



COMPETITION COMMISSION OF INDIA

22nd August 2023

Proceedings against NTPC Limited under Section 43A of the Competition Act, 2002

CORAM:

Ms. Ravneet Kaur
Chairperson

Ms. Sangeeta Verma
Member

Mr. Bhagwant Singh Bishnoi
Member

Appearances

For NTPC Limited: Mr. Ramji Srinivasan, Sr. Advocate, Ms. Nisha Kaur Uberoi, Advocate, Mr. Gautam Chawla, Advocate, Mr. Ankush Walia, Advocate, Ms. Akansha Agrawal, Advocate, Ms. Namrata Saroagi, Advocate, Ms. Sangeeta Kaushik, Representative of NTPC, Mr. P.C. Vishwanathan, Representative of NTPC.

Order under Section 43A of the Competition Act, 2002

1. This Order shall dispose of the proceedings under Section 43A of the Competition Act, 2002 (**Act**) against NTPC Limited (**NTPC/Acquirer**) regarding acquisition of 35.47% of the equity share capital in Ratnagiri Gas & Power Private Limited (**RGPPL/Target**).

Background

2. The Commission had observed from the information available in the public domain that NTPC had acquired 35.47% of the equity share capital of RGPPL without giving a notice



to the Commission in terms of Section 6(2) of the Act. In this regard, on 8th February 2022, the Commission issued a letter to NTPC under Section 36(4) of the Act, in relation to acquisition of 35.47% shares in RGPPL by NTPC from the Lenders i.e., IDBI, ICICI, SBI, IFCI and Canara Bank whereby the shareholding of NTPC in RGPPL increased from 25.51% to 60.98%. The letter was issued for seeking information so as to assess whether further proceeding is required under Section 20(1) and/or Section 43A of the Act.

3. NTPC, in its response submitted on 8th March 2022, provided information pertaining to its acquisition of 35.47% equity shareholding in RGPPL from lenders of RGPPL (**Transaction 1**). Further, NTPC also disclosed: (a) Demerger of the 5 million metric tons per annum (MMTPA) regasified Liquid Natural Gas (LNG) terminal and associated facilities of RGPPL (**LNG Undertaking**) and vesting the same into Konkan LNG Limited (KLL) [**Demerger of LNG Undertaking/Transaction 2**]; (b) Acquisition by GAIL (India) Limited (**GAIL**) of 14.82% equity stake in KLL from NTPC (**Transaction 3**); and (c) Acquisition by NTPC of 25.51% equity stake in RGPPL from GAIL (**Transaction 4**). Since the information provided in the response was not complete, a letter was issued to NTPC on 7th April 2022 seeking certain clarifications. After seeking extension of time, NTPC submitted a comprehensive response on 15th July 2022.
4. In the response dated 15th July 2022, NTPC, *inter alia*, stated with respect to Transaction 1 that NTPC's 35.47% acquisition in RGPPL was undertaken as an independent transaction (i) to revive RGPPL and resolve its Non-performing Asset classification, (ii) make RGPPL a viable business and (iii) supplement the Central Government's vision for RGPPL. Further, NTPC consummated the composite resolution plan with RGPPL and its lenders, i.e., IDBI, ICICI, SBI, IFCI and Canara Bank on 31st December 2020. Given that the debt was a One-Time Settlement (OTS) by NTPC, equity shares of RGPPL held by such lenders (as security) were consequently transferred to NTPC. Thus, NTPC's shareholding in RGPPL increased from 25.51% to 60.98%.



Initiation of proceedings and issue of SCN

5. The Commission, in its meeting held on 20th October 2022, considered the material on record including NTPC submissions dated 15th July 2022 and noted that, prior to Transaction 1 i.e., acquisition of 35.47% equity shareholding in RGPPL, NTPC already held 25.51% equity shareholding in RGPPL. Therefore, when NTPC acquired 35.47% equity shareholding in RGPPL, its shareholding in RGPPL increased to 60.98%. Considering that the shareholding of NTPC in RGPPL after Transaction 1 exceeded 50%, Transaction 1 did not benefit from Item 1A of Schedule I of Competition Commission of India (Procedure in Regard to the Transaction of Business relating to Commission) Regulations, 2011 (**Combination Regulations**). Thus, the Commission was of the *prima facie* opinion that Transaction 1 was a notifiable transaction that ought to have been notified to the Commission prior to its consummation on 31st December 2020 in terms of the provisions of Section 6(2) of the Act read with Regulation 5 of the Combination Regulations. However, NTPC failed to comply with such requirement.
6. Further, based on submissions of NTPC with respect to Transaction 2 i.e., demerger of LNG Undertaking and Transaction 3 i.e., GAIL's 14.82% acquisition, the Commission noted that the exemption given vide Government of India Notification no. S.O. 988(E) dated 27th March 2017 and extended *vide* Notification no. S.O. 1192(E) dated 16th March 2022 was applicable to these transactions. With respect to Transaction 4 i.e., NTPC's 25.51% acquisition in RGPPL, it was noted that the benefit given under Item 2 of Schedule I of the Combination Regulations was available for the transaction.
7. In view of the above, the Commission issued a show cause notice (**SCN**) *vide* its letter dated 27th October 2022 to NTPC under Section 20(1) and 43A of the Act read with Regulation 8(2) of the Combination Regulations and Regulation 48 of the Competition Commission of India (General) Regulations, 2009 (**CCI General Regulations, 2009**) to explain, in writing, why NTPC should not be found in contravention of the obligation contained in Section 6(2) of the Act and why no penalty in terms of Section 43A of the Act should be imposed on it. NTPC was also asked to explain why the Commission



should not direct it to give notice in terms of Regulation 8(2) of the Combination Regulations.

8. After taking extensions, on 23rd December 2022, NTPC submitted its response to the SCN and the Commission considered the same in its meeting held on 18th May 2023. The Commission also considered NTPC's request for grant of hearing and decided to allow the same. Accordingly, NTPC was directed to appear before the Commission for hearing on 18th July 2023.
9. On 18th July 2023, the Commission heard NTPC at length. The Commission further allowed NTPC to file its written submissions, which were received on 28th July 2023.

Submissions of NTPC

10. By way of background, NTPC has submitted that it is a Central Public Sector Enterprise (**CPSE**). It was incorporated in 1975 to accelerate power development in India. NTPC became a Maharatna company in May 2010 and presently, the Government of India owns 51.1% equity stake in NTPC.
11. Dabhol Power Company Limited (**DPCL**) was incorporated on 23rd April 1993 as a joint venture with Enron being the majority shareholder with 65% equity stake in DPCL. On 8th July 2005, in compliance with the directives of the Government of India, RGPPL was incorporated. NTPC contributed INR 500 crore towards equity in RGPPL and a similar amount was contributed by GAIL and Institutional Financial Investors (IFIs), respectively. Accordingly, on 6th October 2005, the Special Purpose Vehicle (SPV) i.e., RGPPL took over the assets of DPCL on an 'as is where is basis', including an integrated gas based combined cycle power project with an estimated capacity of approximately 1967 MW (**Power Undertaking**) and LNG Undertaking.
12. NTPC has submitted that due to the curtailment of natural gas from KG D-6 basin, RGPPL's Power Undertaking operations were stopped in July 2013. Subsequently, Maharashtra State Electricity Distribution Company Limited (**MSEB**) terminated the PPA with RGPPL in May 2014, which added further financial burden upon RGPPL. In



December 2015, KLL was incorporated as a subsidiary of RGPPL, for taking over the operations of LNG Undertaking. In 2018 and 2019, post the demerger of the LNG Undertaking into KLL, Canara Bank, IDBI and SBI declared the loan account of RGPPL as Non-Performing Asset (NPA). In November 2019, NTPC, as the promoter, suggested RGPPL to take up with its lenders to explore various options including OTS for settlement of NPA. As a part of the resolution plan for settlement of outstanding debt of RGPPL through OTS by NTPC, 35.47% of the equity held by lenders (IDBI, ICICI, SBI, IFCI and Canara Bank) in RGPPL was transferred to NTPC on 31 December 2020.

13. With respect to Transaction 1 (**Concerned Transaction**) NTPC has contended that the same was not notifiable to the Commission. Summarily, the arguments of NTPC in this regard are, *inter alia*, as under:

- (i) The ultimate intent of the Concerned Transaction was not to acquire equity shares or additional governance rights and/or control, as understood in commercial parlance. The Concerned Transaction was undertaken to repay debt of RGPPL through OTS in public and national interest to revive an asset of national importance. NTPC did not acquire any additional rights in any form. Therefore, pursuant to the Concerned Transaction, 'in substance' there has been no change in control in RGPPL and resultantly, no impact on the market or competition.
- (ii) After consummation of the Concerned Transaction, only NTPC's equity shareholding increased from 25.51% to 60.98% in RGPPL, however, its rights in RGPPL remained the same. Both before and after the Concerned Transaction, NTPC exercised joint control in RGPPL along with GAIL and MSEB, since both GAIL and MSEB continued to have board representation in RGPPL. Further, no new shareholders' agreement has been entered into between NTPC, GAIL and MSEB post consummation of the Concerned Transaction.



(iii) The Commission has already analysed and approved more than ten transactions including one filed by NTPC for acquisition of Jhabua Power Limited¹ (**Jhabua form**). Thus, the Commission has already looked at the power sector (i.e., the overlap of activities of NTPC and RGPPL) and in peculiar facts and circumstances of the present case, also analysed the sector vis-à-vis NTPC while considering NTPC's acquisition of Jhabua Power Limited.

(iv) The Concerned Transaction could avail the benefit of exemption given vide Government of India Notification no. S.O. 3714(E) dated 22nd November, 2017 (**O&G Exemption**) as both NTPC and GAIL, which jointly control RGPPL, are CPSEs and GAIL operates in gas sector.

14. Further, NTPC has submitted that in the event, the NTPC is found to have acted in contravention of Section 43A of the Act, the Commission may consider the following mitigating factors: (i) NTPC did not conceal any transaction and on their own volition disclosed to the Commission the consummation of three transactions, i.e., the Demerger of LNG Undertaking, GAIL's 14.82% Acquisition in KLL and NTPC's 25.51% Acquisition in RGPPL to assist the Commission; (ii) NTPC made full and complete disclosure of the acquisition of RGPPL in the Jhabua form and made no effort to conceal the Concerned Transaction, rather NTPC inadvertently omitted seeking prior approval of the Commission; (iii) Central Government's directives led to RGPPL's incorporation and the Concerned Transaction was also carried out in order to revive a national asset; (iv) the Concerned Transaction neither resulted in AAEC nor transfer from joint to sole control; (v) RGPPL was a failing firm and NTPC's debt acquisition was aimed to revive a national asset; (vi) the power sector in India is highly competitive and fragmented in nature, as such, the Concerned Transaction does not impact the competitive landscape of the power sector in India; (vii) there are no previous violations of the Act by NTPC and (viii) NTPC has always acted in a *bona fide* manner and sought to co-operate to the fullest extent with the Commission.

¹ Combination Registration No. C-2021/12/884



15. In addition, NTPC has submitted that it should not be directed to file notice in terms of Regulation 8(2) of the Combination Regulations read with Section 20(1) of the Act, *inter alia*, for the reasons that: (i) about two (2) years have elapsed since the consummation of the Concerned Transaction; (ii) the process of filing a notice would be cumbersome and redundant for NTPC since it would need to furnish dated information/data; (iii) the Commission would need to analyse the market dynamics in a constantly evolving and dynamic sector (i.e., power sector) from an outdated perspective; (iv) the Commission has already analysed and approved transactions in the power sector including one transaction filed by NTPC as the acquirer, where capacity of NTPC was over and above the acquisition of RGPPL and (v) it would not be in conformity with the Central Government's initiatives in relation to ease of doing business.

Commission's Analysis and Finding

16. The Commission has considered the submissions of NTPC as well as heard the arguments advanced by their learned counsel. The issue for determination before the Commission is: "Whether NTPC, by acquisition of 35.47% shareholding in RGPPL without filing a notice with the Commission, has contravened the provisions of Section 6(2) and Section 6(2A) of the Act and is, hence, liable for penalty under Section 43A of the Act".
17. Under Section 5 of the Act, acquisition of control / shares / voting rights / assets of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall amount to combination if the asset and turnover thresholds provided therein are exceeded. Further, Section 6(2) of the Act provides that the parties proposing to enter into a combination shall give a notice to the Commission and, as per Section 6(2A) of the Act, "*No combination shall come into effect until two hundred and ten days have passed from the day on which the notice has been given to the Commission under sub-section (2) or the Commission has passed orders under Section 31, whichever is earlier.*"



18. The above provisions in effect imply that the mergers and acquisitions that are combinations in terms of Section 5 of the Act are mandatorily notifiable to the Commission and therefore, cannot be consummated, either entirely or in part, without approval from the Commission, unless they are exempted by the Government of India notification or are such combinations that fall under Schedule 1 of Combination Regulations, in respect of which a notice need not normally be filed.

19. Under Item 1, 1A and 2 of Schedule I of Combination Regulations, the benefit is available to a transaction based on percentage of shares acquired, provided that such acquisition does not result in acquisition of control or change in control from joint to sole control. In a case where an enterprise prior to acquisition has more than 25% shares in the other enterprise, the exemption under Item 1A is available to the transaction if the shareholding does not exceed 50% after the transaction. For reference, Item 1A of Schedule I of Combination Regulations reads as follows:

“An acquisition of additional shares or voting rights of an enterprise by the acquirer or its group, where the acquirer or its group, prior to acquisition, already holds twenty five per cent (25%) or more shares or voting rights of the enterprise, but does not hold fifty per cent (50%) or more of the shares or voting rights of the enterprise, either prior to or after such acquisition: Provided that such acquisition does not result in acquisition of sole or joint control of such enterprise by the acquirer or its group”

20. In the instant case, the Commission observes that the Concerned Transaction was a combination in terms of the provisions of Section 5 of the Act and did not benefit from any exemption given *vide* Government of India notification. Further, NTPC, at the time of the Concerned Transaction, already held 25.51% equity shareholding in RGPPL and when it acquired a 35.47% equity stake in RGPPL, its shareholding increased from 25.51% to 60.98%. Considering that the shareholding of NTPC in RGPPL after the Concerned Transaction exceeded 50%, benefit under Item 1A of Schedule I of Combination Regulations was also not available to the Concerned Transaction and the same ought to have been notified to the Commission, even if NTPC did not get any



additional control conferring rights or the transaction did not result in change in control from joint to sole control.

21. Further, with respect to arguments of NTPC that the Concerned transaction did not result in AAEC in India, it is observed that the mandatory regime for notifying a proposed combination to the Commission is applicable, irrespective of whether the combination causes any AAEC in India or not. The Commission, in its order relating to penalty proceedings under Section 43A of the Act against Intellect Design Arena Limited, has already observed: “.... *the Act clearly provides, irrespective of whether there is any appreciable adverse effect on Competition in India or not, there is mandatory regime for notifying a combination to the Commission.*”
22. In view of the foregoing, the Commission is of the opinion that NTPC, by consummating the Concerned Transaction without filing a notice with the Commission in terms of Section 6(2) of the Act prior to acquisition, has contravened the provisions of Section 6(2) read with Section 6(2A) of the Act, and hence, is liable to a penalty under Section 43A of the Act, which reads as under:
- “If any person or enterprise who fails to give notice to the Commission under sub-section (2) of Section 6, the Commission shall impose on such person or enterprise a penalty which may extend to one per cent of the total turnover or assets, whichever is higher, of such a combination.”*
23. It is to be noted that Section 43A of the Act prescribes the extent of penalty that can be levied for failure to file notice; however, the Commission can consider the conduct of the parties and circumstances of the case to arrive at an appropriate amount of penalty.
24. In the instant matter, the Commission considered the mitigating factors mentioned in para 14 above and the conduct of NTPC whereby it extended cooperation and provided the material/documents as sought by the Commission. However, NTPC cannot be exculpated



of its statutory obligation to file notice with the Commission prior to consummation of the Concerned Transaction.

25. Thus, considering the facts and circumstances of the case and the conduct of NTPC, the Commission decides to impose a penalty of INR 40,00,000 (INR Forty Lakh only) on NTPC. NTPC shall pay the penalty within 60 days from the date of receipt of this order.
26. The Secretary is directed to inform NTPC, accordingly.