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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 73 of 2015

In Re:

Tamil Nadu Power Producers Association (TNPPA)
No. 6, Sardar Patel Road, Guindy, Chennai

Informant

And

Chettinad International Coal Terminal Pvt. Ltd. (CICTPL)
Rani Seethai Hall Building, 5th Floor,
603, Anna Salai, Chennai

Opposite Party No. 1

Kamarajar Port Limited (KPL)
No. 23, Rajaji Salai, Chennai

Opposite Party No. 2

CORAM

Mr. Ashok Chawla
Chairperson

Mr. S.L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Mr. M.S. Sahoo
Member

Appearance: *For Informant*

Shri S. P. Deo, Advocate
Ms. Radika Seth, Advocate

For OP 1

Shri A.N. Haksar, Sr. Advocate
Shri Udayan Jain, Advocate
Shri Joydeep Mazumdar, Advocate
Shri V. Valliammai, General Manager (Finance)



For OP 2

Shri Ramji Srinivasan, Sr. Advocate
Ms. Srinivasan, Assistant Manager (Law)

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

1. The present information is filed by Tamil Nadu Power Producers Association (TNPPA) (hereinafter, the '**Informant**'/'**TNPPA**') under section 19(1)(a) of the Competition Act, 2002 (hereinafter, the '**Act**') against M/s Chettinad International Coal Terminal Pvt. Ltd. (hereinafter, the '**Opposite Party No. 1**'/ '**OP 1**'), and M/s Kamarajar Port Limited (hereinafter, the '**Opposite Party No. 2**'/ '**OP 2**'), collectively referred to as the Opposite Parties/OPs, alleging *inter alia* contravention of the provisions of section 4 of the Act.
2. As per the Information, the Informant is an association of power producers formed in 2004 with an objective to promote and protect the interests of the power producers in Tamil Nadu and is registered under the Tamil Nadu Societies Registration Act, 1975. Its members are located in and around Chennai. They use coal as raw material for power generation which they procure from domestic as well as international sources. Both domestic and international coal is transported through sea which is then transferred from the ports to the power plants through roads or railways. It has been submitted that members of the Informant have commissioned their power plants near ports so as to have minimum land logistics, since transportation of coal by sea is significantly cheaper as compared to other modes of transportation. Members operate under the Group Captive model, by which power producers fix/ prescribe electricity tariffs with users directly, without any intervention over pricing by the State Electricity Boards ("SEB") or the state electricity regulators. The power generated is sold predominantly to industrial users and/ or third party customers.



3. OP 1 is stated to be a special purpose vehicle floated by a consortium of South India Corporation Agencies, Portia Management Services and Navayuga Engineering. OP 2, erstwhile the Ennore Port Limited, is a port situated on the Coromandel Coast which is about 20 km north of Chennai Port. It is submitted that OP 1 was selected, through an open bid, to create a common user coal terminal facility at OP 2 on Build, Operate and Transfer (BOT) basis. OP 1 and OP 2 entered into a License Agreement on 14.09.2006 which allowed it to construct and operate the facility for a period of 30 years from the date of commencement of commercial operations. The need for a common user coal terminal facility emanated due to the fact that the existing two coal berths at OP 2 were dedicated to handle the present and future requirements of Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO'). OP 1 commenced its commercial operations from 11.03.2011.
4. OP 2 is stated to be operating on the "Landlord Port Model" wherein the port i.e., the landlord, provides the basic infrastructure and manages the resources while cargo operations are vested with private BOT Operators and a captive user (TANGEDCO). Under this model, the port only provides basic infrastructure and allied services apart from performing regulatory functions and overall port planning & development. Activities like construction, management, development and operations of terminals are entrusted to the BOT operators.
5. The Informant has submitted that its members used to source their coal through the Chennai Port (CHPT) as their power plants were located nearby. However, the Hon'ble Madras High Court passed an order dated 11.05.2011 pursuant to which dumping and handling of coal at CHPT was stopped *w.e.f.* 01.10.2011 on account of the adverse impact on the environment caused by coal handling activities in Chennai. Therefore, the coal importers had no other option but to import coal through OP 1 located at OP 2, which had become operational from 11.03.2011.



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6. The Informant has contended that during the period of March 2011 to September 2011, both OP 1 and CHPT were operational and buyers had a choice to use the facility of either of these players. During that overlapping period, the charge levied by OP 1 was Rs. 145 – 180/- per MT, which was much closer to the charges levied by CHPT i.e. Rs. 148 – 153 per MT. However, once the import of coal from CHPT was stopped due to execution of orders of the Hon'ble Madras High Court, OP 1 allegedly catapulted to the position of dominance in the relevant market and drastically increased its common user coal terminal charges from Rs. 180 per MT to Rs. 300 per MT by October, 2011. Moreover, because of the distance factors, it is infeasible for the importers to source their coal through any other port e.g. Krishnapatnam or Karaikal ports. Therefore, OP 1 is alleged to be the only common user coal terminal and, hence dominant in the relevant market of 'provision of common user coal terminal services in and around Kamarajar Port, extending up to a point beyond which the total cost of transportation to an alternate port is higher'.
7. The Informant has alleged that OP 1 has abused its dominant position by imposing unregulated charges, charging for coordination and liaisoning services in an unfair manner, by supplying lesser coal than the agreed quantity, by unfairly escalating the charges. The Informant stated that as per Clause 13 of the Licence Agreement between OP 1 and OP 2, the licensee i.e. OP 1 is free to fix and collect charges from the users for the provision of the facilities, subject to the approval by the Regulatory Authority or any other person, if any, appointed by the government from time to time. However, neither OP 2 nor the State Government has appointed any such authority to regulate/ approve the tariff charged by OP 1. The Informant has also stressed on the fact that due to such liberty to OP 1, OP 2 also stands to gain as OP 2 gets minimum annual guaranteed revenue for the 30 years of commercial operation or a revenue share of 52.33% of the gross revenue,



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whichever is higher. Thus, higher gross revenue of OP 1 means higher revenue for OP 2.

8. Further, the Informant has contended that OP 1 requires the users to pay a part of the above mentioned charges as ‘charges for coordination and liasoning services’ to one M/s Breeze Enterprises Private Limited (hereinafter, ‘BEPL’). Allegedly, this coordination and liasoning charge is mandated as a condition precedent for availing the coal terminal services of OP 1, despite the fact that such charges do not form part of the “Published Tariff” of OP 2. Despite several oral and written representations in this regard, OP 2 took no cognisance of the matter other than merely posting a trade notice on its website advising the importers/ exporters/ agents operating at Kamarajar Port not to pay any other charges apart from the published tariff to BOT operators. Further, the members of Informant also have to face difficulty in operation of their power plants due to shortage in the quantum of coal supplied by OP 1. The Informant has also submitted that the frequent increase in the charges and imposition of unfair conditions by OP 1 has led to escalation of costs which cannot be transferred to the customers with whom the members of the Informant have long term agreements. Therefore, any increase in the coal charges or in its handling has to be absorbed by the members of the Informant till the term of such contracts and this adversely impact the competitive position of the members of the Informant *vis-a-vis* their competitors in the power sector.
9. In view of the facts enumerated above, the Informant has prayed the Commission to look into the abusive practices of OP 1 because of the dominant position it has gained in the relevant market with the closure of the coal terminal at CHPT. The Informant has also prayed that OP 2 be directed to appoint a regulator to examine and approve the prices fixed by OP 1 and to hasten the process of creation of the second common user coal terminal facility at its port. The Informant has also prayed for interim relief in the matter.



10. The Commission has perused the information filed by the Informant and the submissions of the Opposite Parties. Further, the Commission has heard the parties at length in its ordinary meeting dated 01.12.2015. The counsel for the Informant reiterated the facts and allegations entailed in the information which are not reproduced herein for the sake of brevity.
11. The learned senior counsel of OP 1 contended that the Informant has concealed various facts, including the Special Leave Petition No. 7883-7884 of 2012 (hereinafter, 'SLP') filed by it challenging the order of the Hon'ble Madras High Court dated 11.05.2011 before Hon'ble Supreme Court of India dealing with the same issues and allegations. It was further highlighted that recently after hearing all the parties including the Informant herein, Hon'ble Supreme Court *vide* its order dated 04.11.2015 disposed of the pending SLP with a direction that the Empowered Committee appointed by it *vide* its order dated 02.04.2012 shall evaluate the proposal submitted by the CHPT alongwith the objections of other parties on it. The Empowered Committee would thereafter formulate the conclusion whether the proposal submitted by CHPT is just and proper and whether pollution would be curtailed as claimed by CHPT. Therefore, allegedly the issues that were raised by the Informant in the present information, including the issues of monopoly, excessive pricing and loss of coal against OP 1 have already been disposed off by the Hon'ble Supreme Court.
12. OP 1 has also contended that the allegation regarding abuse of dominance by way of opportunistic pricing by it is baseless as there are substitutable facilities available at Krishnapatnam port and Karaikal port which are located at a distance of over 130 kms and about 300 kms respectively from the location of members of Informant. OP 1 has submitted that members of the Informant are availing the services of these alternative ports, thus showing actual substitution.



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13. It was also submitted that any comparison between the prices charged by CHPT and OP 1 are totally untenable considering that CHPT was an old port managed by the Government and had manual coal handling facilities. The same cannot be compared with a mechanized new coal handling terminal set up at a huge expense by a private party i.e. OP 1, which has to share a huge part of its revenue with a board managed port and has fully automated facilities which lead to time and cost savings for its customers.
14. OP 1 also contended that the Commission does not have jurisdiction under the Act to issue the directions sought for in the Information as the Commission can neither determine price, nor can it direct any authority to interfere in the market determined prices, where the applicable statute does not require the tariff to be fixed by any regulator. Hence, the information is liable to be dismissed for raising issues beyond the jurisdiction of the Commission.
15. The learned counsel of OP 2 also echoed the submissions made by OP 1 and contended that the Informant has misrepresented the facts before the Commission. At the outset, it was submitted that OP 2 strongly condemns payments made by any of importers or by the users of common user coal terminal services to the BOT operators or any third parties operating at OP 2 in excess of the published tariff. It was submitted that the tariff rate of Rs. 180 per MT was not increased to Rs. 300 per MT by October, 2011, as alleged. Even after the prohibition order of 11.05.2011 passed by the Hon'ble Madras High Court relating to handling of coal at CHPT, the tariff was maintained at Rs. 160 from 4th March, 2011 to 5th January 2012 as per the tariff intimation to OP 2. As per the published tariff, the revision in tariff rate to Rs. 300 per MT was done only in February, 2014.
16. OP 2 stated that it operates on a 'Landlord Model' wherein it provides the basic infrastructure and management of resources, while the rest of the operations are carried out by the private BOT operators. It was submitted that presently there are



six terminals at OP 2 catering to different substances for a license period of 30 years. Out of the six, three are dedicated coal terminals, two of which are earmarked for exclusive use of TANGEDCO and the third one, which was developed by OP 1, is a common user coal terminal meant for the use of private players.

17. It was claimed that OP 2 is the only major port that has been corporatized in India and considering its greater efficiency, independence, professional management and financial autonomy, the Central Government has recently proposed to convert other major ports into corporate ports, illustrating OP 2's model.
18. OP 2 submitted that OP 1 has invested around Rs. 350 crores in building & commissioning the said facility at OP 2, which has a capacity of 8 MMTPA (million metric tonnes per annum), which has fully automated equipments and conveyor systems, yard and evacuations systems with advanced systems of automatic truck-loading and wagon loading machinery. This massive infrastructural development and technological progress was possible only due to the huge investment expenditure incurred by OP 1. For this reason, the Licensee is granted the freedom to set the rate and user charges for the provision of project facilities, berth hire charges, cargo handling charges and other charges for cargo handling facilities. It is pertinent to note that this freedom to determine the tariff was given as OP 2, being corporate port, does not come under the purview of Tariff Authority for Major Ports ("TAMP") which is an institution formed under Major Ports Trust (MPT) Act, 1963.
19. OP 2 further highlighted that apart from the Kamarajar Port, there are two other ports in the nearby vicinity which are handling coal and are in competition with OP 2, namely Krishnapatnam Port Company Ltd., which is a private port located in the adjoining State of Andhra Pradesh; and MARG Karaikal Port which is also a private port located in the union territory of Pondicherry. It was claimed that



both these ports are handling coal cargo and many of the power producers are availing the facility from the said port. Thus it cannot be said that OP 2 is operating independently of competitive forces prevailing in the relevant market.

20. OP 2 has submitted that the revision in tariff rate to Rs. 300 per MT was done only in February 2014. OP 2 has further submitted the data to highlight that the rise in price/tariff charges was only in response to the rise in demand rather than any abuse of dominant position. With regard to the payment of coordination and liasoning charges to BEPL, OP 2 has submitted that the said payment is without its authorisation or knowledge. OP 2 claimed that it has categorically advised the importers/exporters/agents operating at its port not to pay more than the notified tariff to BOT operators. It was also submitted that OP 2 has even published a trade notice to this effect besides taking up the matter with OP 1. It was further contended that since OP 1 has denied levying of such a charge to be a condition precedent to provisioning of services to the members of the Informant or any other user, the payments made by any company (including the members of the Informant) is illegal.

21. It was further submitted that since the Hon'ble Supreme Court disposed of the SLPs and directed the Empowered Committee to consider all the views and objections and take its final decision by 31.03.2016, the Commission need not entertain the present information and reject the same.

22. The Commission has analysed the contentions made by the Informant as well as the Opposite Parties. During the course of hearing, the learned senior counsels for OP 1 and OP 2 emphasized that the Informant has already challenged similar issues before the Supreme Court by way of SLP No. 7883-7884 of 2012. It was also stated that the aforesaid SLP was disposed of by the Hon'ble Supreme Court *vide* order dated 04.11.2015 wherein the matter was referred to the Empowered Committee to examine the proposal of the CHPT in light of the



objections/submissions of the other stakeholders. Hence, it was contended that the Commission should close the present matter on this ground alone.

23. The Commission has considered the above submission carefully and is of the view that the preliminary objection of the OPs is liable to be rejected in light of the duty entrusted upon the Commission under section 18 read with the preamble to the Act i.e. 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. The Commission is duty bound to *inter alia* take cognizance of the anti-competitive practices and abuse of dominant position having an adverse impact on the competitive landscape in the sale/provisioning of goods/services in the markets in India. Hence, the Commission is of the considered opinion that despite the order of the Hon'ble Supreme Court directing the Empowered Committee to examine the proposal of CHPT with regard to its potential claims of curtailing the pollution, the Commission is, nevertheless, duty bound to examine the competition issues, if any, arising in the matter. In any case, the decision or outcome of the empowered committee would have a prospective effect. The preliminary objection of OPs is thus liable to be rejected.

24. The Informant has primarily alleged that pursuant to the ban imposed on CHPT by the Madras High Court (*vide* order dated 11.05.2011), OP 1 has become dominant and has abused its dominant position in terms of section 4 of the Act. Since the allegations pertain to abuse of dominant position under section 4 of the Act, the relevant market needs to be determined comprising of the relevant product market and relevant geographic market. The Informant is an association of captive power plants, sourcing coal for power generation from domestic and international sources. For transportation of coal, shipping it through sea is the most economic alternative as compared to transportation through land. Once the coal is shipped by sea to the port, before it is transported by land to power plants



through railways and/or roadways, the services of a coal terminal at the port is used by the purchasers/ importers of coal. Thus, the relevant market in the instant case appears to be *'the provision of coal terminal services.'*

25. Relevant geographic market, as per section 2(s) of the Act, comprises the area in which conditions of competition for supply of goods or provision of services are distinctly homogenous and can be distinguished from conditions prevailing in neighbouring areas. The Informant has proposed the relevant geographic market to be 'the area in and around Kamarajar Port, extending up to a point (*i.e.*, the captive hinterland) beyond which the overall cost of transportation to an alternate port is higher.' As per the information, the members of the Informant are located in and around Chennai and due to primary factors like location of power plants, cost effective transportation by sea, they source their coal requirement through OP 1 located at OP 2. During the hearing, OP 1 and OP 2 have asserted that there are other alternative ports like Krishnapatnam Port and Karaikal Port which are offering similar services. The Commission, however, is of the view that owing to the distance between the aforesaid two ports and the power plants of the members of the Informant, they may not be considered as the viable alternatives. The fundamental purpose of demarcating relevant geographic market is to exclude such players from the contours of the relevant geographic market who may be providing similar product/service but are beyond the geographic reach of the set of consumers under consideration. In view of the foregoing, the relevant geographic market in the present case appears to be an area *in and around Kamarajar Port*'.

26. Accordingly, the relevant market *prima facie* appears to be *'the provision of coal terminal services in and around Kamarajar Port'*.

27. After determination of relevant market, the next step is to assess whether OP 1 is dominant as alleged or not. The Commission notes that though the Informant has



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named two Opposite Parties in the Informant, the allegations of abuse of dominant position are levelled only against OP 1. With regard to OP 2, the Informant has alleged that it has failed to take any action against OP 1 for its alleged abusive conduct.

28. The relevant market has been defined as '*the provision of coal terminal services in and around Kamarajar Port*'. In the said relevant market, there seem to be only two ports namely the CHPT (which is stated to be located at a distance of 20 kms from the Kamarajar Port) and Kamanajar Port Trust *i.e.*, OP 2. It has been already mentioned that after the Hon'ble Madras High Court's order, w.e.f. 01.10.2011, the members of the Informant can only avail the services offered by the facilities operating at OP 2. As per the information, there are three facilities at OP 2 for importing/ handling of coal. However, out of these three, only OP 1 is a common user facility which can be used by the members of the Informant for transportation of their coal requirement. The other two coal berths at OP 2, being operated by TANGEDCO as its captive facility, are not available to be used as a common user facility. Thus, the market share of OP 1, being the only available common user terminal facility within OP 2, is 100%.

29. As regard inter-port competition in the relevant market, given the closure of coal handling at CHPT, it may be noted that OP 1 does not seem to face any competition from this adjoining port. The size and resources of OP 1 (investment of approximately Rs. 400 Crores in developing the Common User Coal facility on BOT (build-operate-transfer basis) also indicate that it has a dominant position in the relevant market. The License agreement has granted OP 1 the autonomy to set and realize tariff for the usage of the said facility for a period of 30 years. Given the time required to alter the infrastructure, investment requirements, locational advantages, connectively etc. the market share of CICTPL (OP 1) in the relevant market is intact and is unlikely to change in the short term.



30. Further, it may be pointed out that the other ports outside the captive locality of OP 1 are Krishnapatnam Port to its North and Karaikal Port to its South. As per the information, they are situated at a distance of approximately 180 Kms and 345 Kms respectively from OP 2. While Krishnapatnam’s coal handling facility is comparable to that of OP 1, it does not seem to have constrained OP 1 from frequently increasing its charges because of the distance at which it is located. Karaikal Port, on the other hand, is a much smaller port than Kamarajar Port. Thus, it appears that OP 1 is the only common user port in the relevant market and the other ports cannot be used as a substitute on account of higher transportation cost involved in sourcing coal through these ports in comparison to that of OP 1. On the basis of foregoing, Commission is *prima facie* of the view that OP 1 is dominant in the relevant market.

31. The Informant has highlighted certain practices of OP 1 which have been alleged to be abusive. It has been alleged that the OP 1 has been charging unregulated and excessive charges for providing its services. The following table has been submitted by the Informant illustrating the charges payable by the user of coal terminal port services:

(in Rs./MT)

Particular	August 2011	October 2011	December 2012	May 2013	September 2013	December 2013	February 2014	July 2014
Stevedoring and handling charges including loading on to trucks	85	85	120	120	150	175	200	200
Additional and special equipment and	45	45	50	50	50	50	50	50



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machinery charges for augmentation of terminal								
Wharfage	30	30	30	30	50	50	50	50
Sub Total	160	160	200	200	250	275	300	300
Liasoning Charges (payable to BEPL)	20	140	90	125	100	75	50	75
Grand Total	180	300	290	325	350	350	350	375

32. The data provided by the Informant shows that the charges from the users for the provision of the facilities by OP 1 have undergone a significant increase immediately after the ban on CHPT became operational in October 2011, though the charge was levied under the head coordination and liasoning charges payable to a third party i.e. BEPL. The OPs, however, have submitted that the charges did not increase at the pace highlighted by the Informant. The Commission notes that the main difference between the data submitted by OP 2 and that submitted by the Informant is because of the inclusion of coordination and liasoning charges by the Informant. OP 2 has given the data regarding the changes made in the published tariff and have categorically denied levy of any coordination and liasoning charge.

33. During the hearing, the learned counsels for OP 1 and OP 2 respectively submitted that they neither have knowledge nor have they authorised BEPL to collect charges under the head 'liasoning and coordination charges'. OP 1 categorically denied asking any of the users of its services to make such a payment to any third party (i.e. BEPL). OP 2 also submitted that it does not authorise any third party to collect any such charges and also stated that it had put a trade notice on its website cautioning the users not to pay any such charge to any third party other than the published tariff. However, the Informant has



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submitted invoices showing the payment of such charges by its members in favour of BEPL.

34. The Commission has considered the respective contentions of the parties. Though OPs have denied such a charge, the Commission finds it highly implausible for any buyer of services (member of the informant in this case) to pay such a charge to a third party (i.e. BEPL) without the knowledge of OPs. The payment of such a charge to a third party that too for availing the services of OP 1 located at OP 2 raises a strong suspicion with regard to OPs having an involvement with the imposition of such a charge. In such a circumstance, *prima facie* it appears that OP 1 had mandated the payment of such a charge to BEPL as the condition precedent for availing its coal terminal services. The same amounts to a contravention of section 4(2)(a)(i) and 4(2)(d) of the Act *i.e.*, imposition of unfair terms and conditions and making a condition precedent makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts. Therefore, imposition of such a charge and considering its sharp increase (from Rs. 20 in August 2011 to Rs. 140 in October 2011) at the time when the ban imposed by the Hon'ble Madras High Court on CHPT became effective raises a strong suspicion of it being abusive in nature imposed by OP 1.

35. *Prima facie* OP 1 appears to be abusing its dominant position in contravention of the provisions of section 4 of the Act. Accordingly, the DG is directed under the provisions of section 26(1) of the Act to investigate the matter and to submit a report within a period of 60 days from receipt of this order.

36. During the course of investigation, if involvement of any other party is found, the DG shall investigate the conduct of such other parties who may have indulged in the said contravention. In case of contravention, DG shall also investigate the role



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of the persons who at the time of such contravention were in-charge of and responsible for the conduct of the business of the contravening entity/entities.

37. It is, however, made clear that nothing stated herein shall tantamount to an expression of final opinion on the merits of the case and the DG shall conduct the investigation without being influenced by any observations made herein.

38. The Secretary is directed to send a copy of this order alongwith the information and the documents filed therewith to the DG.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S.L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C. Nahta)
Member

New Delhi
Dated: 04.01.2016



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DISSENT NOTE

Per: Mr. M. S. Sahoo, Member

I have gone through the majority order of the learned Commission. I have also gone through the material available on record, including the information filed by the informant and the replies of the opposite parties, and the oral submissions made at the hearing on 1st December 2015. I do not find existence of a prima facie case warranting an investigation into the matter under section 26(1) of the Act for the reasons recorded hereafter.

2. It has been alleged in the information that OP1 catapulted to the position of dominance in October 2011 and it has been abusing its dominance since then by imposing an:
 - a. unfair price for its services from members of the informant – it is levying a price higher than competitive prices; and
 - b. unfair condition on sale of its services to members of the informant – it is requiring payment of liaisoning charge to a third party as a condition precedent to avail its services.

In a sense, these two are alternate abuses. As per the allegation, the price includes liaisoning charge. If liaisoning charge forms a part of the price, it is not a condition of sale. Hence the condition does not exist. If, however, the condition exists, the liaison charge does not form a part of the price. In that case, the price, exclusive of liaisoning charge, may not be unfair as the higher price is on account of liaisoning charge.



3. The investigation into the matter is warranted only if prima facie (a) the opposite parties are dominant, and (b) they have abused their dominant position in the manner alleged.
4. Before proceeding further, I observe the facts as under:
 - a. OP2 has six cargo handling berths. For the sake of convenience, I identify them as B1, B2, B3, B4, B5 and B6. B1, B2 and B3 presently handle coal. B1 and B2 have been developed and are managed by Tangedco for its captive use. B3 is a common user facility which has been developed and is managed by OP1. It is used by Tangedco, members of the informant and others. B4 is designed to handle iron ore, but remains unused. On a request dated 31st July 2015 of OP2, the Ministry of Shipping, vide its letter dated 9th October 2015, has permitted modification of B4 to also handle coal. B5 and B6 handle general cargo and oil respectively. Chennai Port, which is located at a distance of 20 kms from OP2, has coal handling facility. It stopped coal handling in October 2011 following a Court order on account of negative externalities. Krishnapatnam and Karaikal ports, which are located at distance of 180 kms and 345 kms respectively from OP2, also provide coal handling facility.
 - b. The table under Para 31 of this order, which is extracted from the information, presents total charge borne by members of the informant for coal handling at B3. It is observed that the total charge included Rs.20 paid towards liaisoning services in August 2011, that is, before the OP1 catapulted to the position of dominance. This included Rs.140 paid towards liaisoning services in October 2011 when OP1 catapulted to the position of dominance. This included



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- Rs.75 paid towards liaisoning services in July 2014 when OP1 continues to be dominant. The charge for liaisoning services is varying over time and it is paid to different service providers at different points of time.
- c. The handling of coal at OP2 involves using three sets of services. For the sake of convenience, I identify them as S1 (basic infrastructural services provided by the port operator), S2 (cargo operation services provided by the berth operators), and S3 (liaisoning services). In case of B1 and B2, Tangedco, being a captive user, provides S2 and S3 to itself. It, however, pays Rs.179 / MT of coal to OP2 for S1. OP1 provides S1 and S2 together to users of B3, including Tangedco, and levies a total charge of Rs.300 / MT. It shares 52.33% of revenue of Rs.300, that is, Rs.157 / MT with OP2 towards S1. The users pay an additional Rs.75 / MT for S3 at B3 as of July 2014.
- d. As of July 2014, the users bear a total charge of Rs.375 / MT for availing all three services together at B3. The charges suffered by users for similar services, as claimed by the informant, at neighbouring ports at Krishnapatanam and Karaikal are Rs.320 / MT and Rs.410 / MT respectively. The Chennai port used to levy a charge of Rs.148-153 / MT during March - September 2011.
5. The informant claims OP1 to be dominant in the relevant market, namely, 'provision of common user coal terminal services in and around Kamarajar Port'. While broadly agreeing with the informant, the majority order of the learned Commission holds OP1 to be dominant in the relevant market, namely, 'the provision of coal terminal services in and around Kamarajar Port'. This is based on the understanding that there is only one coal



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handling berth in the relevant market available to members of the informant and only one enterprise, that is, OP1 owns and operates it. Such determination is discomfoting for the following reasons:

- a. It determines relevant market from the perspective of a consumer(s) only. Accordingly, B1, B2 and B3 constitute relevant market for Tangedco, while B3 constitutes the relevant market for members of the informant. This makes OP2 dominant in the relevant market for Tangedco and OP1 dominant in the relevant market for members of the informant. This approach would make every supplier of every product dominant in the every relevant market.
- b. The relevant market for members of the informant excludes B1, B2, and Chennai Port, as these are denied to them. This approach takes denial of market (services of B1, B2, and Chennai Port) as given, and then proceeds to examine competition concerns in the remainder of the market.
- c. The relevant market excludes B4 which has the potential to handle coal from the same premises. It excludes B5 which handles general cargo from the same premises. It excludes Krishnapatnam Port and Karaikal Port, which are used by some members of the informant. It excludes other ports as well. It also excludes other options of handling coal, such as, road transport, rail transport, etc. Such exclusions have been justified by general statements. When a member of the informant, namely, Kalyani, imports coal by using B3, which is 468 kms away, and by using Krishnapatnam port, which is 709 kms away, why should it not be possible for other members of the informant to use any port located up to 500 or 700 kms away from their plants. It may not be possible for them, but this



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needs to be illustrated with detailed workings. An user has the option to use any of the ports in the country. One of these ports would be the nearest to the user. This does not necessarily mean that the nearest port only constitutes the relevant market for the user, as the second nearest port would entail relatively more transport cost in comparison to the nearest one. One needs to consider the costs of transport of coal from the port to the location of the user, the costs of handling coal at the port, the cost of transport of coal to the port and even the cost of purchase of coal. The determination of relevant market needs to be established by facts and figures.

- d. As stated earlier, coal handling at port involves three sets of services. Since the bone of contention is S3, and S1 is provided separately - OP2 sells S1 for Rs.179 / MT to Tangedco and for Rs.157 / MT to OP1, it could be useful to determine relevant markets for three services separately unless there is a justification not to do so. OP1 may or may not be dominant in all three services.

I, therefore, do not agree with the manner of determination of relevant market and consequently relevant market and dominance of OP1 therein. It may also be noted that if OP1 is the dominant supplier of services, the informant is the dominant consumer of the services provided by OP1. I do not wish to labour further on this aspect, as there is no abuse of dominance as explained hereafter.

6. I now proceed to examine if the alleged, alternate abuses by OPs amount to abuse under section 4 (2) (a) of the Act.

- 6.1 Is the price charged by OP1 unfair? Assume that OP1 levies the total price, directly or indirectly, as presented in table under Para 31



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of this order. There is no standard tool to determine if a price is unfair. Generally, a price is considered unfair, as argued by both the parties, if it is higher than the competitive prices. The following table compares prices, as provided by the informant, for similar services in adjacent markets:

Sl. No.	Service Provided at	Price (Rs./MT)	Remarks
1	B1 and B2	179	It is the price for S1 since July 2013. To make it comparable with the price at B3, the following need to be added: a. Price of S2 (This is Rs.143 - 47.67% of price of Rs.300 - in case of B3), b. Price of S3 (This is Rs.75 in case of B3), and c. Revision in price which is due from 1 st July 2016.
2	B3	375	It is the current price. To make it comparable with the price at B1 and B2, the following need to be excluded: a. Price of Rs.143 for S2, b. Price of Rs.75 for S3, and c. Rs.50 for escalation since July 2013, when it was Rs.325.
3	Chennai Port	153	It was price up to September 2011. To make it comparable, the following need to be added: a. Price for negative externalities,



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			<p>b. Indexation for inflation during the last four years, and</p> <p>c. Price for better quality of service (the competitive price at OP2 is generally higher than that at Chennai Port. For example, oil handling cost of Rs.110 at OP2 is higher than that of Rs.98 at Chennai Port).</p>
4	Karaikal Port	320	
5	Krishnapatanam Port	410	

It is observed from the above table that the total price, including the liaisoning charges, is not clearly higher than the price charged in neighbouring comparable markets. If the liaisoning charge is excluded and the quality of service is factored in, the price charged by OP1 could be lower than that in the neighbouring markets. Hence the price charged by OP1 cannot be considered unfair.

6.2 Is there a condition precedent to availing services at B3 and is such condition unfair? It is apparent that the members of informant make payment to different third parties directly for liaisoning services. Do they do so on their own or as a condition of sale by OP1? No evidence what so ever has been produced to the effect that the OP1 requires the members of the informant to pay liaison charges to any third party. On the contrary, OPs have made it clear repeatedly, including in public media, that anybody using the port services needs to pay the charges at the published rates only and have advised users not to use any third party. At the hearing also, they reiterated their stance and welcomed the members of the informant to deal



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with them directly, rather than through third parties. If members of the informant use the third parties for liaisoning services, for which they probably get value for money, it cannot be construed as a condition precedent imposed by OP1.

7. When did the alleged abuse commence? It has been stated in the information that members of the informant used to pay Rs.20 towards liaisoning charges before OP1 catapulted to the position of dominance. It did not start after the OP1 became dominant, though there is sharp increase in the rate. It increased to Rs.140 / MT in October 2011. The informant did not find it abuse of dominance for more than four years. It finds the charge abusive when the charge has reduced to Rs.75 / MT. Further, it has been stated by the informant that OP1 levied unfair prices in October 2011. It is difficult to appreciate why the informant suffered the alleged unfair price for four years and brings it up on 13th August 2015, after OP2 sought permission, vide its letter dated 31st July 2015, to operate coal handling also from B4 which will compete with B3.
8. In view of the above, I do not find any merit in the information warranting an investigation under section 26(1) of the Act.

Sd/-
(M. S. Sahoo)
Member

New Delhi
Dated: 04.01.2016