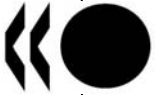


**Unclassified**

**DAF/COMP/GF/WD(2005)20**



Organisation de Coopération et de Développement Economiques  
Organisation for Economic Co-operation and Development

**14-Jan-2005**

**English - Or. English**

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**DAF/COMP/GF/WD(2005)20  
Unclassified**

## **Global Forum on Competition**

### **ABUSE OF DOMINANCE IN REGULATED SECTORS**

**Case submitted by Russian Federation**

**-- Session III --**

*This case is submitted by Russian Federation in view of its discussion in Sub-Session 1 on Friday 18 February 2005 (from 9.30 am).*

**English - Or. English**

**JT00176955**

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**RUSSIAN FEDERATION  
“ROSENERGOATOM” AGAINST RAO “UES RUSSIA”**

1. In September 2001, MAP Russia received an application from the concern “Rosenergoatom” complaining about wrongful acts by RAO “UES Russia”, which had refused to sign a contract with “Rosenergoatom” to render the services of electric power transmission.

2. In accordance with the Order of the President of the Russian Federation (of 10.04.00 No Pr- 705) “On elaboration of measures to increase the volume of exports of electric power produced by nuclear power plants”, in April–May 2001 “Rosenergoatom” signed two contracts to deliver electric power. One was a contract with a German firm acting on the electric power market of the Republic of Georgia, “PBE Trading GMBx,” to supply electric power to Georgia until 2006. The second contract was with an association of Ukrainian enterprises “Electro technical corporation “Elkor” (Kharkov) to deliver electric power to Ukraine. For realisation of these contracts, in accordance with Art. 435 of the Civil Code, “Rosenergoatom” had sent a formal request to RAO “UES Russia”.

3. In response to the request by “Rosenergoatom”, RAO “UES Russia” replied that it was impossible to sign a contract on transmission of electric power with “Rosenergoatom” before RAO “UES Russia” is given copies of the contract that was concluded between “Rosenergoatom” and “PBE Trading GMBx” and the contract between “Rosenergoatom” and “Elkor” (Kharkov).

4. “Rosenergoatom” refused to give the requested copies of the contracts, pointing out that all necessary technical information for signing and further realisation of the contracts was contained in the request, and the other information contained in the contracts between “Rosenergoatom” and the contracting parties is its commercial classified information and is not necessary for the consideration of the request for transmission of electric power. At the same time, “Rosenergoatom” showed its readiness to render additional technical information if it is necessary.

5. In reply to the mentioned letter, “Rosenergoatom” offered to eliminate from the contract text references to contracts, and after that send the new one for consideration by RAO “UES Russia” or to render the copies of the contracts.

6. As a basis of the legal position, the applicant provided the letter from RAO “UES Russia”, which points out the groundlessness of “Rosenergoatom’s” activity in signing the contracts with “PBE Trading GMBx” and “Elkor” because:

- in accordance with the Decree of the Government of the Russian Federation (of 12.07.96 No793) “On Federal wholesale electric power market” (further, “Decree on federal wholesale electricity market”) such contracts should be previously agreed by RAO “UES Russia”;
- “Rosenergoatom” offers electric power to foreign partners at dumping price, and it causes damage not only to RAO “UES Russia” but to Russian producers too.

7. The Commission [the decision-making body within the MAP] tested the proofs provided and listened to explanations by persons participating in this case, and decided:

8. RAO “UES Russia” occupies a dominant position on the market of electric power generation in the Russian Federation (share more than 65%), as well as on the services market of high voltage transmission (330kV and higher) of electric power (share more than 65%). It is inscribed in the Federal

section of the Register of Economic Entities which have market shares of more than 35%. Besides, RAO "UES Russia" is a natural monopoly subject according to Article 4 of the Federal Law "On Natural Monopolies" and is inscribed in the Register of Natural Monopolies.

9. In cases when, in accordance with the Code or other laws, the Party which has received the offer (draft contract) has to sign the contract, then according to paragraph 1 of the Article 445 of the Civil Code of the Russian Federation (further, "Civil Code"), this Party has to inform the other Party on acceptance, or to refuse the acceptance, or to inform on acceptance of the offer under other conditions (protocol of differences and draft contract) within thirty days after receiving the offer. Signing the contract on electric power transmission is obligatory for RAO "UES Russia" according to Article 10 of the Civil Code and Article 5 of the Federal Law "On Competition and Restriction of Monopolistic Activity at Commodity Markets" (further, "Competition Law") and Article 8 of the Federal Law "On Natural Monopolies".

10. RAO "UES Russia" infringed Article 445 of the Civil Code. The following actions, provided by the indicated Article, were not taken in response to the offer by "Rosenergoatom": refusal of the offer, acceptance of the offer, sending the protocol of differences.

11. At the same time RAO "UES Russia" has sent to "Rosenergoatom" a proposition to provide it with copies of the contracts between "Rosenergoatom" and "PBE Trading GMBx", and between "Rosenergoatom" and "Elkor". It is RAO "UES Russia's" opinion that, in accordance with the Decree on Federal Wholesale Electricity Market, these contracts should be preliminarily agreed by RAO "UES Russia" and RAO "UES Russia" has the authority to agree any contracts regarding electric power export. Therefore, the requirement to render the indicated contracts before concluding them is lawful. But the Decree on Federal Wholesale Electricity Market does not grant to RAO "UES Russia" the indicated authority. Besides, in accordance with Article 55 of the Constitution of the Russian Federation and Article 1 of the Civil Code, civil rights could be limited on the basis of Federal Law only as much as necessary in order to protect the grounds of the constitutional system, morality, health, rights and valid interests of other persons, providing defence and security of the country.

12. Representatives of RAO "UES Russia" could not explain to the Commission what RAO "UES Russia" meant by "dumping prices" and have not given any proof to support its own position. Moreover RAO "UES Russia" has no authority to control prices agreed by Parties when they sign either domestic or export contracts.

13. RAO "UES Russia" insists that it is necessary to know the conditions of the contracts on selling electric power signed by the applicants. This statement is not grounded on real conditions and legal rules, because all essential conditions of the contract on electric power transmission are contained in the request made by "Rosenergoatom" to RAO "UES Russia". Besides, contracts could not contain any additional obligations, because these contracts are bilateral agreements, and RAO "UES Russia" is not a Party to the agreement. The establishment of rights and duties for third persons in bilateral agreements without approval by the third person contradicts Article 421 of the Civil Code, and regulations containing such rights and duties are invalid and do not involve any legal consequences for third persons.

14. Therefore RAO "UES Russia's" requirement that "Rosenergoatom" render contracts on the sale of electric power as the reason not to conclude the contract on electric power transmission is invalid and infringes Article 445 of the Civil Code.

15. Nuclear plants belonging to "Rosenergoatom" produce electric power with the aim of delivering it to the market. But it is necessary to transmit electric power from producer to consumer via power lines in order to deliver produced electric power to the market, and RAO "UES Russia" is a monopolist and the owner of these power lines. Due to the fact that RAO "UES Russia" does not render the services of electric

power transmission to producers, especially to “Rosenergoatom”, the generating company has no access to the market of electric power.

16. The fact that RAO “UES Russia” does not sign the contract on electric power transmission in the established order and in established dates creates insuperable barriers for “Rosenergoatom” to enter the electric power market.

17. The Competition Law qualifies as abuse of a dominant position the creation, by an economic entity in a dominant position, of barriers to market entry by other economic entities.

18. According to Article 5 of the Competition Law and Article 10 of the Civil Code, abusing a dominant position is prohibited.

19. Taking into consideration the above-mentioned facts, the Commission made a decision to declare that the actions of RAO “UES Russia” that created barriers for “Rosenergoatom” to enter the electric power market violate paragraph 6 point 1 of Article 5 of the Law of the Russian Federation “On Competition and Restriction of Monopolistic Activity at Commodity Markets.” The Commission gave instructions to RAO “UES Russia” to eliminate the violation of the antimonopoly legislation.

20. All court authorities agreed on the legality of this decision of the federal antimonopoly body.