



COMPETITION COMMISSION OF INDIA

Case No. 12 of 2014

In re:

**Vidharbha Industries Association
1st Floor, Udyog Bhawan,
Civil Lines, Nagpur, Maharashtra**

Informant

And

- 1. MSEB Holding Company Ltd.
Hong Kong Bank Building,
Mahatma Gandhi Road, Fort,
Mumbai - 400001, Maharashtra** **Opposite Party No. 1**

- 2. Maharashtra State Power Generation Co. Ltd.
Hong Kong Bank Building,
Mahatma Gandhi Road, Fort,
Mumbai - 400001, Maharashtra** **Opposite Party No. 2**

- 3. Maharashtra State Electricity Transmission Co. Ltd.
Plot No. C-19, E-Block,
Bandra-Kurla Complex, Bandra (E),
Mumbai – 400051, Maharashtra** **Opposite Party No. 3**

- 4. Maharashtra State Electricity Distribution Co. Ltd.
Hong Kong Bank Building,
Mahatma Gandhi Road, Fort,
Mumbai - 400051, Maharashtra** **Opposite Party No. 4**



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Fair Competition
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CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Justice G. P. Mittal
Member

Appearances:

For Informant: Mr. K. K. Sharma and B. S. Grover, Advocates.

*For OP 4: Mr. Sanjay Jain, ASG; Ms. Natasha Thakur, Mr. Sankalp Jain and
Mr. Shreshth Jain, Advocates.*

Order under Section 26(6) of the Competition Act, 2002

1. The information in the present matter was filed by Vidharbha Industries Association (hereinafter referred to as the '**Informant**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the '**Act**') against MSEB Holding Company Limited (hereinafter referred to as '**OP 1**'),
Case No. 12 of 2014



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Maharashtra State Power Generation Company (hereinafter referred to as ‘OP 2’), Maharashtra State Transmission Company Limited (hereinafter referred to as ‘OP 3’) and Maharashtra State Electricity Distribution Company Limited (hereinafter referred to as ‘OP 4’) [all the Opposite Parties collectively hereinafter referred to as the ‘OPs’] alleging contravention of 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 stated to be a trade association working to promote and harness balanced industrial development in Vidharbha region of the State of Maharashtra. OP 1 is a public limited company incorporated under the erstwhile Companies Act, 1956. OP 2, OP 3 and OP 4 are subsidiaries of OP 1 and are engaged in the business of generation, transmission and distribution of electricity respectively in the State of Maharashtra. It is stated that in terms of the Electricity Act, 2003, the Government of Maharashtra *vide* G. R. No. ELA-1003/P.K.8588/bhag-2/Urja-5 dated 24.01.2005 has restructured the Maharashtra State Electricity Board (MSEB) and established OP 1, OP 2, OP 3 and OP 4 with effect from 06.06.2005.

2.2 The Informant has alleged that the OPs, as a group, have abused their dominant position by deliberately generating and distributing electricity in an extremely inefficient manner and denying market access to other efficient power generating companies for generating and distributing electricity in the State of Maharashtra. It is averred that irrespective of the price charged by OP 2, OP 4 purchases all the electricity/ power generated by OP 2. It is stated that OP 4 has arbitrarily entered into long-term Power Purchase Agreement (PPA) with OP 2 and the tariff of power purchased by OP 4 is decided by Maharashtra Electricity Regulatory Commission (MERC) as per PPA entered into between OP 2 and OP 4. As per the Informant, since the electricity tariff



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is decided by MERC as per the cost structure and revenue forecast submitted by OP 4, MERC is determining higher electricity tariff as compared to all other states in India because of the fact that OP 4 is procuring electricity from OP 2 at a higher rate. It is averred that due to inefficiency and high price charged by OP 2, the cost structure of OP 4 remains very high. Resultantly, MERC is determining higher electricity tariff which is against the interest of the consumers.

2.3 It is further alleged that the conduct of OP 4 in arbitrarily purchasing the entire electricity generated by OP 2, despite exorbitant price, results in denial of market access to other efficient power generating companies. It is also alleged that OP 4, being the owner of essential facilities/ infrastructure required for supply of electricity *i.e.* distribution network, has been consistently refusing to accept the request of consumers who want to procure electricity through open access. Thus, the Informant has alleged that OP 4 is denying market access to the other power generating companies for distribution of electricity in the State of Maharashtra in violation of Section 4(2)(c) of the Act.

2.4 The Informant has submitted that since there is no competition in the electricity generation market, OP 2 never intends to adopt efficient and competitive methods of power generation. It is alleged that OP 2, through its decision to shut down four units of Koradi Thermal Power Plant during December, 2010 and January, 2011, has limited the electricity output in contravention of the provisions of Section 4(2)(b)(i) of the Act.

2.5 Furthermore, it is alleged that while procuring power from OP 2 under the Merit Order Dispatch (MOD) principle, OP 4 is considering the overall average purchase rate of generating units of OP 2 instead of taking each generating unit separately. It is also averred that OP 4 is considering only the



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variable cost of OP 2 instead of taking the fixed and variable cost together in purchase rate. On the other hand, for purchase of power from other sources, OP 4 is considering both the fixed and variable cost. As per the Informant, the aforesaid conduct of OP 4 is a clear case of discrimination and unfair pricing in contravention of the provisions of Section 4(2)(a)(ii) of the Act.

3. The Commission examined the averments made by the Informant in the information and was of the opinion that there existed a *prima facie* case of contravention of the provisions of Section 4 of the Act in the matter by OP 4. Accordingly, *vide* its order dated 05.08.2014 passed under Section 26(1) of the Act, the Commission directed the Director General ('DG') to cause an investigation to be made into the matter.

DG's Investigation

4. In terms of Section 26(3) of the Act, the DG submitted the investigation report to the Commission on 19.11.2015. A brief of the DG's investigation report is highlighted below:

4.1 For examination of the alleged abusive conduct of OP 4, the DG considered the market for "*provision of services for distribution of electricity in the state of Maharashtra except Mumbai*" as the relevant market and found that, being the sole distribution licensee, OP 4 is in a dominant position in the above said relevant market.

4.2 The DG examined the alleged abusive conduct of OP 4 and came to the conclusion that the alleged conduct of OP 4 as enumerated *supra* cannot be considered as abusive in terms of Section 4 of the Act and accordingly, no contravention of any of the provisions of Section 4 of the Act was found by the DG. During investigation, the DG found that OP 4 purchases power from



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different sources *viz.* OP 2, Central Public Sector Undertakings and private/independent power producers and stated that the power from the Public Sector Undertakings are usually purchased under long term PPAs through the Memorandum of Understanding (MOU) route whereas power from others are usually purchased under open bidding. As per the DG report, PPAs executed between the OP 2 and OP 4 were approved by the MERC and covered under the Tariff Policy of 2006 and clarification issued thereunder by the Ministry of Power, Government of India. The DG has reported that the PPAs executed under MOU route including those between OP 2 and OP 4 after 05.01.2011 have been examined by the MERC and detailed orders have been passed from time to time keeping in view the various parameters including the interest of the consumers.

4.3 Further, as per the DG report, the tariff or purchase price of electricity by OP 4 from power generating companies is determined by the Central/ State Electricity Regulatory Commission, as the case may be, for each year in accordance with the statutory power vested under the Electricity Act, 2003 and relevant Regulations. In case of power purchased from National Thermal Power Corporation (NTPC) or Nuclear Power Corporation India Limited (NPCIL), such tariff is determined by Central Electricity Regulatory Commission (CERC) and in case of power purchased from OP 2, such tariff determined by the MERC. The DG has also reported that the tariff to be charged from the ultimate consumer is also determined by the MERC through the tariff orders issued from time to time.

4.4 With regard to the issue of open access, it is observed in the DG report that it involves (a) the issue of non-grant of open access permission for sourcing power from Indian Energy Exchange (IEX) and (b) the issue of non-grant of open access permission for sourcing power excluding IEX. On the first issue, it is reported that MERC in its order dated 11.04.2014 has categorically stated



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that there were genuine operational issues about the provisions for grant of distribution of open access through IEX in the Open Access Regulations of 2005. Thus, in view of the above, the DG has concluded that non-grant of open access permission by OP 4 for sourcing power through IEX cannot be considered as a case of abuse of dominance under Section 4 of the Act. On the second issue, it is reported that because of certain legal issues, open access applications could not be accepted and therefore, it cannot be said that such denial was on account of the abuse of dominance by OP 4.

Replies/ Submissions by the Parties

5. The investigation report of the DG was supplied to the Informant and the OPs for obtaining their objections/ submissions/ replies on the findings of the DG's report. The Informant and OP 4 have filed their replies/ objections on the findings of the DG. A brief of the submissions made by the Informant and OP 4 are outlined under the following paragraphs:

Replies/ Submissions of the Informant

- 5.1 The Informant has submitted that the investigation report of the DG suffers from serious infirmities since it does not traverse through most of the allegations mentioned in the information. It is pointed out that the investigation report of the DG does not consider the submissions and testimonies produced by the Informant during the course of investigation and hence, fails to include the same as part of annexures to the DG's investigation report. It is submitted that the factual scenario of the matter was not properly brought about by either doing an empirical analysis or an investigation based on information available in the public domain.



5.2 It is stated that a plain reading of the DG's report clearly shows that while investigating the matter, the DG has not even studied the electricity sector and the contentions of the Informant as highlighted in the information properly. It is submitted that the DG has gone in detail into the issue of jurisdiction of the Commission in the matter ignoring the fact that the issue of jurisdiction had already been settled by the Hon'ble High Court of Delhi *vide* its order dated 15.09.2014 in WP(C) 6177 of 2014 filed by OP 4 against the Commission. As per the Informant, despite the above said fact, the DG has spent his efforts and energy in examining the issue of jurisdiction and has lost his focus completely to investigate the abusive conduct of OP 4. It is submitted that lack of clarity of the DG in understanding the issues involved in the matter has affected the outcome of investigation. Further, as per the Informant, the DG's investigation report has failed to differentiate between transmission and distribution segments of electricity.

5.3 The Informant has further submitted that no opportunity for cross-examination was given to it by the DG which is in clear violation of the principles of natural justice. It is stated that the DG has taken the feedback from only two independent power producers for the purpose of investigation which indicates that the investigation was completed without collecting all the relevant information.

5.4 The Informant has agreed with the DG so far as delineation of the relevant market and assessment of the position of dominance of OP 4 in that market is concerned. However, with regard to the findings of the DG on the alleged abusive conduct of OP 4, the Informant has submitted that the starting point of determination of tariff by the sectoral regulator is the purchase price of electricity submitted before it. The purchase price of electricity of OP 4 from OP 2 is higher than the other available sources because of the long term PPA entered into between OP 2 and OP 4. It is submitted that OP 4, by purchasing



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the entire power produced by OP 2, is protecting and incentivising the inefficient OP 2 and unfairly denying market access to other efficient power producers which is in violation of Section 4(2)(c) of the Act. Regarding the finding of the DG that OP 4 has purchased power from OP 2 which is approximately 41% of its total purchase/ distribution of electricity in the state of Maharashtra; the Informant has stated that what constitutes 41% of purchase of OP 4 is 100% production of OP 2. It is submitted that this 100% power production of OP 2 is brought at a rate higher than the average rate of power being sold by other players in the market. Further, it is submitted that the symbiotic relationship between OP 2 and OP 4 has been clearly mentioned in the PPA entered into between OP 2 and OP 4 which makes mandatory for OP 4 to purchase 100% electricity produced OP 2, despite it being not the cheapest option.

5.5 With regard to the finding of the DG that the allegation that major portion of power purchased from OP 2 being factually incorrect, the Informant has submitted that the significance of the inference has not been properly understood by the DG. As per the Informant, once OP 4 has already filled 41% of its requirement at a non-competitive higher cost, the latter virtually kills the competition and various competitive advantages. Therefore, power producers offering power to OP 4 at a much lower price have to shut down their production.

5.6 One of the allegations of the Informant was that MOD principle is not being followed by OP 4 and consequently, it discriminates between power purchased from OP 2 and other power producers as there is common Board of Directors of OP 2 and OP 4. In this regard, the Informant has stated that the DG ought to have understood the intricacies of the MOD principle and then dig deeper to find out whether electricity produced from various plants of OP 2 go through MOD screening or not .



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- 5.7 On the issue of denial of market access by OP 4, the Informant has submitted that the DG ought to have investigated the aspect of long term PPAs which hinder competition and affect the independent power producers who are interested in supplying electricity at lower rates. It is stated that the long term PPAs for 25 years limit and restrict the scope of competition in the relevant market by restricting OP 4 from purchasing electricity from sources other than OP 2. In addition, it is submitted that long term PPAs also hamper the investment in generating power from renewable sources of energy and thereby limit the market for sale/ purchase of electricity. As per the Informant, the DG has failed to take into account the observations of the Comptroller and Auditor General (CAG) in this regard which could have served as the best lead in the present case.
- 5.8 On the allegation of denial of open access, the Informant has stated that the DG could have investigated whether OP 4 discriminates between customers buying electricity directly through OP 4 or through open access. Further, the DG could have found evidence in the form of benefits not being passed to open access customers arising from load factor and power factor incentives which are passed on to the customers of OP 4.
- 5.9 Lastly, the Informant has requested the Commission to reject the investigation report of DG and direct re-investigation of the matter.

Replies/ Submissions of OP 4

- 5.10 With regard to the long term PPAs, OP 4 has submitted that it has executed long term PPAs under the Memorandum of Understanding (MOU) route in terms of the National Electricity Policy (NTP), 2005. OP 4 has referred to clause 5.1 of NTP which states that '*after 5 years from notification of NTP i.e. after 06.01.2011, all future requirements of power shall be procured by*



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the distribution licensee through competitive bidding only, for which the Ministry of Power, Government of India will issue detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensee for medium or long term period'. Accordingly, the Ministry of Power, Government of India has issued the competitive bidding guidelines for long term and medium term procurement on 19.01.2005 and the same have been amended from time to time. The Ministry of Power, Government of India has also issued the competitive bidding guidelines for procurement of power on a short term basis in 2012. It is submitted that PPAs with OP 2 were entered during the period 2005-2011 when there was acute shortage of power in Maharashtra and load shedding was highly prevalent and the power generation market was not as developed as it is today. In such circumstances, OP 4 entered into PPAs through MOU route and successfully contracted for power purchase through transparent bidding process. It is submitted that the power procurement through well-established MOU route was essential since the competitive bidding mechanism was at nascent stage and ensuring continuous power supply to the consumers was its top-most priority.

5.11 On long term PPAs, OP 4 has stated that signing PPAs for 25 years give assurance of power supply and price stability. Further, it is submitted that as per the Central Electricity Regulatory Commission's Tariff Regulations and MERC Tariff Regulations, the life span of a generating plant is about 25 years and during the initial 10-12 years of the commissioning of the plant the tariff raised is used for servicing of the debt involved in installation of the generating plant. Therefore, the tenure of PPAs is linked to the useful life of the generating plant where the cost as well as benefit are shared by both the parties to the agreement. Also, it is stated that the short term market may not have enough depth and liquidity to absorb huge demand from OP 4, so it uses the long term contracts for meeting a large proportion of its base demand.



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5.12 OP 4 has submitted that it is not true that the tariff rates of OP 2 are high. It is stated that the tariff cost of private generators has also increased unexpectedly due to increase in taxes and change in law related to the provisions of the respective PPAs entered between OP 4 and private generators pursuant to which the private generators such as Adani Power Maharashtra Limited and Rattan India Power Ltd. through competitive bidding were provided additional compensatory tariff by the regulator. As a result, variable charge for Rattan India Power Plant has been around Rs. 2.90 per unit. Moreover, generators selected under competitive bidding also have many large claims pending before the regulators for providing additional tariff under change in law and *force majeure* mechanism.

5.13 Further, it is submitted that many a time power purchase through MOU route has also been economical for OP 4. Power plants such as Vindhyachal Super Thermal Power Plant (Stage V) have been supplying power to OP 4 at variable rate of around Rs. 1.80 per unit which is much cheaper than the rates of many private generators like Adani Power Maharashtra Limited and Rattan India Power Ltd and there are also other power plants like Korba, Sipat under MOU route whose variable rates are quite economical.

Issues and Analysis

6. The Commission has perused the material available on record, besides hearing the learned counsel appearing for Informant and OP 4.
7. The Commission observes that the allegations of the Informant in the instant case are four fold: firstly, OP 4 buys the entire electricity produced by OP 2 even if at a higher rate which results in denial of market access to other power producers; secondly, OP 4 is buying power at a higher cost from OP 2 which is cost inefficient in comparison to other power generating companies



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resultantly, the competition in electricity generation sector has been affected and the consumers of OP 4 are compelled to pay higher tariff for electricity; thirdly, OP 4 is denying open access to consumers for availing electricity from other sources; and fourthly, OP 2, through its decision to shut down four units of Koradi Thermal Power Plant, has limited/ restricted the output of electricity. Thus, the Informant has alleged that OP 4 is imposing unfair prices on the consumers and denying market access to other power generating companies and consumers for distribution of electricity in contravention of the provisions of Section 4(2)(a)(ii) and 4(2)(c) of the Act respectively and OP 2 is limiting the electricity output in contravention of the provisions of Section 4(2)(b)(i) of the Act.

8. Having perused the report of the DG, replies/ objections filed by the Informant and OP 4, arguments advanced by the learned counsel who appeared on behalf of the Informant and OP 4 and other materials available on record, the Commission observes that the allegations of the Informant in the instant matter are primarily directed towards the abusive conduct of OP 2 and OP 4. However, OP 1 and OP 3 have been made *pro-forma* parties to the case. With regard to the allegation of shutting down of four units of Koradi Thermal Plant and consequent limitation of output by OP 2, the Commission, from the submissions made by OP 2, notes that the aforesaid four units of Koradi Thermal Plant had rendered service for more than 35 years and had become commercially unviable and harmful to the environment. Therefore, the Commission is of the view that the allegation of the Informant that OP 2 has limited/ restricted the output of electricity through the above said conduct in violation of Section 4(2)(b)(i) of the Act is misplaced and does not hold ground. Thus, in order to arrive at a decision in this matter, the only issue to be determined is whether OP 4 has infringed provisions of Section 4 of the Act. However, determination of the said issue requires delineation of relevant market, assessment of the position of dominance of OP 4 in the relevant



market and examination of the alleged abusive conduct of OP 4 in terms of Section 4 of the Act in case it is found to be in a dominant position in the relevant market.

Determination of Relevant Market

9. The Commission notes that as per Section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the 'relevant product market' or the 'relevant geographic market' or with reference to both the markets.

10. The term 'relevant product market' has been defined under Section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and intended use. To determine the 'relevant product market', the Commission shall have due regard to all or any of the following factors *viz.* physical characteristics or end-use of goods, price of goods or services, consumer preferences, exclusion of in-house production, existence of specialised producers and classification of industrial products, in terms of the provisions contained in Section 19(7) of the Act.

11. Further, the term 'relevant geographic market' has been defined under Section 2(s) of the Act as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the 'relevant geographic market', the Commission shall have due regard to all or any of the following factors *viz.* regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities,



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transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services, in terms of the provisions contained in Section 19(6) of the Act.

12. The Commission takes note of the fact that while defining the relevant product market in the instant matter as the ‘*provision of services for distribution of electricity*’, the DG has distinguished different market segments in the supply chain of the electricity viz. generation, transmission and distribution. As per the DG report, in each of the above segment, buyers and sellers are different and the scope of demand substitution from one market to another is limited. It is also reported by the DG that each segment of the electricity supply chain is characterised by competitive dynamics and governed by different regulatory requirements. Further, the Commission observes that the Informant is in agreement with the findings of the DG in this regard. However, OP 4 has not submitted any reply in this regard. Further, the Commission observes that the DG has considered ‘*the State of Maharashtra except Mumbai*’ as the relevant geographic market because OP 4 has been granted license to distribute electricity throughout the State of Maharashtra except Mumbai. The Informant has also agreed with the relevant geographic market definition provided in the DG’s investigation report.

13. The Commission considered the findings of the DG in regard to delineation of the relevant market and submission of the Informant in this regard. It is observed that while delineating the relevant market, the DG has considered the relevant provisions of the Act as highlighted *supra*. The Commission is in agreement with the finding of the DG that given the regulatory architecture, the services of electricity distribution is a distinct relevant product market and it cannot be substituted with the services of generation, transmission and retailing of electricity as the market dynamics of different segments of electricity supply chain are different. Based on the above, in consonance with



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the findings of the DG, the Commission is of the view that the market for the 'provision of services for distribution of electricity' may be considered as the relevant product market in this matter. In regard to the relevant geographic market, the Commission agrees with the findings of the DG that 'the State of Maharashtra except Mumbai' is the relevant geographic market in the instant matter. Considering the fact that OP 4 can only operate in the aforesaid geographic area as it was granted license to distribute electricity only in the state of Maharashtra except Mumbai. Thus, the Commission is of the view that the relevant market in the present matter may be considered as the market for the 'provision of services for distribution of electricity in the State of Maharashtra except Mumbai'.

Assessment of Dominance of OP 4 in the Relevant Market

14. The Commission notes that Explanation (a) to Section 4(2) of the Act provides that dominant position means a position of strength, enjoyed by an enterprise in the relevant market to: (a) operate independently of competitive forces prevailing in the relevant market or (b) affect its competitors or consumers or the relevant market in its favour. Thus, the underlying principle in assessing dominant position of an enterprise in any relevant market is whether the enterprise in question can act independently of the competitive forces in the relevant market and can affect the relevant market in its favour in detriment of its competitors and consumers.
15. To determine whether an enterprise is in a dominant position or not in a relevant market, in terms of the provisions of Section 19(4) of the Act, the Commission is required to have due regard to all or any of the factors such as market share of the enterprise; its size and resources; size and importance of its competitors; its economic power including commercial advantages over competitors; vertical integration of the enterprise or sale or service network of



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such enterprise; dependence of consumers; whether monopoly or dominant position acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position; or any other factors which the Commission may consider relevant for the inquiry.

16. On the issue of dominance of OP 4 in the relevant market as defined in para 13, the DG has considered the aforementioned factors of Section 19(4) of the Act and concluded that OP 4 is in a dominant position in the relevant market. The Informant, *vide* its written submissions, has also agreed with the findings of the DG in this regard.

17. From the DG investigation report, the Commission observes that OP 4 has 100% market share in the relevant market as defined in para 13 because it is the sole licensee to distribute electricity in the State of Maharashtra except Mumbai and as such, there is no competitor of OP 4 in the relevant market. Further, since there is no competitor of OP 4 in the relevant market, the consumers are completely dependent on OP 4 for electricity supply. It is also observed from the DG's investigation report that OP 4 is a Public Sector Undertaking (PSU) of the Government of Maharashtra and is a distribution licensee in terms of Section 2(17) of the Electricity Act, 2003. Thus, OP 4 acquires its monopoly position in the relevant market being a PSU and the sole licensee for distribution of electricity in the relevant geographic market. Therefore, OP 4 enjoys a position of strength unchallenged by any competitor in the relevant market which enables it to operate independently of



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competitive forces and affect its consumers and relevant market in its favour. Thus, the Commission, in agreement with the findings of the DG, is of the view that OP 4 is in a dominant position in the relevant market as defined above.

Examination of the alleged abusive conduct of OP 4

18. After having analysed the dominance of OP 4 in the relevant market, the next step is to examine whether OP 4 has abused its dominant position in the relevant market. As highlighted in the DG report, the issues pertaining to abuse of dominant position by OP 4, as emerging from the facts of the instant matter, can be looked into on the following three counts: (i) whether OP 4 purchases the entire electricity generated by OP 2 irrespective of the price which results in denial of market access to other power producers in contravention of Section 4(2)(c) of the Act; (ii) whether OP 4 has purchased power from OP 2 at a higher cost that resulted in imposition of unfair price on the consumers in contravention of the provisions of Section 4(2)(a)(ii) of the Act; and (iii) whether OP 4 has denied open access to consumers for availing electricity from other power generating companies for distribution of electricity in contravention of the provisions of Section 4(2)(c) of the Act.

(i) Whether OP 4 purchases the entire electricity generated by OP 2 irrespective of the price which results in denial of market access to other power producers in contravention of Section 4(2)(c) of the Act

19. The Informant has alleged that OP 4 purchases all of the power produced by OP 2 under long term PPAs entered for 25 years between OP 4 and OP 2 irrespective of the price which hinders the scope of competition in the relevant market by restricting OP 4 from purchasing electricity from sources other than OP 2. In this regard, the Commission observes that first of all, usually power



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from public sector undertakings is purchased under long term PPAs through MOU route only whereas power from other sources is purchased through open bidding. Secondly, OP 4 has categorically justified the long term PPAs with OP 2 by stating that the aforesaid PPAs were entered into between OP 2 and OP 4 during difficult circumstances of shortage of electricity and prevalent load shedding of power in the State of Maharashtra. As competitive bidding mechanism was in a nascent stage during that time and ensuring stable and continuous supply of electricity was the top priority, long term PPAs were signed through MOU route and also through competitive bidding process with Rattan India for Amravati power plant. The Commission is of the view that the justification offered by OP 4 for entering long term PPAs with OP 2 looks plausible. Further, the allegation of the Informant that the long term PPAs entered into between OP 4 and OP 2 hinder competition in the relevant market by restricting OP 4 from purchasing electricity from the sources other than OP 2 is not found to be correct as OP 4 purchases 59% of its power requirements from the sources other than OP 2 and the entire power produced by OP 2 and purchased by OP 4 constitutes only 41% of the power requirement of OP 4. In view of the above analysis, the Commission is of the opinion that by purchasing the entire electricity produced by OP 2 and entering into long term PPAs with OP 2, OP 4 has not denied market access to other power generating company as alleged by the Informant. Therefore, no case of infraction of the provisions of Section 4(2)(c) of the Act is made out against OP 4 in the present matter.

(ii) Whether OP 4 has purchased power from OP 2 at a higher cost that resulted in imposition of unfair price on the consumers in contravention of the provisions of Section 4(2)(a)(ii) of the Act

20. On this issue, the Informant has alleged that inefficiency of power generation by OP 2 is reflected in its high cost which in turn is reflected in the high cost



structure and revenue forecast submitted by OP 4 to MERC. As a result of the same, higher tariffs are decided by the MERC and the consumers in the end in the relevant geographical market are paying the highest electricity tariff compared to all other states in India. The Commission in this regard, observes that the purchase price of electricity of OP 4 from power generating companies is determined by the Central/ State Electricity Regulatory Commission, as the case may be, for each year in accordance with the statutory power vested in it under the Electricity Act, 2003 and relevant regulations thereunder.

21. With regard to the issue of long term PPAs, OP 4 is purchasing power from OP 2 by executing PPAs through MOU route whereby tariff is determined by MERC under Section 62 of the Electricity Act, 2003 and same is based on the MOD principle *i.e.* the least cost power should be dispatched in preference to the more costly power. Further, the PPAs executed under MOU route including those after 05.01.2011 between OP 2 and OP 4 have been examined by MERC and detailed orders have been passed from time to time keeping in view the various parameters including the interest of the consumers. The Maharashtra State Load Dispatched Centre (MSLDC) which is the apex body to ensure integrated operations of the power system of the state does optimum scheduling under the MOD principle and OP 4 has no role to play in this regard. It is reported that the long term PPAs between OP 2 and OP 4 were executed pursuant to approval of MERC and tariffs charged from the ultimate consumers are determined by the MERC through the tariff orders issued from time to time. Therefore, OP 4 cannot arbitrarily impose price on the consumers in violation of the provisions of Section 4(2)(a)(ii) of the Act.

22. With regard to the contention of the Informant that pursuant to the long term PPA entered into between OP 4 and OP 2, the purchase price of electricity of OP 4 from OP 2 is higher than the other available sources, the Commission



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observes that the price of power being charged by OP 2 is not the highest for the last 3 years viz. 2011-12, 2012-13 and 2013-14. In fact, Ratnagiri Gas and Power Pvt. Ltd. and non-conventional sources have been found to have higher purchase rates of electricity for the last 3 years. Also, the rationale for signing a long term agreement is justified keeping in mind that the tariff generated in the initial 10-12 years is used for servicing of debt incurred for installation of the generators for respective plants. In view of this, the allegation of the Informant that OP 4 arbitrarily entered into long term PPAs with OP 2 stands negated.

23. On the issue of MOD principle, the Informant has alleged that OP 4 while procuring power from OP 2 is considering the overall average purchase rate of generating units of OP 2 instead of taking each generating unit separately and is taking into account only the variable cost instead of fixed and variable cost in purchase rate of procuring power from OP 2. The Commission notes that Merit Order is a way of ranking of available sources of energy based on ascending order of price together with the amount of energy that will be generated. In a centralised management, those with the lowest marginal cost are first one to be brought online to meet demand and the plants with highest marginal cost are last to be brought to line. Further, the Commission observes that the tariff or purchase price of electricity by OP 4 from power generating companies is determined by the Central/ State Electricity Regulatory Commission for each year in accordance with the statutory power vested by the Electricity Act, 2003 and relevant regulations thereunder. In case of power purchased from NTPC or NPCIL, such tariff is determined by CERC and in case of power purchased from OP 2 such tariff is determined by MERC. In view of the above, the Commission notes that determination of tariff between OP 2 and OP 4 by MERC is in line with the established rules and regulations and within the purview of the regulatory architecture under the Electricity Act, 2003. Thus, the Commission is of the view that the allegation of the Informant



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that OP 4, by purchasing power from OP 2 at a higher cost, has imposed unfair price on its consumers in contravention of Section 4(2)(a)(ii) of the Act is not established.

(iii) Whether OP 4 has denied open access to consumers for availing electricity from other power generating companies for distribution of electricity in contravention of the provisions of Section 4(2)(c) of the Act.

24. The Commission before analysing this issue in detail takes note of the fact that open access is defined in terms of Section 2(47) of the Electricity Act, 2003 as “*the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission*”. It enables non-discriminatory sale/ purchase of electric power/ energy between two parties utilising the system of a third party and not blocking it on unreasonable grounds. Thus, open access is a framework for development of power market and promotion of competition in the sector and is mandated to allow freedom for consumers (or suppliers) to choose suppliers (or consumers) as the case may be. It basically means that the buyer has the freedom of selecting the seller.

25. On this issue, the Informant has alleged that OP 4, being responsible for essential facilities/ infrastructure required for supply of electricity *i.e.* distribution network, has been consistently refusing to accept the request of the consumers who want to procure electricity through open access. The DG has examined two aspects in this regard *i.e.* non-grant of open access permission for sourcing power from IEX, and non-grant of open access permission for sourcing power excluding IEX.



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26. With regard to non-grant of open access permission for sourcing power from IEX, the DG has reported that MERC in its order dated 11.04.2014 (Case No. 104 of 2013), has categorically observed that there were genuine operational issues about the provisions for grant of distribution of open access through IEX in the Open Access Regulation of 2005. In this regard, the Section 42 of the Electricity Act, 2003 mandates that the State Regulators shall introduce open access in phased manner through regulations subject to operational constraints. The DG having examined the issue found that there were ambiguities in the Open Access Regulations of 2005 which were later superseded by the notification of Open Access Regulations of 2014 and as a result of which, open access of power through IEX was not granted prior to 2014 to many parties. In this regard, the Commission has carefully perused the Appellate Tribunal for Electricity (APTEL) order dated 07.10.2015 in Appeal Number 138 of 2014 (*M/s Linde India Limited Vs. Maharashtra Electricity Regulatory Commission and Maharashtra State Electricity Distribution Company Ltd.*), wherein the aforesaid issue of open access through IEX has been exhaustively discussed. The relevant paragraph of the aforesaid order is mentioned as follows:

*“Our attention is drawn to the judgement of this Tribunal dated 28.07.2011 in Appeal No. 36 of 2011 (MSEDCL vs. MERC & Ors.) where this Tribunal has taken a view that the State Commission has jurisdiction to direct grant of Open Access in a petition under Section 142 of the Electricity Act. In our opinion the said judgement has no relevance to the present case because **here we have come to a conclusion that Open Access through IEX could not be granted because there were operational constraints and because there was no provision for it in Regulations 2005. In our opinion in this case there is no willful default on the part of MSEDCL. There was no intention to contravene any provisions of the Electricity Act. Hence there is no***



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question of issuing any penal directions. We also do not find that MSEDCL has abused its dominant position. Consequently, Section 60 of the Electricity Act is not attracted to this case.” (Emphasis supplied)

27. The Commission, in view of above facts, is of the opinion that in the absence of explicit provision in the aforesaid Open Access Regulations of 2005, OP 4 was unable to grant permission for open access through IEX. However, some open access applicants approached the MERC with petition on the issue of non-grant of open access through IEX and consequently, eight applicants have been given permission for open access during the period. In view of this, the Commission is of the view that the conduct of OP 4 regarding open access through IEX is not violative of Section 4 (2)(c) of the Act.
28. On non-grant of open access permission for sourcing power excluding IEX, the DG has reported that due to certain legal issues, the same was not conceded. In this regard, the Informant has also not specified any particular case of denial of open access excluding IEX by OP 4; however, the Commission has taken note of three specific cases of parties alleging denial of open access excluding IEX. These three cases have been discussed in the subsequent paragraphs.
29. In one of the cases, M/s Haldiram Foods International Pvt. Ltd. (Haldiram) established a 1.5 MW solar power plant in Kasana and after 4 months of operation received a communication from OP 4 for not allowing rebate for night operations on the ground that Haldiram was using solar power in day time. Further, Haldiram in the instant matter has alleged that there is no commercial circular existing for such denial of night rebate and the conduct of OP 4 is due to the monopoly being enjoyed by it. Subsequently, Haldiram approached the Bombay High Court for relief in the instant matter. OP 4 in its reply has pointed out that no policy guidelines for installation of solar roof top



plants were issued by the state government and the nodal agency MEDA for renewable energy had not issued any in principle 'No Objection Certificate' or other clearances for the aforesaid project of Haldiram. However, OP 4 in view of the promotion of solar energy still granted permission for open access to the project of Haldiram for captive use without any night rebate to the consumers for units consumed during off peak hours. The Bombay High Court has granted stay on the deduction on night rebates. The matter is still *sub-judice*.

30. In another case, Sanvijay Rolling & Engineering Ltd. (Sanvijay) submitted an application dated 13.01.2011 for grant of Open Access but the same was not allowed by OP 4. In this regard, OP 4 has clarified that Sanvijay was granted open access for sourcing power from its captive power plant in the name of M/s Grace Industries but the permission was not availed by Sanvijay. On another occasion, it was granted the permission by OP 4 but the same again was not availed. Sanvijay yet again applied *vide* application dated 19.03.2013 for wheeling 8 MW power for self-use from its captive power plant Chandrapur to Nagpur. However, it was observed by OP 4 that there was a pending dispute with OP 4 for recovery of Rs. 17 crores. In view of this, the aforesaid application by Sanvijay was not allowed by OP 4 in terms of MERC Regulations 2005 and Sanvijay was directed to deposit the disputed amount of Rs. 17 crores with OP 4 in the instant matter.

31. In another instance, it was alleged that Spentex Industries Ltd. (Spentex) was not allowed short term Open Access by OP 4. OP 4 in its reply stated that Spentex is availing 3 separate HT industrial connections from OP 4. Further, the delay in grant of permission of Open Access to Spentex had been agitated by Wardha Power Co. Ltd. in 2011 and 2012 before MERC *vide* Case No.161 of 2011 and Case No. 117 of 2012. Detailed orders regarding the aforesaid cases were passed on 16.08.2013 and 28.08.2013 by MERC. Further, MERC



also held that there was no abuse of dominant position by OP 4 in both the cases.

32. The Commission considered the aforesaid three cases for non-grant of Open Access excluding IEX and is of the view that the explanation submitted by OP 4 in respect of the above cases is quite reasonable and here again, as in the case of IEX, the Commission does not find any contravention of Section 4(2)(c) by OP 4 as alleged by the Informant.
33. Further, the Commission observes that issues pertaining to fixation of tariff and charges of open access including wheeling charges, cross subsidy surcharge and additional surcharge has already been dealt by both State Regulatory Commission and APTEL through their respective orders and in view of this, the Commission does not find any merit to go into further details in the aforesaid issues of open access and fixation of tariff. Thus, based on the above, in consonance with the findings of the DG in this regard, the Commission is of the view that the allegation of denial of open access by OP 4 to its consumers cannot be construed as violation of the provisions of Section 4(2)(c) of the Act.
34. Based on the above analysis, the Commission is of the opinion that even though OP 4 is in a dominant position in the relevant market as defined under para 13 *supra*, the allegations raised by the Informant regarding abuse of dominant position by OP 4 *viz.* OP 4 purchases the entire electricity produced by OP 2 which results in denial of market access to other power producers; OP 4 is buying power at a higher cost from OP 2 which is cost inefficient in comparison to other power generating companies resultantly, the competition in electricity generation sector has been affected and the consumers of OP 4 are compelled to pay higher tariff for electricity and OP 4 is denying open access to consumers for availing electricity from other sources have not been



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substantiated and violation of Section 4 of the Act is not established. Since, no case of contravention of any of the provisions of Section 4 of the Act is made out against OP 4, the matter relating to this information is disposed of accordingly and the proceedings are closed forthwith.

35. The Secretary is directed to inform the parties accordingly.

Sd/-

(Devender Kumar Sikri)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

Sd/-

(Justice G. P. Mittal)
Member

New Delhi
Date: 21.04.2017