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Fair Competition  
For Greater Good

## COMPETITION COMMISSION OF INDIA

Case No. 12 of 2014

### In Re:

Vidharbha Industries Association

**Informant**

### And

MSEB Holding Co. Limited.

**Opposite Party No. 1**

Maharashtra State Power Generation Co. Ltd.

**Opposite Party No. 2**

Maharashtra State Electricity Transmission Co. Ltd.

**Opposite Party No. 3**

Maharashtra State Electricity Distribution Co. Ltd.

**Opposite Party No. 4**

### CORAM

**Mr. Ashok Chawla**  
**Chairperson**

**Mr. Anurag Goel**  
**Member**

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

**Mr. Sudhir Mittal**  
**Member**

**Present:** Advocates Shri K.K. Sharma, Shri Danish Khan on behalf of the  
Informant



सत्यमेव जयते



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

The present information has been filed by Vidharbha Industries Association ('**the Informant**') under section 19(1) (a) of the Competition Act, 2002 ('**the Act**') against MSEB Holding Company Limited ('**OP 1**'), Maharashtra State Power Generation Company ('**OP 2**'), Maharashtra State Transmission Company Limited ('**OP 3**') and Maharashtra State Electricity Distribution Company Limited ('**OP 4**') alleging contravention the provisions of section 4 of the Act.

2. Factual matrix of the matter, as unfolded in the information, is stated below:

2.1 The Informant is a trade association in the region of Vidarbha in the State of Maharashtra. OP 1 is a public limited company incorporated under the Companies Act, 1956. OP 2, OP 3 and OP 4 are subsidiaries of OP 1, formed w. e. f 06/06/2005 by virtue of the new Electricity Act, 2003 of the Government of Maharashtra. OP 2, OP 3 and OP 4 are engaged in the business of generation, transmission and distribution of electricity respectively in the state of Maharashtra.

2.2 The Informant alleged that the Opposite Parties, as a group, have abused their dominant position *inter alia* by deliberately generating and distributing electricity in extremely inefficient manner and by denying market access to other efficient and economical power generating companies. The inefficient activities of OP 2 and OP 4 are reflected in the exorbitant cost structure submitted by OP 2 and OP 4 to Maharashtra Electricity Regulatory Commission (MERC) which results in increase in tariff, as determined by MERC.

2.3 The Informant has further alleged that irrespective of the price charged by OP 2, OP 4 purchases all the power generated by OP 2. Since the tariff for the



सत्यमेव जयते



power purchase is decided by the MERC as per the cost structure and revenue forecast submitted by OP 4, due to inefficiency of OP 2 the cost structure invariably remains very high. In such a scenario, MERC is bound to determine tariff at a rate which is much higher than the prevailing market rate. Resultantly, the consumers of OP 4 are paying the highest electricity tariff compared to all other states in India.

2.4 It has been stated that the power purchase cost of OP 4 during the financial year 2011-12 and 2012-1 has increased by 18% and 15% respectively. Further, the power purchase cost of OP 4 from OP 2 is the highest amongst the major conventional energy power sellers. It has also been alleged that OP 4 has violated the Merit Order Despatch Principles whereby it is mandatory to purchase the least expensive electricity first and the most expensive electricity last.

2.5 The Informant has further stated that while purchasing power from OP 2 under Merit Order Despatch principles, OP 4 is considering overall average purchase rate of generating units of OP 2 instead of each generating unit separately and is considering only variable cost instead of fixed and variable cost of purchase rate whereas for other sources OP 4 is considering both fixed and variable cost. The Informant alleged that this is a clear case of discrimination and in violation of section 4(2) (a) (i) of the Act.

2.6 The Informant submitted that NTPC Ltd. sold power to OP 4 at 60% lower rates than OP 2 for the financial 2013-14. Relying on a news report, the Informant submitted that had the cost of power procurement from OP 2 been at par with NTPC, the consumers would have saved Rs. 7,400/- Crore in the year 2013-14.

2.7 It has been stated that the tariff of power purchased by the distribution licensee is decided by the MERC as per the power purchase agreement between a generating company and a distribution licensee. The Informant alleged that OP



सत्यमेव जयते



- 4 arbitrarily enters into long-term power purchase agreement with inefficient OP 2. Since there is no competition in the relevant market for OP 2, it never intends to adopt efficient and competitive procedures towards power generation.
- 2.8 The Informant further alleged that the conduct of OP 4 in respect of arbitrary purchase of entire electricity generated by OP 2, despite the exorbitant purchase costs, results in unfair denial of market access to the other efficient power generating companies.
- 2.9 It has been stated that OP 4 is the owner of essential facilities/infrastructure required for supply of electricity that is, distribution network. Any power generating company which needs to supply electricity to consumers has to sell it through the distribution licensee *i.e.*, the OP 4. The Informant further stated that owing to the extremely high tariffs of OP 4, consumers have repeatedly requested to grant open-access to other power generating companies. But, OP 4 has been consistently refusing to accept such requests citing, *inter alia*, operational constraints.
- 2.10 The Informant stated that OP 4 adopts cost-shifting techniques by classifying all expenditure and revenue heads as uncontrollable and accordingly giving its cost structure to the MERC, defeating the very purpose of the tariff determination process.
- 2.11 It has also been alleged that 50% of the agricultural consumers in the relevant geographic market are unmetered, thereby causing major revenue loss to OP 4 which are being passed on to the consumers. The Informant stated that in the areas like Nandurbar, Beed, Nanded etc. the power distribution losses are projected to be around 35-49%. It was further stated that even though the MERC has been directing OP 4 to install DTC meters for analyzing correct losses since 2005, no steps were taken in this regard and no energy audit or loss calculations were carried out. Further, OP 4 has intentionally assessed



सत्यमेव जयते



higher consumption for unmetered agricultural consumers. The Informant also stated that the methodology adopted by OP 4 to calculate distribution losses, which is based on the assumption that all the meters are working at 100% load factor, is incorrect.

2.12 It has been alleged that OP 2, through its decision to shut down four units of Koradi Thermal Power Plant during December 2010 and January 2011, has contravened the provision of section 4(2) (b)(ii) of the Act which amounted to limiting/restricting the output.

3. Based on the above averments and allegations, the Informant prayed to the Commission to:

- a. initiate an investigation under Section 26(1) of the Act against abuse of dominance by the Opposite Parties;
- b. pass cease and desist Order against the acts of the Opposite Parties;
- c. direct OP 4 to stop arbitrarily purchase of electricity from OP 2 and enter Power Purchase Agreements on a competitive bidding basis for its entire distribution network.

4. The Commission has perused the information and heard the counsel appearing on behalf of the Informant at length.

5. Since the case relates to the alleged abuse of dominant position by the Opposite Parties, the first point of consideration is delineation of the relevant market. Considering the allegations in the information and the dynamics of the electricity sector, the markets of generation, transmission and distribution of electricity can be meaningfully distinguished. Each market consists of different set of producers and consumers and the scope of demand substitution from one market to another is limited.



6. In the instant case the allegations primarily pertain to the abusive conduct of OP 4 which is operating in the electricity distribution market. Accordingly, the market for distribution of electricity is considered as the relevant product market in the present case. No other products can be considered as substitute of the distribution of electricity. As OP 4 is given license to supply/distribute electricity in all areas of Maharashtra except Mumbai etc., the licensed area of OP 4 in the State of Maharashtra is considered as the relevant geographic market in this case. Accordingly, '*the market for distribution of electricity in the licensed area of OP 4 in the State of Maharashtra*' is considered as the relevant market in the instant case. In the said relevant market OP 4 is the seller and the end consumers of electricity are the buyers.
7. The allegations of the Informant are also directed towards the abusive conduct of OP 2 which is operating in the electricity generation market. The allegations pertain to closure of power generation plants by OP 2 which caused inefficient production of electricity and higher prices. In this regard it is observed that shutting down of the plants, *prima facie*, looks like an operational decision and this does not seem to be in contravention of the provisions of section 4 of the Act.
8. On the issue of dominance it is observed that OP 4 is the only licensee distributor of electricity in the relevant geographic market. Hence, it is a monopoly distributor of electricity in the relevant market.
9. Essentially, the allegations against OP 4 are twofold; firstly, it continues to buy power from OP 2 which is cost inefficient in comparison to other available power generating companies and secondly, it is denying open access to consumers for availing electricity from other sources.
10. With respect to the allegation that OP 4 continues to buy power from cost inefficient OP 2, it is observed that as per Merit Order Stack for financial year 2012-13 approved by MERC, OP 4 purchases electricity from OP 2 at rates



सत्यमेव जयते



which are comparatively higher than the rates offered by other electricity generating enterprises. This translates into higher tariff charged to the end consumer as that tariff is decided by MERC on the basis of purchase cost of OP 4. *Prima facie*, the said conduct of OP 4 amounts to indirect imposition of unfair price on the consumers which is in contravention of Section 4(2) (a) (ii) of the Competition Act.

11. In regards to denial of open access by OP 4, the Informant has cited an instance where OP 4 was requested by consumers to allow open access but the same was denied citing operational constraints. As envisaged in the Electricity Act, 2003, the concept of open access allows consumers consuming electricity above 1 MW to buy cheaper power from alternative power generator. The idea is that the consumers should get choice instead of being forced to buy from the existing electric utility monopoly. It is aimed at helping large consumers by ensuring regular supply of electricity at competitive rates.
12. It is observed that denial of open access shuts the door on competition in the distribution market. The consumers are left with no choice but to keep buying power at whatever rate the distribution company supplies. On the other hand, a generator, who can become a rival distributor through open access, cannot supply electricity to the consumers. Therefore, *prima facie*, the conduct of OP 4 amounts to denial of market access to other power generating companies for distribution of electricity in the relevant market which is in contravention of the provisions of Section 4 (2) (c) of the Act.
13. In view of the foregoing discussion, a *prima facie* case of contravention of the provisions of section 4 of the Act is made out against OP 4.
14. Accordingly, under the provisions of 26 (1) of the Act the Director General (DG) is hereby directed to cause an investigation into the matter and to complete the investigation within a period of 60 days from receipt of this



सत्यमेव जयते



order. During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties including the conduct of group companies, if any.

15. The DG is also directed to investigate the role (if any) of the persons who were in charge of and were responsible for the alleged conduct of such companies.
16. It is, however, made clear that nothing stated herein shall tantamount to an expression official opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observation made herein.
17. The Secretary is directed to send a copy of this order alongwith the information and the documents filed therewith to the Office of DG forthwith.
18. It is ordered accordingly.

Sd/-  
**(Ashok Chawla)**  
**Chairperson**

Sd/-  
**(Anurag Goel)**  
**Member**

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

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

**New Delhi**  
**Date:05-08-2014**