



COMPETITION COMMISSION OF INDIA

Case No. 11 of 2017

In Re:

Karnataka Power Corporation Limited

Informant

And

- | | |
|---------------------------------------|-----------------------------|
| 1. Coal India Limited | Opposite Party No. 1 |
| 2. Mahanadi Coalfields Limited | Opposite Party No. 2 |
| 3. Western Coalfields Limited | Opposite Party No. 3 |

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearance: Shri Ajay Nandalike and Shri Achyuth Ajith Kumar, Advocates for the Informant.

Shri Ramji Srinivasan, Senior Advocate with Shri Yaman Verma, Ms. Gauri Mehta, Shri Toshit Shandilya and Shri Tushar Bhardwaj, Advocates alongwith Shri Snehasis Mallick, Chief Manager, Shri Kodanda Dhar Sahu, Senior Manager, Shri Arijit Das, Deputy Manager of MCL and Shri Sunil Kumar Roy, Chief Manager of WCL for the Opposite Parties.



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ORDER

1. The present information has been filed by Karnataka Power Corporation Limited ('the Informant') under Section 19(1)(a) of the Competition Act, 2002 (the 'Act') against Coal India Limited (OP-1/ CIL) and its subsidiaries viz. Mahanadi Coalfields Limited (OP-2/ MCL) and Western Coalfields Limited (OP-3/ WCL) (collectively, the 'OPs') alleging contravention of the provisions of Section 4 of the Act.
2. The Informant - Karnataka Power Corporation Limited - is a government company incorporated under the erstwhile Companies Act, 1956 and is entirely owned and controlled by the Government of Karnataka. It is engaged in the business of generating electrical power in State of Karnataka and controls and manages 34 dams and 24 power stations at Raichur and Bellary with a total power generation capacity of 3420 MW. It is stated in the information that the Informant requires about 51,000 Metric tons of coal every day for power generation.
3. To purchase such coal, it entered into an FSA with OP-3 on 14.10.2009, with OP-2 on 17.09.2009 for Raichur Thermal Power Station (RTPS) units 1-7 and on 22.03.2013 for RTPS unit 8 for procurement of coal. Both these OP-2 and OP-3 are subsidiaries of OP-1. It is alleged that OP-1 is in dominant position in India having complete control over production, supply, distribution, storage, acquisition and control of coal. It is stated that after nationalisation of coal mines in 1971, more than 90 percent of the coal is produced by the public sector, wherein OP-1 and its subsidiaries account for the largest proportion. Hence, it is stated that they are dominant entities.



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4. The Informant is primarily aggrieved of the fact that there is huge grade slippage in the quality of coal (grade of coal), when the coal is analysed at the colliery and when it is delivered to the Informant at the power station. Further, it is stated that until 2013, the sampling of coal was done by OP-2 and OP-3 themselves; however, from 2013, a third party was appointed by OP-2 and OP-3 for the same. It was only from 2016 that the Informant could carry out sampling at the loading end by an independent third party appointed by it (through Central Institute for Mining and fuel Research / 'CIMFR'). It is stated that grade of coal as assessed by third parties appointed by the Informant and by the OPs respectively showed marked difference. This slippage has also been observed by the Office of Comptroller and Auditor General (CAG) in its reports for the years ending 31.03.2010 and 31.03.2012. Even after complaining about such deficiency of grades time and again, the OPs did not address the problem.
5. In addition to the above, it is also stated that the OPs were required to install Automatic Samplers (AMS) within 24 months of signing of FSA which has not been done by the OPs. Further, the Informant states that it has received a lot of boulders, shale and other foreign materials in the coal rakes delivered by OP-3, causing damage to the Informant's machinery.
6. In sum, the Informant, impugning various clauses of Fuel Supply Agreements (FSAs) pertaining to grade slippage, sampling procedure, deemed delivery and other obligations, has alleged abuse of dominant position by the OPs.
7. Based on the above averments and allegations, the Informant has filed the instant information against CIL and its subsidiaries alleging abuse of dominant position in violation of the provisions of Section 4 of the Act.
8. The Commission has perused the information and the documents filed therewith besides hearing the learned counsel appearing for the parties.



9. The Commission notes that the Informant, a State power generating company, requires non-coking coal for its thermal power plants to generate electricity. Hence, based on the delineation of relevant market in the earlier coal cases *i.e.* Case Nos. 03, 11 and 59 of 2012, the Commission is of the view that the relevant market in the instant case would also be “*market for production and sale of non-coking coal to thermal power generators in India*”.
10. In the aforesaid relevant market, the Commission in the previous coal cases has already found CIL and its subsidiaries to be in a dominant position.
11. Coming to the abuse of dominance part, the Informant has raised various issues emanating out of FSAs executed with OPs, which are alleged to be abusive in nature. Specifically, the Informant has alleged that the OPs do not permit the Informant to negotiate its contracts for procurement of coal and it is not made party to the negotiations and discussions of provisions of FSAs and has to accept the terms thereof without any demur or protest. The Informant has also raised the issue of grade slippage/mis-declaration. It is alleged that there is substantial evidence to show that the grade of coal that is being shown in the invoice is not what is actually being supplied. It is alleged that the OPs have supplied lower quality of coal and have billed the Informant for higher grades of coal.
12. Raising serious objection to the *extant* sampling procedure, it has been stated in the information that there is a pressing need for the samples to be analysed by a mutually appointed independent third party at the unloading end as well. It is further stated that the OPs were required to install AMS (Automatic Samplers) within 24 months from signing of FSA where loading was to be through a silo. However, the OPs have failed to install AMS according to the agreed terms and conditions. Due to non-installation



of AMS, collection of samples of coal cannot be done properly. In such circumstances, the sample collection is required to be done at the unloading end as well. However, contrary to the provisions of FSA, neither AMS has been installed in time nor samples have been permitted to be taken at the unloading end.

13. The Informant has also sought directions against the OPs to require them compulsorily to make investments in crushers and coal washeries- which are stated to be integral parts of coal mining and sale process. It has been pointed out that the coal is required to be crushed and washed so that the Grade/ Gross Calorific Value of coal is consistent and in terms of what is contracted, supplied and invoiced. It is alleged that by not washing coal, the OPs are encouraging private washeries to be engaged in the supply chain which is causing huge losses due to adulteration of coal and pilferage.
14. The Informant has also stated that there has to be specific investments made in the coal mining and handling infrastructure to support introduction of international best practices.
15. Lastly, the Informant has submitted that the entire conduct and approach of the OPs is based on the policy of “*pay whether you agree or not*”, which means that regardless of whether or not the purchaser is satisfied with the qualities and quantities of coal supplied by the OPs, it has to accept the consignment of coal. Even if the purchaser refuses to accept the said substandard or lower coal, the delivery of the same is considered as “deemed delivery” and the purchaser is bound to make payment thereof. Thus, it is stated that the purchaser has to accept all grades of coal supplied by the OPs and if the purchaser raises any objection, in such circumstances also, the purchaser has to make payment thereof.



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16. On a careful perusal of the information and the averments/ allegations made therein, the Commission notes that the Informant has primarily raised issues relating to lack of negotiations in drafting of FSAs. Further, the issues relating to qualities and quantities of coal supplied under FSAs have been raised by the Informant in respect of sampling procedure, grade slippage/mis-declaration of grades, deemed delivery and lack of investments in coal mining and handling infrastructure to support introduction of international best practices.
17. In this regard, it is observed that in the previous coal cases (Case Nos. 03, 11 and 59 of 2012) decided by the Commission on 24.03.2017, the issues raised by the Informant have been substantially dealt with by issuing appropriate directions to CIL and its subsidiaries. As such, no further or other orders are required to be passed in this information and the same may be disposed of in light thereof.
18. In the aforesaid backdrop, after hearing the learned counsel appearing for the respective parties on 10.01.2018, the Commission directed the learned counsel appearing on behalf of the Informant to submit written submissions in respect of the two points urged by him during the course of hearing *i.e.* the availability/ adequacy of remedy under Colliery Control Rules in respect of grade slippage and freight issues arising out of the alleged underloading/overloading of wagons at Railway Sidings by the OPs.
19. The Commission has examined the submissions dated 17.01.2018 and 23.02.2018 filed by the Informant and response dated 24.01.2018 and 06.03.2018 filed by the OPs thereto, in respect of the aforesaid two points.
20. On perusal of these submissions, the Commission notes that so far as the issue of availability/ adequacy of remedy under Colliery Control Order in respect of grade slippage is concerned, the same is already covered by the



decision of the Commission in the previous coal cases wherein the Office of Coal Controller was noted as a suitable and independent mechanism to redress the grievances arising out of grade slippage. The Commission finds no merit in the suggestion made by the Informant regarding the independence of the Office of Coal Controller on the ground that that Coal Controller is an authority appointed by Ministry of Coal and at the same time the OPs are also operating under the aegis of Ministry of Coal and a Joint Secretary from Ministry of Coal serves on the Board of CIL. The Commission is of the considered opinion that the Office of Coal Controller has a statutory backing and in the absence of any material on record, it is inappropriate to cast aspersion on functioning of public officials who are discharging their mandate. By very nature of their office, it is expected that such public officials would act in an impersonal and impartial manner and any allegation or suggestion to the contrary needs to be substantiated by cogent evidence and cannot be made merely on the basis of some perception.

21. On the second issue *i.e.* freight issues arising out of the alleged overloading of wagons at Railway Sidings by the OPs, it has been contended on behalf of the Informant that under Clause 10 of the FSA, any penal freight for overloading charged by the Railways for any consignment is payable by the purchaser. It is only when overloading is detected from any particular colliery consistently during three continuous months, on due intimation from the purchaser to this effect, the seller undertakes to take remedial measures.
22. The OPs, however, have countered the allegation by arguing that the above clause casts a positive obligation upon the seller to rectify any issue pertaining to overloading, on being intimated by the purchaser of consistent overloading for three months. It was pointed out that the Informant has not placed any evidence on record to demonstrate that it made any such intimation to either MCL or WCL. It was further submitted



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that FSA provides a specific obligation upon CIL to resolve any issue of this nature, but such resolution can only be reached after the purchaser intimates CIL of the issue. If, upon being intimated, CIL had failed to resolve the issue, the purchaser *i.e.* the Informant would be entitled to seek the appropriate remedies for the failure to comply with the contract. It was alleged that the Informant is trying to short-circuit the contractual process and seeking remedies from the Commission when it has alternate remedies available under FSA.

23. The Commission has examined the issue in light of the submission made by the parties. From the material on record, it appears that overloading is occurring due to various factors such as loading of rakes mechanically using pay-loaders without pre-weighing facility; weighing of rakes in the rail in-motion weighbridges which are at a distance from the loading platform; composite loading of coal from different mines with different specific gravity/crushing quality/moisture content *etc.*
24. Be that as it may, it cannot be lost sight of the fact that the buyer has to pay the penal freight due to overloading at Railway Sidings by the OPs. The Commission is constrained to note that though the OPs have given elaborate reasons for overloading, yet they seem to have taken no steps to remedy the situation. In these circumstances, the Commission takes on record the submissions filed by the OPs and the Informant is at liberty to intimate the OPs of overloading in terms of the provisions contained in Clause 10 of the FSA, if so required. Needless to add, the OPs would take the necessary remedial measures immediately on being intimated by the Informant. No other or further direction is required to be issued in this regard in view of the categorical assertion of the OPs that the impugned clause casts a '*positive obligation*' upon the seller to rectify any issue pertaining to overloading.



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25. So far as the prayers of the Informant seeking directions against CIL to compulsorily make investments in coal mining and handling infrastructure are concerned, it is observed that the same do not raise any competition issue and such commercial decisions are to be left to CIL Board.
26. With the aforesaid observations and directions, the information filed by the Informant stands disposed of.
27. The Secretary is directed to communicate to the Parties, accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

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

New Delhi
Date: 16/03/2018