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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 08 of 2014

In Re:

M/s GHCL Limited

Informant

And

1. M/s Coal India Limited

Opposite Party No. 1

2. M/s Western Coalfields Limited

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

Appearances: Shri Venkatraman, Advocate with Shri K.K. Pokhariyal,
GM (Comm.) for the Informant.

Shri Rajshekhar Rao, Ms. Gauri Puri, Advocates for the
Opposite Party No. 1.



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S/ Shri Srijan Sinha and Himanshu Chaubey, Advocates for
the Opposite Party No. 2.

Order under Section 27 of the Competition Act, 2002

1. The present information has been filed under section 19(1)(a) of the Competition Act, 2002 ('the Act') by M/s GHCL Limited ('the Informant') against M/s Coal India Limited ('the Opposite Party No. 1'/ CIL) and M/s Western Coalfields Limited ('the Opposite Party No. 2'/ WCL) (collectively 'Opposite Parties'/ 'OPs') alleging *inter alia* contravention of the provisions of section 4 of the Act.

Facts

2. Facts, as stated in the information, may be briefly noticed.
3. The Informant is a company incorporated under the Companies Act, 1956 and is *inter alia* engaged in the business of manufacture and sale of soda ash, which is a basic industrial raw-material used predominantly in manufacture of glass (flat/container), detergent, chemicals, silicates and host of other basic chemicals. The Informant commenced its commercial production of soda ash in 1986 at its manufacturing facility at Sutrapada, Distt. Somnath Gir (earlier in Junagadh Distt.) in the State of Gujarat.
4. It is stated in the information that the Informant, which requires coal for running its captive power plant, was issued a Letter of Assurance (LoA) No. NGP/WCL/S&M/C-12(348-B)/798 dated 07/08.06.2010 by the Opposite Party No. 2 calling upon the Informant to fulfil various conditions precedent to enable the Opposite Party No. 2 to enter into a Fuel Supply Agreement (FSA) dated 08.11.2012 with the Informant for supply of coal. It is stated that LoA, apart from the usual conditions precedent requiring the Informant to obtain all requisite approvals and



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permissions, under Para 3.1 required the Informant to furnish a Commitment Guarantee (CG) in the form of a bank guarantee of Rs. 1,00,38,900/- equivalent to 10% of the base price of indigenous coal as on the date of application for issue of LoA. In compliance thereof, the Informant issued CG as stipulated and also complied with each of the conditions precedent stipulated under LoA. The said commitment bank guarantee issued by IDBI Bank Ltd., Ahmedabad was enhanced and renewed from time to time as required by the Opposite Party No. 2 even as there was no fault or shortcoming on the part of the Informant. The Informant, which was eager to commence purchase of coal from the Opposite Parties, wrote to the Opposite Party No. 2 on 11.09.2012 informing about compliance with the conditions precedent to LoA and calling upon it to approve FSA. Immediately upon receipt of the said letter, the Opposite Party No. 2 replied *vide* its letter dated 12.09.2012 stating therein that *'The signing of FSA in respect of LoA issued to GHCL Ltd., vide letter No. NGP/WCL/S&M/C-12(348-B)/798 dt.07/08.06.2010 shall be executed after receipt of certain clarification sought from MOC/ CIL. However, bank guarantee submitted towards Commitment Guarantee and additional Commitment Guarantee are expiring in Oct 2012 and requires to be extended. You are therefore requested to kindly extend the validity of the Bank Guarantee submitted towards Commitment Guarantee, failing which, WCL shall have no option but to encash the Bank Guarantee.'*

5. It is alleged that a plain reading of the said letter clearly demonstrates that the Opposite Parties had coerced the Informant into extending the commitment bank guarantee issued by the Informant by threatening to encash the commitment bank guarantee even though there was no default or failure on the part of the Informant. The Informant replied to the said letter on 04.10.2012 explaining its position yet complied with the unreasonable demand of the Opposite Party No. 2 with regard to extension of the commitment bank guarantee to avoid the encashment of



the same.

6. It is the case of the Informant that upon compliance with the conditions precedent and meeting even the unreasonable demands of the Opposite Party No. 2 as set out hereinbefore, the Informant was provided a model draft of FSA for its approval. Since, there were few clauses in the said FSA which were absolutely one sided, the Informant wanted the Opposite Party No. 2 to redraft the said clauses to make it more balanced. However, the Opposite Party No. 2 made it clear to the Informant that these are standard terms of supply of coal by the Opposite Party No. 2 and as such the terms and conditions of FSA were not negotiable and that any delay or failure to execute FSA within the stipulated time period would result in the invocation of the bank guarantee issued by the Informant. Being left with no alternative, the Informant sent its duly authorized representative to execute FSA, which was mandatory for commencing supply of coal under the New Coal Distribution Policy, 2007 (NCDP).
7. Accordingly, it is averred that the Informant sent its duly authorized representative only to be given to understand that the Informant will have to execute a Memorandum of Understanding (MoU) along with FSA. Since, there was no whisper about this requirement and further as the terms and conditions of the said MoU were absolutely one-sided and loaded against the Informant, the duly authorised representative of the Informant expressed his inability to execute such a one-sided MoU without obtaining clearance from the Informant. It is alleged that a plain reading of MoU would clearly establish that the conditions relating to quantity and quality of coal to be supplied under FSA were diluted.
8. It is alleged that upon hearing the response of the duly authorized representative of the Informant, the Opposite Party No. 2 referred to Para 3.4.2 of LoA and threatened to encash the commitment bank guarantee



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furnished by the Informant if the duly authorized representative of the Informant refused to execute MoU alongwith FSA.

9. The Informant is aggrieved by the fact that the Opposite Party No. 2 instead of executing FSA as required under NCDP required the Informant to execute an MoU alongwith FSA diluting the terms and conditions of FSA on issues like quality control, grade failure, short supply, joint sampling *etc.*, which are the material terms and conditions of supply of coal under the agreement.
10. The Informant has also made various other allegations and a gist thereof is noted below:
 - a) The Opposite Parties have abused their dominance by dictating the terms and conditions of supply of coal through LoA, FSA, MoU and the Addendum to FSA by imposing such one-sided onerous conditions upon the buyers without seeking, much less considering, the inputs of the power producers and have thus acted independent of the market forces.
 - b) The clause relating to Deemed Delivered Quantity (DDQ) in FSA was fully loaded against the Informant and gave undue leverage to Opposite Parties to evade and avoid their liability for short supply.
 - c) The terms and conditions of supply were not as mandated under NCDP. LoA, FSA and MoU, which the Informant was asked to execute, did not address all aspects of supply like quality control, grade failure, short supply, joint sampling *etc.*, and these were not detailed/ enumerated in clear terms and conditions.
 - d) Diversion of coal mandated to be supplied under FSA/ NCDP to online buyers at a premium at the cost of the Informant and other



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consumers who were allotted coal under LoA/ FSA based on NCDP. The Annual Report 2011-12 of Ministry of Coal (MoC) provides the statistics which will demonstrate that sale of coal sold through e-auction *i.e.*, spot auction or forward auction was market driven and far in excess of the notified price under LoA/ FSAs; helped the Opposite Parties to increase their revenue by a phenomenal 36% in 2011-12 and there was a direct nexus between the e-auction sales and the inability of the Opposite Parties to meet their contractual commitments to consumers under FSAs.

- e) The Opposite Parties have not been able to honour their contractual commitments/ obligations with regard to Annual Contracted Quantity (ACQ) to consumers who were issued LoAs and have executed FSAs/ MoUs pursuant thereto.
- f) Inferior quality of the coal supplied by the Opposite Party No. 2 caused severe operational and maintenance problems apart from forcing the Informant to purchase quality coal from alternate sources.
- g) By taking advantage of their dominant position, the Opposite Parties have not only diverted the coal agreed to be sold through LoA/ FSA route to the e-auction purchasers and thereby deprived the consumers like the Informant of ACQ of coal but, have also failed to improve their infrastructure to increase their coal production to meet the annual contracted demands of their consumers thereby forcing these consumers to import coal from alternate sources to meet their energy needs.

11. Based on the above averments and allegations, the Informant has filed the instant information.



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Directions to the DG

12. The Commission after considering the entire material available on record *vide* its order dated 10.03.2014 passed under section 26(1) of the Act directed the Director General (DG) to cause an investigation to be made into the matter and submit a report. The DG, after receiving the directions from the Commission, investigated the matter and filed the investigation report on 22.09.2014.

Investigation by the DG

13. The relevant market was determined by the DG as 'production and supply of non-coking coal to thermal power producers including the captive power plants in India'. It was further found that OPs are in a dominant position in the said relevant market.
14. It was held that the terms and conditions of LoA, FSA and MoU have been drafted by OPs unilaterally and there is no consultation process with the customers/ other parties either at the time of drafting of FSA or at the time of modifications. The conduct of OPs in this regard was found to be independent of the market forces affecting the consumers and market in their favour.
15. It was noted in the report that the dependence of consumers on OPs and their ability to act independent of market forces allowed them to decide the one sided terms and conditions of LoA, FSA and MoU without any corresponding obligations. It was, therefore, held that the conditions imposed by OPs in LoA, FSA and MoU were unfair and in violation of the provisions of section 4(2)(a)(i) of the Act.
16. The investigation further revealed that OPs have imposed unfair and discriminatory conditions by reducing the quantity of supply and trigger



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level for penalty for short delivery. The clauses of MoU relating to reduction in quantity, trigger level for penalty and DDQ were found to be unfair. It was, therefore, concluded that the conditions imposed in MoU were in violation of provisions of section 4(2)(a)(i) of the Act.

17. The conduct of WCL by issuing letter dated 12.09.2012 to the Informant for extending CG or to face consequence of encashment, even when there was delay in execution of FSA on account of failure of OPs only, was found to be exploitative and in violation of the provisions of section 4(2)(a)(i) of the Act.
18. The provisions in FSA relating to Security Deposit (SD) were found to be discriminatory. It was observed that in few cases SD is refunded to the consumers while in the case of the Informant the amount of SD was further increased. It showed differential treatment against the Informant without any justification.
19. The provisions relating to quality, sampling & analysis, grading, over-sized coal and compensation of stones were found to be lacking in FSA for small and medium quantity buyers like the Informant. The conduct of OPs was, therefore, found to be unfair and discriminatory in violation of the provisions of section 4(2)(a)(i) of the Act.
20. In sum, the investigation concluded that OPs have violated the provisions of section 4(2)(a)(i) of the Act by imposing unfair and discriminatory provisions.

Consideration of the DG report by the Commission

21. The Commission in its ordinary meeting held on 09.10.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections



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thereto. The Commission also directed the parties to appear for oral hearing on 25.11.2014 when the arguments of the parties were heard.

Replies/ Objections/ Submissions of the parties

22. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of CIL

23. At the outset, CIL denied the allegations against it in relation to the alleged abuse of its alleged dominant position as they were unfounded. It was further submitted that it has not engaged in any anti-competitive activities in violation of the provisions of the Act as it has always acted fairly and in the best interests of its customers and is a law abiding corporate citizen. Further, it was pointed out that being owned and controlled by Government of India (GoI) it is not driven purely by a profit motive. It is fully aware of its social obligations/ responsibilities and has always acted and continues to act in the larger national interest sacrificing its own commercial interests.
24. Detailed arguments were made challenging the delineation of the relevant market by the DG and the issue of dominant position of CIL therein. It is not necessary to reproduce the same in any great detail at this stage as the same shall be dealt with while analyzing the issues in the order.
25. On the issue of abuse, it was submitted that it has not abused its market position and has conducted all its business activities in a fair and transparent manner, and in the best interests of its customers. CIL also made detailed submissions on various aspects of the alleged abuse and the same shall be adverted to in the latter part of the order. However, few submissions in this regard may be noted at this stage only.



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26. On the conditions in relation to the quality of coal, it was submitted that all the allegations in this regard have been subject matter of litigation and contest before the Commission and the Hon'ble Competition Appellate Tribunal (COMPAT). In light of the existing findings of the Commission, the DG has not conducted any independent analysis of the allegations and has returned the erroneous findings. Such an approach shows the preconceived notions of the DG against CIL and is a sufficient ground for the rejection of the DG's Report. It was submitted that allowing joint sampling facilities for customers procuring coal above 400,000 tonnes annually is fair and reasonable, for it is impossible for CIL to continue supplying coal and meet its dispatch targets if it is required to provide sampling facilities for every customer.
27. Further, it was argued that the declaration of the grade of coal is done in compliance with the procedure laid down by the Office of the Coal Controller (CCO). The sampling and analysis process for declaration of grade draws on various established standards laid down by Bureau of Indian Standards (BIS). In addition to providing detailed process for declaring the grade, CCO rules also provide for a statutory complaint mechanism which can be exercised by any customer who is not happy with the grade of coal that is being supplied to it. Thus, the absence of a clause specifically providing a customer with the same remedy (*i.e.* the option of filing a complaint with CCO for re-declaration) cannot be seen as discriminatory treatment, as lack of this clause makes no difference to the ability of the customer to exercise its rights. In any event, it was submitted that the power sector and non-power sector consumers are separate class of customers. Therefore, they are not similarly placed and consequently, there cannot be any allegation of discrimination between them based on differential treatment.
28. Lastly, it was concluded on behalf of CIL that the other clauses of FSA



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which have been found to be in violation by the DG are completely fair and reasonable as has been contested by CIL before the Commission in the previous cases and currently pending before COMPAT. In conclusion, it was argued that there is no merit in the findings of the DG in so far as the DG holds CIL in violation of the allegations regarding the quality of coal as the finding is nothing but a reproduction of the findings of the Commission in the previous case which are challenged and disputed.

Replies/ objections/ submissions of WCL

29. Supplementing the submissions made by CIL, it was submitted on behalf of WCL that clause 16.1.4 of FSA entitles WCL to terminate FSA in case the buyer lifts less than 30% of ACQ in a year. Clause 3.7 of FSA further stipulates that in the event of termination of the agreement, WCL shall be entitled to forfeit SD submitted by the Informant. In light of the said provision, it was pointed out that the Informant has only lifted 940 tons of coal from the mines of WCL in the year 2012-13 against the available 46050 tons and no coal was lifted in the year 2013-14. The quantity lifted in 2012-13 was an abysmal 1.99% of ACQ, whereas it was zero in the year 2013-14.
30. It was also submitted that due to the severe short lifting on the part of the Informant, WCL was entitled to terminate the agreement and forfeit SD and the same was within the knowledge of the Informant. The Informant has conveniently omitted the said fact in its information and has woken up after nearly 2 years of the signing of MoU only to avoid the forfeiture of SD. It was highlighted that the Informant has been running its power plant for the past 2 years without even lifting any coal from WCL and nowhere has it been shown in the information that the actions of WCL have caused prejudice to the Informant.
31. Rebutting the allegations of the Informant to the effect that the terms of



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MoU are one sided and WCL coerced the Informant into signing the same on the pretext of forfeiture of CG, it was submitted that the Informant neither annexed any document in this regard and on the contrary remained silent at the time of signing of MoU by not raising any objection and also kept silent for nearly 2 years before agitating the issues before the Commission.

32. It was further submitted that the execution of MoU was imperative for saving FSA from the application of section 56 of the Contract Act, 1872. It was argued that as per this provision any agreement to perform an impossible act is *void*. It is clear from the facts of the present matter and the observation of the DG himself that WCL was not in a position to supply 100% indigenous coal to its consumer due to its already existing commitment towards power producers. Therefore, it was impractical for WCL to enter into an agreement with any consumer, the essential term of which would have been supply of 100% indigenous coal, necessitating execution of MoU which brought down the level of commitment required on the part of WCL and made the execution of FSA possible.
33. Reiterating the submissions, it was submitted that the Informant was entitled to procure 46050 MT of indigenous coal from WCL and its submission that WCL was only ready to supply 11512.50 MT of indigenous coal is false and the same has been made to mislead the Commission into believing that it was not practical for the Informant to lift the coal from WCL's depot. It was argued that WCL has not only provided the complete quantity of promised 50% of indigenous coal but has also on occasions, when it had surplus quantity of coal, invited the consumers to lift 100% of indigenous coal from its depots and to accordingly get their MoU s modified.
34. It was also submitted that the allegation of the Informant that the coal



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was being diverted towards e-auction is false and the same is apparent from the submission made by WCL before DG. It must be noted that WCL could not have foreseen the short lifting on the part of the power consumers at the time of entering into FSA and MoU was only entered into keeping in mind its existing commitments.

35. Dealing with the condition of DDQ, it was submitted that the reason behind insertion of DDQ clause emanates from the reason behind MoU itself, which was to balance the interest of both the parties and to save FSA from application of section 56 of the Contract Act, 1872. It must be appreciated that any difference between the committed 50% of ACQ and the actual quantity delivered will not be because of any fault on the part of WCL but will be a result of the difference between the quantity of coal being produced by WCL and the number of consumers attached with it. It was submitted that WCL cannot be penalized for any such eventuality because it does not have the liberty to deny supply of coal to any consumer directed towards it by Standing Linkage Committee (Long Term) [SLC (LT)].
36. Furthermore, it was submitted that clause 5.1 of NCDP requires the consumers to furnish an Earnest Money Deposit (EMD) and the same shall stand discharged only once FSA is concluded. It is only in compliance of the aforestated clause that WCL requested the Informant to extend the validity of CG beyond the period of 24 months till the time of execution of FSA. It has been overlooked by the DG that the alleged delay in execution of FSA was only due to want of certain clarifications from MoC/ CIL and FSA was executed within a month of extension of CG.
37. Grievance was also made of the fact that the DG has erroneously compared the difference between the quantum of EMD prescribed under NCDP and quantum of CG levied under LoA even though the same has



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no relevance with the issue at hand, which is the requirement of extension of CG beyond the initial period of validity.

38. In view of the above submissions, it was prayed on behalf of WCL that the Commission take cognizance of the misrepresentation of facts made by the Informant as it has not approached the Commission with clean hands.

Replies/ objections/ submissions of the Informant

39. The Informant, while broadly agreeing with the findings of the DG, has also filed its response by way of written arguments besides making oral submissions and the same shall be dealt with while examining the issues on merits.

Analysis

40. In the present case, the issues essentially emanate out of the alleged unfair and discriminatory treatment meted out by OPs to small consumers like the Informant who require coal for captive power plants. Allegedly, such buyers are forced to sign MoUs which dilute the obligations assumed by OPs under LoAs/ FSAs.
41. On a careful perusal of the information, the report of the DG and the replies/ objections filed and submissions made by the parties and other materials available on record, the following issues arise for consideration and determination in the matter:
- (i) What is the relevant market in the present case?
- (ii) Whether the Opposite Parties are dominant in the said relevant market?



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(iii) If finding on the issue No.(ii) is in the affirmative, whether the Opposite Parties have abused their dominant position in the relevant market?

Issue No. (i) : What is the relevant market in the present case?

42. The DG determined and delineated the relevant market as 'production and supply of non-coking coal to thermal power producers including the captive power plants in India'.
43. Challenging the delineation of the relevant market by the DG, it was argued by CIL that such a finding by the DG is not only bad in law but it is also contrary to admitted facts by the Informant. It was submitted that while analyzing the scope of the relevant market, the DG has simply added the category of 'captive power plants' to the previously determined relevant market in Case Nos. 03, 11 and 59 of 2012 (*Mahagenco-GSECL* case). It was also pointed out that in a case involving sponge iron manufacturers (Case No. 44 of 2013), the DG had added the category of 'sponge iron manufacturers' to the relevant market.
44. It was contended that such an approach towards defining the market by the DG is antithetical to the idea of any investigating power of a statutory authority. It was alleged that the DG is simply adding categories of customers to the relevant market defined by it in the *Mahagenco-GSECL* case, purely on the basis of the nature of the Informant involved.
45. Elaborating further, it was argued that such an approach demonstrates non-application of mind by the DG and renders the entire investigation meaningless and *void*. It was pointed out that the Act lays down the parameters on which the determination of relevant market must be done. Thus, it was submitted that the findings of the DG regarding the



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definition of the relevant market should be set aside as they give unwarranted consideration to the findings of the DG in a previously decided case with a different set of facts and circumstances.

46. Impugning the findings of the DG on the relevant geographic market, it was submitted that the finding of the DG that relevant geographic market cannot be broader than India, is glaring example of non-consideration of the relevant material which is further exemplified from the finding of the DG that the boilers of Indian power plants do not support imported coal, which is clearly contradictory to GHCL's own admission of the fact that its power plants have been using imported coal. It was submitted that imported coal is a substitute to the coal produced by CIL. The admissions by GHCL merely confirm the submissions made by CIL regarding the geographic scope of the relevant market before the DG as well is in the objections to the DG's Report. Contrary to the findings of the DG, it was contended that the recent import data demonstrate that significant quantities of coal are imported into India from other countries. Therefore, the relevant geographic market for supply of non-coking coal is global.
47. The Commission has very carefully perused the submissions on the point.
48. The Commission notes that relevant product market has been defined in 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. Furthermore, to determine the 'relevant product market', the Commission is to have due regard to all or any of the following factors *viz.* physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of



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industrial products, in terms of the provisions contained in section 19(7) of the Act.

49. From the information, it is noticed that the Informant is *inter alia* engaged in the business of manufacture and sale of soda ash, which is a basic industrial raw-material and requires coal for running its power plant.
50. It may be seen that the product in question is non-coking coal which is used as raw material for generation of power by the thermal power producers whether captive or otherwise. This product has no demand side substitutability as no such other substitute product can be utilized as fuel for generation of electricity through thermal source for the thermal power plants.
51. A lot was made by CIL of the purported admission of the Informant that it was using imported coal for its captive power plant. It was also vehemently contended that recent import data demonstrate that 'significant' quantities of coal are imported into India from other countries and therefore the relevant geographic market for supply of non-coking coal has to be global. It was further submitted that there is no dependence of GHCL on CIL in the present case as is clear from facts of the case, GHCL has lifted only 951 MTs of coal from CIL in past 3 years and its plants are fully operational. It was also canvassed that during the oral hearings before the Commission, the counsel for GHCL has admitted that they satisfy their requirement of coal through imported coal and lignite and some other additional sources. In light of this express admission, it was sought to be suggested that there remains no doubt that there is absolutely no dependence of the customer on CIL and CIL is one of the options to procure coal and clearly not the preferred one because of easy access to imported coal due to the locational advantage of GHCL. Further, referring to the estimates provided by the



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CCO, it was submitted that import of non-coking coal stood at 27.76 million tonnes in 2007-08 which increased to 131.248 million tonnes in 2013-14, representing an approximate increase of 373%.

52. On a careful consideration of the matter, it appears that the plea of CIL has no force. The informant has sufficiently met these aspects by pointing out that the quality of coal supplied by WCL from its mines was of inferior quality and therefore the Informant was forced to use lignite in place of indigenous coal to be supplied by WCL as the quality of lignite available to the Informant was stated to be much superior than the inferior quality coal supplied by WCL. It was, however, clarified that whilst lignite on account of its low gross calorific value and high ash content cannot be an effective substitute for coal, considering the fact that the Opposite Parties did not supply ACQ of coal, which conformed to quality specifications, the Informant was forced to use lignite in place of coal by mixing a higher proportion of imported coal with lignite to achieve operational efficiency of its power plant. This, however, can by no stretch of reasoning be taken as indicative of a preference of a consumer for another product much less a scenario where all consumers in the market treat such product as substitutable or interchangeable.
53. Further, nothing turns upon the submissions made by the counsel appearing for CIL to the effect that the Informant is importing coal for running its plant. As noted above, the Informant had to use lignite in place of coal by mixing a higher proportion of imported coal with lignite to achieve operational efficiency of its power plant and this is not suggestive of the fact that the Informant was running its plant or it was otherwise viable for it to run its plants on imported coal only. Further, it also cannot be gainsaid that imported coal is more expensive than domestic coal on account of many factors such as import duty, sea freight, exchange rate and price based on country of origin *etc.*



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54. It has been pointed out by the Informant that it being located in the coastal region of Gujarat had easy access to superior quality imported coal at a landed price, which was cheaper than *the coal to be imported and supplied by the Opposite Parties* and therefore, it decided to opt against purchase of imported coal to be supplied by the Opposite Parties. This decision was stated to be taken by the Informant also for the reason that the Opposite Parties failed to give any commitment with regard to supply of imported coal.

55. The counsel, except referring to the estimates provided by the CCO to submit that import of non-coking coal stood at 27.76 million tonnes in 2007-08 which increased to 131.248 million tonnes in 2013-14 representing an approximate increase of 373%, has not even mentioned the quantum of imported non-coking coal in comparison to the domestic produced quantity. No data in terms of quantities and prices was produced which can persuade the Commission to hold that imported coal is substitutable with the domestic coal and to rebut the findings of the DG. In these circumstances, it is futile for CIL to contend on the basis of the limited import done by the Informant to use the same in conjunction with lignite or the coal sourced from other sources. Even such limited use of imported coal has been found feasible by the Informant only due to its locational advantage. Moreover, it has to be kept in mind that the issue of relevant market has to be seen *inter alia* from the perspective of demand-side substitutability in the market and cannot be decided merely on the basis of viability and feasibility of one particular customer who can import coal in a limited manner for its plants due to locational and similar advantages.

56. Furthermore, it may be observed that in respect of thermal power plants the Commission in previous cases had not found the imported coal substitutable with the domestic coal as the DG had categorically returned a finding of lack of demand side substitutability of the product *i.e.*, non-



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coking coal.

57. It also needs reiteration that in previous cases, it was held that imported coal is not a viable substitute or alternative for the Indian thermal power plants in view of the boilers used by them as well as on account of fact that the imported coal is very costly and the raw material *i.e.* coal alone amounts to 60%-70% of the total cost incurred by a thermal power plant.
58. In view of the above, the Commission is of opinion that there does not exist any substitute for non-coking coal which can be made available to the thermal power producers whether captive or otherwise and, as such, the Commission holds the relevant product market as 'production and supply of non- coking coal to the thermal power producers including captive power plants'.
59. The plea of the Opposite Parties that the DG has kept on adding categories to the earlier defined relevant markets, is also of not much significance in as much as the same was done by way of exemplification of the market as the market essentially relates to production and supply of non-coking coal.
60. Further, as the conditions for supply of coal in the entire country are uniform and homogeneous as there are no barriers within the territory of India in terms of geographic location for the consumers, the relevant geographic market was taken as the whole of India by the DG.
61. In this connection, it may be noted that 'relevant geographic market' has been defined in section 2(s) of the Act meaning 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',



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the Commission is to have due regard to all or any of the following factors *viz.* regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

62. The Opposite Parties, however, argued that the markets for supply of coal are global and accordingly objected to the DG concluding that the relevant geographic market for supply of non-coking coal cannot be expanded beyond India.

63. The Commission notes that the contention of the Opposite Parties that the relevant market for the present purposes has to be global and cannot be confined to India as was done by the DG, is legally untenable. From a plain reading of the Explanation to section 4 of the Act, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Thus, the plea advanced by the Opposite Parties contending the relevant market to be global is *ex facie* contrary to the express provisions of the Act and has to be rejected.

64. In view of the above, the Commission is of opinion that relevant market in the present case may be taken as 'production and supply of non-coking coal to thermal power producers including captive power plants in India'.

Issue No. (ii): Whether the Opposite Parties are dominant in the said relevant market?

65. On the issue of dominance, the DG concluded that OPs are dominant in



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the said relevant market.

66. It was, however, submitted on behalf of CIL that in the global market there are number of other significant active players such as Peabody Energy, Shenhua Group, RWE Energy, Arch Coal, BHP Billiton, Datong Coal, Anglo American *etc.*, and, therefore, CIL is not dominant.
67. It was further argued that that there is no dependence of GHCL on CIL as GHCL has lifted only 951 MTs of coal from CIL in past 3 years and its plants are fully operational. During the oral hearings before the Commission, the counsel for GHCL has admitted that they satisfy their requirement of coal through imported coal and lignite and some other additional sources. In light of this express admission, there remains no doubt that there is absolutely no dependence of the customer on CIL as it is one of the options to procure coal and clearly not the preferred one because of easy access to imported coal due to the locational advantage of GHCL.
68. To negate dominance, it was also argued that CIL is faced with significant countervailing buyer power exercised by some of its largest customers such as the National Thermal Power Corporation (NTPC) *etc.*, both directly and through government bodies such as Ministry of Power (MoP), Central Electricity Authority (CEA) *etc.*
69. Furthermore, it was argued that the customers to whom coal is to be supplied under the FSAs are decided by the SLC (LT). A binding obligation is imposed on it to meet the committed supplies to its customers, and a failure to comply with this requirement would lead to penalties. Such an arrangement clearly negates any kind of dominance and is contrary to free market principles. It was also submitted that the quantity of coal to be supplied to these customers is also decided by SLC (LT) on the basis of the recommendations given by MoP/ CEA in



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relation to thermal power plants. CIL does not have freedom in deciding the quantity of coal to be supplied to the customers. Therefore, the issue of behaving independently of customers does not even arise. Further, the trigger levels for new and existing power plants have been decided by the Presidential Directives and CEA respectively, and not by CIL.

70. Reference was also invited to the social costs and obligations incurred by CIL in running its mines. It was pointed out that CIL has been operating and continues to operate number of loss-making mines, as shutting down these mines would result in *inter alia* loss of employment and reduction in production. Further, under the terms and conditions of FSAs, coal is to be supplied on the basis of advance payment. However, CIL continues to supply to power utility companies, even where significant sums of money have not been paid to it by them. It was also sought to be highlighted that social costs and obligations borne by CIL are not its routine corporate social responsibility activities.
71. Lastly, on the issue of dominance, it was submitted that CIL does not enjoy economic power as its behavior in the market is constrained by a number of factors. In addition to the countervailing buyer power exercised by purchasers of coal, pricing of coal by CIL is done keeping in mind the larger public interest, in accordance with the directions of the Hon'ble Supreme Court. Further, the Presidential Directives imposed on CIL force it to commit to a higher level of coal supplies than are actually available with it. The DG has completely ignored all these important aspects in coming to its conclusion.
72. The Commission has noted the detailed submissions made by CIL on the issue and it may be pointed out that while determining the relevant market the Commission has already rejected the plea whereby it was sought to be suggested that the market has to be global.



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73. The Commission has also considered in detail the various submissions relating to availability of imported coal, countervailing power exercised by customers and stakeholders, social costs and obligations, lack of freedom in deciding the quantity of coal to be supplied to the customers *etc.* advanced by CIL. The same were rejected after a thorough examination of the merits of the pleas in the previously decided cases involving the same relevant market. Except repeating the submissions, nothing has been presented or otherwise shown before the Commission which may persuade the Commission to take a different view on the pleas.
74. In the present case, the Commission, on perusal of market share of CIL and its subsidiaries in the relevant market and after considering the market structure and size of market and in view of the analysis recorded above, is of opinion that the dominance of OPs in the relevant market is beyond any doubt. Further, since the passing of the earlier orders by the Commission, nothing has been brought on record to suggest that any change has been effected in the *extant* regulatory and legal architecture which may affect the present market construct and structure.
75. Further, it is also not in dispute that following the enactment of the Nationalization Acts, the coal industry was reorganized into two major public sector companies *viz.* CIL which owns and manages all the old Government-owned mines of National Coal Development Corporation (NCDC) and the nationalized private mines and SCCL which was in existence under the ownership and management of Andhra Pradesh State Government at the time of the nationalization. Thus, it is evident that in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of the Central Government. As a result, CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. In view of the statutory and NCDP scheme, the coal companies



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have acquired a dominant position in relation to production and supply of coal. The dominant position of CIL is acquired as a result of the policy of Government of India by creating a public sector undertaking in the name of CIL and vesting the ownership of the private mines in it. Thus, CIL and its subsidiaries face no competitive pressure in the market and there is no challenge at the horizontal level against the market power of the Opposite Parties.

76. As noted earlier, the Commission also finds no merit in the objections raised by the Opposite Parties on the issue of delineation and determination of the relevant market and determination of the dominance of the Opposite Parties therein on the basis that the DG has kept on adding categories to the previously defined relevant markets. In the light of present statutory regime, it cannot be disputed that CIL and its subsidiaries enjoy a near monopoly status as of today and notwithstanding the manner of delineation of relevant market, it continues to enjoy such status in the market.
77. In view of the above, it is held that CIL and its subsidiaries enjoy undisputed dominance in the relevant market, as defined above.

If finding on the issue No.(ii) is in the affirmative, whether the Opposite Parties have abused their dominant position in the relevant market?

78. The DG identified and examined the various alleged instances of abuse by the Opposite Parties in the report and the same may be noted below alongwith the analysis and findings of the Commission thereon:
- a) Whether the terms and conditions of LoA, FSA, and MoU were prepared by OPs without consulting the buyers and whether the agreements were non-negotiable?



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79. The above issue also came up before the Commission in previous cases as well wherein it was held that CIL in abuse of its dominance did not try to evolve/ draft/ finalize the terms and conditions of FSAs through a mutual bilateral process and the same were sought to be imposed upon the buyers without seeking, much less considering the inputs of the power producers.
80. In the present case also, it has been categorically noted by the DG that CIL, due to its dominance and on account of lack of competitive process in the supply of non-coking coal, has not tried to evolve the terms and conditions of FSA by way of a bilateral process. The FSA was drafted by CIL for all the consumers not by taking into consideration the suitability of both the sides but only giving priority to its own convenience and strategy. It was also noted that the OPs have not produced any document material to substantiate that the FSA or LoA/ MoU for supply of coal was prepared with bilateral process as envisaged in NCDP. The conduct of OPs was found to be unilateral as no input from the Informant was obtained or allowed during drafting of the agreements or at the time of further modifications of the clauses of the FSA. Thus, the allegation of the Informant that OPs have finalized the agreements relating to supply of coal unilaterally due to its dominant position was found to be correct by the DG.
81. It was, however, submitted on behalf of CIL that the limited purpose of LoA as acknowledged by the DG was to act as a bankable document for financial institutions to sanction the projects. It was also contended that LoA merely contains the broad scope of the terms and conditions that would be contained in the FSAs and, therefore, there is no question of them being unfair or discriminatory.
82. It was also argued that the provisions in relation to the submission of CG



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and achievements of the milestones were fair as by committing to supply coal to its customers, CIL was taking the risk of apportioning a quantity of coal for supply in an otherwise supply deficit coal market. Therefore, the purpose of the milestones in LoA and the CG was to have an assurance from a dedicated buyer for coal, and to ensure that only serious buyers who could actually buy coal were signing up for linkages. Further, it was submitted that since CIL is already mining coal and supplying to other customers, there is no question of milestones for CIL. It was also pointed out that where separate mines were to be opened for supplies to a particular customer, FSAs had specific conditions precedent that had to be fulfilled by CIL as well.

83. It was also submitted that CIL engaged in consultation with non-power sector consumers through Credit Rating Information Services of India Limited (CRISIL). This was sought to be evidenced from the fact that various versions of FSAs were drafted after incorporating the comments received from various stakeholders. In fact, it was argued that CRISIL also prepared a report for CIL setting out the comments. This clearly showed, submitted CIL, that it engaged in consultative process for drafting FSAs for non-power customers.

84. The Commission finds the plea of CIL to the effect that LoA merely contained the broad scope of the terms and conditions that would be contained in the FSAs, as disingenuous. It was noted by the DG that whereas clause 2 of LoA imposes certain obligations on the part of the Informant, there are no similar provisions or obligations cast on the coal company. As per LoA, the Informant was required to complete all the milestones set therein within 24 months but there was no corresponding time-limit to be adhered to by the supplier. Similarly, the coal supplier has taken CG from the Informant which is liable to be encashed in case the Informant fails to fulfil the milestones prescribed in LoA. However, there was no similar obligation or penal provisions in case of failure on



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the part of the coal supplier.

85. Resultantly, the Commission is in agreement with the DG that the terms and conditions incorporated in LoA do not have the balancing provisions and the same appear to be tilted in favour of the seller and as such the findings of the DG recording that OPs have imposed unfair terms and conditions in LoA in contravention of the provisions of section 4(2)(a)(i) of the Act are confirmed.
- b) OPs have not honoured the contractual commitments/ obligations with regard to the Annual Contracted Quantity (ACQ) by imposing diluted provisions in MoU
86. It may be observed that the Informant was granted linkage of 92,100 tonnes coal by SLC (LT) and accordingly the LoA for the said quantity was issued by WCL. In the FSA also, the ACQ was mentioned at 92,100 tonnes. However, in the provisions relating to compensation on failure to supply the ACQ by WCL the trigger level was mentioned at 50% of ACQ. Thus, in effect, OPs' obligation for minimum supply was set at 46,050 tonnes as against the ACQ of 92,100 tonnes.
87. These provisions relating to quantity and trigger level were not found by the DG to be unfair or discriminatory *per se* after taking into account the huge gap between the demand of coal and the coal produced by CIL. However, the conduct of OPs in forcing the buyers to execute MoU alongwith FSA whereby such quantity and trigger levels have been further diluted/ reduced was found to be in contravention of the provisions of section 4(2)(a)(i) of the Act.
88. The Commission notes that as per the provisions of FSA, if OPs fail to supply 50% of ACQ, they will be liable to pay penalty to the Informant. Thus, the FSA ensured a regular supply of the 50% of the quantity



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mentioned in LoA *i.e.*, 46050 tonnes of coal by OPs.

89. However, the Informant was asked by WCL to sign one MoU alongwith FSA which was stated to be an integral part of FSA. The other power utilities were not required to sign such MoU alongwith FSA whereas for the Informant, who is having a captive power plant, the condition of signing MoU was made mandatory by Opposite Party No. 2 and the said MoU was made part of FSA. In this context, the DG rightly noted that NCDP clearly categorized the Captive Power plants (CPPs) in the same category of Power Utilities but CIL did not consider the CPPs as power utilities and imposed different conditions in the FSA of CPPs. This discriminatory treatment resulted in reduced level of ACQ for the CPPs, opined the DG.
90. It was, however, pointed out on behalf of CIL that in light of the adverse coal balance in the country and in order to fulfil the demand of all the consumers of CIL, an MoU was signed between GHCL and WCL at the time of signing of FSA, according to which the quantity of coal to be supplied to the Informant from indigenous sources was set at 50% of the ACQ. The limited purpose behind this reduction was only to start supplies of coal before a decision on imported coal had been made. Further, without prejudice to the submissions that CIL has tried to fulfil all its supply commitments with respect to its customers, it was pointed out that GHCL has admittedly not even lifted even 30% of its ACQ in the past two years.
91. The Commission is of opinion that from perusal of the relevant clauses of MoU, it is evident that the OPs have reduced the quantity of coal to further 50% of ACQ and the trigger level of penalty for short supply was also reduced from 50% to 25% of ACQ. It may be observed that the purchaser had no option but to accept the terms and conditions of MoU as there was no scope for negotiations.



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92. It may be seen that the cumulative effect of the FSA read with the MoU was that the net effective ACQ, which was 96,100 MT under the FSA came down to 46,050 MT after surrender of imported coal by the Informant and this revised ACQ of 46,050 MT was further reduced to 50% in view of the condition imposed by the MoU bringing the ACQ to 23,025 MT. The obligation to pay compensation was also diluted under the MoU whereunder the OPs had no obligation to compensate the Informant unless the supply of coal falls below 25% of ACQ which meant that WCL could unilaterally increase or reduce the supply of coal between 23,025 MT *i.e.* 50% of the revised ACQ of 46,050 MT and 11,512.50 MT *i.e.* 25% of the revised ACQ of 46,050 MT per annum. This small quantity of 11,512.50 MT becomes less than 1000 tonnes on monthly basis which cannot be transported through Railways and transportation by roads results in higher cost rendering the whole process unviable.

93. The Commission also finds the contention of CIL that GHCL has not even lifted even 30% of its ACQ in the past two years, as being irrelevant and specious as GHCL had categorically explained the reasons for non-lifting of coal on quality concerns, as noted *supra* and as such CIL cannot be allowed to take advantage of its own wrong.

94. The Commission is of opinion that the conduct of OPs by unilaterally reducing the ACQ of coal agreed to be supplied by them by forcing the buyers to execute the MoU alongwith FSA, is unfair besides being discriminatory (in as much as the other power utilities are not required to sign such MoU alongwith FSA) and hence in contravention of the provisions of section 4(2)(a)(i) of the Act.

c) Clauses pertaining to Deemed Delivered Quantity (DDQ)

95. The Informant has also impugned certain clauses relating to DDQ in



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MoU as being unfair and in contravention of the provisions of the Act. OPs, however, pointed out that the issue relating to DDQ in FSAs was dealt with by the Commission in previous cases and no adverse inference was drawn by the Commission on this count.

96. In this connection, the DG distinguished the previous cases by highlighting the fact that in those cases the issue under examination related to DDQ in FSA only whereas in the present case the clauses of MoU pertaining to DDQ are under consideration.
97. In the present case, the Informant has raised the issue of additional provisions of DDQ in MoU. It is observed that in addition to the provisions in FSA, the MoU also contained following provisions relating to DDQ at clause 6(viii):

As quantum of allocation of indigenous coal may vary from time to time the difference between 50% of ACQ and quantum of allocation of indigenous coal made by Seller during the corresponding period, shall be counted as deemed delivered quantity of Seller.

98. The above clause was found by the DG to dilute the provisions of FSA and give advantage to OPs as the difference between 50% of ACQ and the actual quantity allocated is also deemed as quantity delivered. Thus, OPs safeguarded their position by incorporating such deeming provision in MoU.
99. The Commission notes that this additional clause relating to DDQ was inserted in MoU which gives advantage to OPs to consider the shortage in coal supply as DDQ. The condition in MoU is evidently unfair in as much as the same was unilaterally imposed by CIL upon the Informant



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to safeguard its position and to further dilute the contractual obligations assumed by the parties under FSA. In these circumstances, the Commission is of opinion that such conduct is in contravention of the provisions of section 4(2)(a)(i) of the Act.

d) Abuse relating to Commitment Guarantee (CG) and Security Deposit (SD)

100. It may be noted that the LoA, apart from the usual condition precedent of requiring the Informant to obtain all requisite approvals and permissions, under para 3.1 required the Informant to furnish a CG in the form of a bank guarantee in a sum of Rs. 1,00,38,900/- equivalent to 10% of the base price of indigenous coal as on the date of application for issue of LoA.

101. The investigation revealed that the LoA was issued to the Informant in June 2010 and the Informant was required to achieve all the milestones as prescribed in the LoA within 24 months from the date of LoA *i.e.* June 2012. After achieving all the milestones by June 2012, the Informant was required to sign the FSA within 3 months otherwise the CG could have been encashed by WCL. The Informant, after achieving all the milestones within the prescribed time, requested the OPs to execute the FSA *vide* its letter dated 11.09.2012. It was mentioned in the said letter that the inspection of the Informant's unit was undertaken on 28.05.2012 by WCL which was presumably satisfied with the achievement of the milestones. Thus, the Informant had apparently fulfilled the condition precedents laid down in LoA. However, OPs were not prepared to execute the FSA and the Informant was asked *vide* the letter dated 12.09.2012 of WCL to extend the period of CG. It was further communicated to the Informant that in case of non-extension of validity period of CG, the same might be encashed by WCL.



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102. It was noted by the DG that the Informant had complied with the initial condition of CG and has also not contested the same in its information. However, the issue raised is the threat of encashment of CG even when there was no failure on the part of the Informant. The plea taken that the direction issued to extend the CG was in line of NCDP was also not found to be tenable by the DG in view of the fact that the Informant had already furnished CG and had achieved the required milestones in time. It is pertinent to mention here that as per NCDP, EMD of only 5% of value of annual coal was suggested but the OPs decided to take 10% of value of annual coal in the LoA. Hence, the contention of OPs that they merely asked for the compliance of NCDP was not found by the DG to be based on correct facts. The Informant had already fulfilled the required conditions laid down in LoA and therefore it had already proved its seriousness and commitment. Under these circumstances, this conduct was not found to be fair.

103. CIL, explaining the rationale for provisions in relation to CG and SD, submitted that the amount of SD is kept with CIL for the entire duration of the agreement in case of the customers in non-power sector consumers, to ensure the seriousness and commitment of the buyer. It was also argued that it is the policy decision of GoI to accord different priorities to different sectors. While the power sector is a regulated sector which needs constant supply of coal, captive power plants supply coal only to their parent industry whose end product is non-regulated. Therefore, having greater level of commitment and assurance from such buyers is justified.

104. The Commission is of opinion that OPs in abuse of their dominance issued a direction *vide* letter dated 12.09.2012 seeking extension of validity period of CG with the threat of encashment thereof in case of non-compliance even though the failure to sign FSA was not attributable to the Informant and was on account of OPs. Such a conduct is



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exploitative and in contravention of the provisions of section 4(2)(a)(i) of the Act.

105. So far as the issue of SD is concerned, it may be noted that OPs are treating the buyers differentially in respect thereof. It may be noted that in December 2012, CIL amended the provisions relating to SD of 6% obtained at the time of FSA. Prior to this amendment, SD was to be refunded only after the expiry of the agreement. The amended provision in the FSA, however, provided that the SD shall be refundable to the purchaser at the end of 30 days from the first delivery date.

106. However, similar amendments were not made in the case of other buyers like the Informant. The SD amount of FSA holder which is a non-interest bearing deposit is locked-in for the entire period of agreement. Thus, the condition relating to SD was rightly found to be discriminatory by the DG as the difference in treatment with different class of buyers does not appear to be founded upon any intelligible differentia. Furthermore, when there is a provision for advance payment by the buyer even before issuing the delivery order of coal by the seller, the provision of refund only after the expiry of agreement was not fair.

107. In view of the above, the Commission, in agreement with the DG, is of opinion that OPs have contravened the provisions of 4(2)(a)(i) of the Act by imposing unfair and discriminatory condition relating to SD in FSA upon the buyers such as the Informant.

e) Provisions relating to sampling, testing and grade of coal

108. The DG concluded that OPs have imposed unfair and discriminatory conditions relating to quality, sampling & analysis, stones and oversized coal in violation of section 4(2)(a)(i) of the Act.



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109. In this connection, it may be noted that the Informant alleged there was no guarantee with regard to delivery of the promised quantity of coal and furthermore there was no guarantee that the quality of the indigenous coal would be in conformity with the terms and conditions of the FSA. The Informant stated that it started facing serious quality issues with the coal supplied by WCL which was affecting the performance of its power plant. It was further pointed out that as per terms of FSA, top size of coal to be supplied by the Opposite Parties should not be more than +250 mm size. However, WCL supplied oversized coal and stones. It is alleged that the inferior quality of the coal supplied by WCL caused severe operational and maintenance problems apart from forcing the Informant to purchase quality coal from alternate sources.

110. It was noticed by the DG that there was no obligation under FSA on the part of OPs to supply the agreed quality and grade of coal. There is no mechanism for sampling and testing in the FSA either.

111. It appears from the DG report that the OPs, in fact, accepted that there was no provision for testing of quality of coal in the FSA for the small buyers like the Informant. The reason for this was cited as the increase in expenses and reduction in target profit. The FSA casts no obligation on the OPs to supply the coal of quality and size agreed upon. Further, it has come in the DG report that the provisions regarding assessment of quality, sampling and analysis have not been provided in the FSA. Similarly, there is no provision relating to compensation on supply of stones or oversized coal in the FSA of the Informant. Thus, the OPs were rightly found to be discriminating between different categories of buyers on the issue of quality of coal.

112. The Commission is of opinion that assessment of quality of coal has to be a necessary part of all the FSAs irrespective of the size of the buyers. Resultantly, the Commission, in agreement with the DG, is of opinion



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that the OPs have imposed unfair and discriminatory conditions relating to quality, sampling & analysis, stones and oversized coal upon the Informant in contravention of the provisions of section 4(2)(a)(i) of the Act.

113. On the issue of grade of coal also, it may be seen that there is no similar provision in the FSA entered with the Informant for review of grade in case of continuous grade slippage. Needless to say the declared grade of coal is of great importance as the same is the basis of price/ bills for the entire year. It is observed that once the grade of coal is declared, the same remains basis for billing for that financial year. In the case of power producers, there is a provision for review of grade if there is continuous grade slippage (more than 3 months) in the coal supplied to the consumers. The purchaser may request the coal company for re-declaration of the grade of coal.

114. In view of the above, the Commission is of opinion that there is a differential treatment by OPs with small buyers *vis-à-vis* the power producers. As such, OPs have contravened the provisions of section 4(2)(a)(i) of the Act on this count as well.

Conclusion

115. In view of the above discussion, the Commission is of considered opinion that CIL and its subsidiaries operate independent of market forces and enjoy undisputed dominance in the relevant market. The Commission also holds the Opposite Parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act, as detailed in the order.

ORDER

116. In view of the findings recorded by the Commission, it is ordered as



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under:

- (i) The Opposite Parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order; and
- (ii) The Opposite Parties are further ordered to take remedial steps in light of the observations and findings recorded in the present order within a period of 60 days from the receipt of this order.

117. It is, however, made clear that the above direction shall not be applicable *qua* the clauses and conduct which were also subject matter of order passed by the Commission in Case Nos. 03, 11 and 59 of 2012. It may be pointed out that the Opposite Parties preferred an appeal before the Appellate Tribunal being Appeal No. 01 of 2014 wherein the Hon'ble Tribunal ordered *status quo vide* its order dated 13.01.2014 which has been continued from time to time. In these circumstances, the directions relating to the clauses and conduct which were also subject matter of order passed by the Commission in earlier case would be subject to the decision of COMPAT.

118. Before concluding, it is made clear that in the facts and circumstances of the present case, the Commission refrains from imposing any penalty upon the Opposite Parties as a penalty of Rs. 1773.05 Crores was already imposed upon them in the previous batch of informations with respect to *inter alia* similar issues.

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

Sd/-
(Ashok Chawla)
Chairperson



**Sd/-
(S. L. Bunker)
Member**

**Sd/-
(Sudhir Mital)
Member**

**Sd/-
(Augustine Peter)
Member**

**Sd/-
(U.C. Nahta)
Member**

New Delhi
Date: 16/02/2015