity Act would get attracted and section 175 of the Electricity Act will have



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*to yield. The contention of the Appellant, that the Competition Act also has a non-obstante clause in Section 60 of the Act giving it an overriding effect, does not assist his case because the Electricity Act, 2003 is admittedly a later special statute and in the event of irreconcilable inconsistency between the Electricity Act and the Competition Act, the former would override even though the Competition Act contained the non-obstante clause in Section 60 of the Act. We agree with the counsel of DHBVN that the principle of *leges posteriores priores contrarias abrogant* upheld by the Supreme Court in the case of *Solidaire India Ltd. vs. Fair Growth Financial Service Ltd.* – (2001) 3 SCC 71, will be applicable and the Electricity Act would prevail.”*

11. Furthermore, TPCL submitted that, for the purposes of interpretation of two statutes in apparent conflict, the provisions of a general statute must yield to those of a special one, i.e., when there is a conflict between general law and special law, special law shall prevail. Therefore, in the instant case, the provisions of the Electricity Act, being the special statute dealing with the electricity sector in India, would override the provisions of the Act. However, if both the Electricity Act and the Act are considered special statutes, then the principle of *leges posteriores priores contrarias abrogant* will be applicable, i.e., the later special statute will prevail, being the Electricity Act.
12. TPCL submitted that, notwithstanding the above, when OERC, *vide* its letter dated 29 January 2021 (**NESCO Letter**), directed TPCL to comply with the requirements of the Act for the first time, it filed a notice with the Commission regarding the acquisition of 51% equity share capital of North Eastern Electricity Supply Company of Odisha Limited (**NESCO Combination**)¹ on 8 February 2021, in compliance with the NESCO Letter. Subsequently, on 30 March 2021, given the direction in the NESCO Combination, TPCL voluntarily filed a notice with the Commission for the WESCO Combination as well, although the NESCO Letter did not give any specific directions for the same.

¹ CCI Combination Registration No. C-2021/01/813 (NESCO/TPCL)



13. Based on the above, TPCL submitted that it is committed to comply with all laws, including the Act, and it genuinely believed earlier that OERC had exclusive jurisdiction in the matter. However, when it received the NESCO Letter from OERC in the NESCO Combination, it filed a notice for the WESCO Combination with the Commission voluntarily as a good corporate citizen and out of abundant caution, even though no such letter or direction was issued by OERC.
14. Further, TPCL submitted that it provided full cooperation in inquiry and provided all documents to the Commission required for its assessment. Moreover, there were no previous instances where TPCL had been found to be in violation of the provisions of the Act. Also, there is no finding of appreciable adverse effect on competition (AAEC) in the respective relevant markets by the Commission or a finding of AEC by OERC. Furthermore, there was immense pressure from OERC to close the respective transactions as soon as possible, including continuance of the proceedings and the process before OERC even during the COVID-19 pandemic.
15. In view of the foregoing, TPCL prayed that no penalty, or only a nominal penalty be levied upon it.

Analysis and Findings of the Commission

16. The Commission has considered the submissions of TPCL as well as heard the arguments advanced by the learned counsel in the matter. Before proceeding further, the Commission deems it appropriate to first deal with the issue of jurisdiction, whereby it is argued by TPCL that OERC has exclusive jurisdiction to regulate the combination pursuant to Section 60 of the Electricity Act, and that the operation of competition law is overridden by the non-obstante provision in Section 173, 174 and 175 of the Electricity Act. In this regard, it is highlighted that the issue of conflict or overlap in the two statutes, namely, the Act and the Electricity Act, has already been dealt by the



Commission in the matter of *Shri Arun Mishra and State of U.P. & Ors. (Case no. 43 of 2017)*², wherein it was observed that:

“ 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.

.....

*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.”

² Order under Section 26(2) of the Act



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 29th September, 2015 that the mandate of the Commission is to eliminate 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 mandate of the Act is vast and its jurisdiction cannot be perceived to be ousted by the Electricity Act, 2003. ...”

17. Similar observations were made by the Commission in the order passed under Section 26(1) of the Act in the matter of *HPCL-Mittal Pipelines Limited and Gujarat energy Transmission Corporation Limited & others (Case no. 39 of 2017)*. Further, in the said order, as regards the judgement of the erstwhile Hon'ble COMPAT in the Anand Prakash case, the Commission had observed that

“41 ratio of the hon'ble erstwhile COMPAT clearly indicates that the said judgment was only with respect to matters pertaining to electricity tariff approved by the Appropriate Commission under the EA03.

42. Certainly, EA03 is a special legislation governing, inter-alia, matters pertaining to generation, transmission and supply of electricity. However, to argue that in all matters in the electricity industry EA03 would prevail over the provisions of the Act, because of the presence of a sectoral regulator, would go against the spirit of the said statute as well as against the purpose for which the Act was enforced.....”



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18. Since TPCL has also placed reliance upon the same case to argue exclusive jurisdiction of OERC, the Commission reiterates its observations in the aforesaid matter for the purposes of the instant case.
19. Further, the position that the sectoral regulator does not have exclusive jurisdiction under the Electricity Act is also supported by the case of *Shri Neeraj Malhotra, Advocate vs. North Delhi Power Ltd. & Ors. [Case No. 6/2009]*, wherein it was alleged that only the Delhi Electricity Regulatory Commission (**DERC**) under the Electricity Act had jurisdiction to deal with issues relating to the anti-competitive behaviour of electricity distribution companies. The Commission, in this case, had referred the matter to DERC for its comments, and DERC, in its communication to the Commission, had categorically opined that *“matters relating to electricity tariff have to be decided as per the provisions of the Electricity Act, 2003 and DERC Regulations. Accordingly, CCI may not be appropriate forum to deal with such issue. However, specific issues alluded to by the petitioner accusing the Discoms of abuse of their dominant position may be looked into by the CCI in terms of the Competition Act, 2002.”*
20. Likewise, in the instant case, OERC, in the NESCO Letter, noted the provisions contained in Section 60 of the Electricity Act, then expressly directed TPCL that, *“...notwithstanding the confirmation regarding conformity with relevant Indian Laws & Regulations already provided in the covering letter forming part of your bid, TPCL is required to comply with the requirements of Competition Act, 2002 and furnish a certificate on such compliances to OERC.”* From the aforesaid paragraph of the NESCO Letter, it is clear that OERC also recognises the jurisdiction of the Commission in the matter of regulation of combinations in the electricity sector and has, therefore, directed TPCL to comply with the provisions of the Act.
21. Thus, based on the above, the Commission is of the opinion that OERC cannot be said to have exclusive jurisdiction in relation to the WESCO Combination, and that it was incumbent upon TPCL to file a notice with the Commission under Section 6(2) of the



Act in respect of the WESCO Combination prior to the consummation. Such obligation was not subject to OERC giving directions to TPCL.

22. It is to be noted that the merger control regime in India is mandatory and suspensory in nature. Section 5 provides the assets and turnover criteria to determine which acquisitions of control / shares / voting rights / assets or mergers and amalgamations will amount to combination under the Act. Section 6(2) of the Act mandates parties to give a notice in respect of the proposed combination. In case of acquisitions, the trigger for notifying the transaction to the Commission is the execution of any agreement or other document for the acquisition of control / shares / voting rights / assets referred to in Section 5(a) or acquiring of control referred to in Section 5(b) of the Act. Section 6(2A) of the Act provides that a combination notified to the Commission shall not come into effect for a period of 210 days from the date of notification or earlier approval by the Commission. The provisions in effect imply that the mergers and acquisitions that can be considered combinations in terms of Section 5 of the Act are mandatorily notifiable to the Commission and therefore, cannot be consummated, either entirely or in part, without approval from the Commission, unless they are exempted by the Government of India notification or are combinations that fall under Schedule 1 of Combination Regulation, in respect of which a notice need not normally be filed. Based on the submission of TPCL, it is noted that the WESCO Combination was neither exempted by any Government of India notification nor covered under Schedule 1 of Combination Regulations. Also, it is pertinent to note that the mandatory regime for notifying a proposed combination to the Commission is applicable irrespective of whether or not the combination causes any AAEC in India.
23. Thus, in light of the above, the Commission finds that TPCL, by acquiring 51% of equity share capital of WESCO without filing a notice with the Commission in terms of Section 6(2) of the Act prior to consummation, has contravened the provisions of Section 6(2A) of the Act, and hence, is liable for penalty under Section 43A of the Act, which reads as under:



“If any person or enterprise fails to give notice under Section 6(2) of the Act, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or the assets, whichever is higher, of such a combination”

24. It is to be noted that Section 43A of the Act prescribes the extent of penalty that can be levied for failure to file notice; however, the Commission has sufficient discretion to consider the conduct of the parties and circumstances of the case to arrive at an appropriate amount of penalty.
25. Based on the submissions of TPCL, the Commission notes that, in the instant case, TPCL was under an obligation to comply with the strict timelines imposed upon it by OERC. Therefore, while, on the one hand, it was incumbent upon TPCL to file a notice with the Commission under Section 6(2) of the Act on its acceptance of LOI, on the other hand, it was also incumbent on TPCL to meet the timelines of OERC and give effect to the WESCO Combination immediately, subsequent to the issuance of LOI. Further, TPCL was faced with ambiguity emanating from overlapping provisions in the two special acts and had no specific direction from OERC, such as in case of the NESCO Combination, to comply with the provisions of the Act. Nevertheless, pursuant to the receipt of the NESCO Letter, TPCL filed a notice with the Commission in relation to the WESCO Combination voluntarily and fully cooperated during the inquiry, supplying all requisite material / documents in response to the information requirement of the Commission, which formed the basis of the findings of contravention.
26. While all the above factors do not absolve TPCL of its obligation to file a notice prior to the consummation of the WESCO Combination, they can at best be considered mitigating factors. It is reiterated that, under the mandatory and suspensory regime under the Act, it became incumbent upon the Acquirer to file a notice with the Commission under Section 6(2) of the Act on acceptance of the LOI for approval of the Commission before consummation of any step of the Combination.



27. Thus, considering the facts and circumstances of the case and the conduct of TPCL, wherein contravention has been established based on the information voluntarily disclosed by TPCL, who have extended full cooperation in furnishing the information, the Commission decides to take a lenient view and imposes a nominal penalty of INR Five Lakhs (INR 5,00,000/-) on TPCL. TPCL shall pay the penalty within 60 days from the date of receipt of this order.
28. The Secretary is directed to communicate to TPCL accordingly.