



COMPETITION COMMISSION OF INDIA

Case No. 71 of 2012

In Re:

Faridabad Industries Association (FIA)

Informant

And

M/s Adani Gas Limited

Opposite Party

CORAM

**Mr. Ashok Chawla
Chairperson**

**Mr. Anurag Goel
Member**

**Mr. M. L. Tayal
Member**

**Mr. S. L. Bunker
Member**



Appearances: Mr. Sharad Gupta, Advocate for the informant.

Ms. Nisha Kaur Oberoi, Mr. Aditya Sondhi and Ms. Gauri Chhabra with Mr. Bhashit Dholakia, Vice-President of M/s Adani Gas Limited for the opposite party.

Order under Section 27 of the Competition Act, 2002

The present information under section 19(1)(a) of the Competition Act, 2002 ('the Act') was filed by Faridabad Industries Association (FIA) against M/s Adani Gas Limited alleging *inter alia* contravention of the provisions of section 4 of the Act. The Commission after considering the entire material available on record *vide* its order dated 27.12.2012 passed under section 26(1) of the Act directed the DG to cause an investigation to be made into the matter and to submit a report.

2. The informant is an association of industries, registered under the Societies Registration Act, 1860 situated in Faridabad having about 500 members. The members' industries comprise auto component, medical devices, steel, alloys, textile, chemical *etc.*

3. The opposite party *i.e.* M/s Adani Gas Ltd. (AGL) is a company incorporated and registered under the provisions of the Companies Act, 1956 and is engaged *inter alia* in the business of setting up distribution network in various cities to supply natural gas to industrial, commercial, domestic and CNG customers.



4. It is averred in the information that about 90 members of the informant association consume natural gas supplied by the opposite party to meet their fuel requirements.

5. It is further alleged in the information that the opposite party by grossly abusing its dominant position in the relevant market of supply and distribution of natural gas in Faridabad has put unconscionable terms and conditions in Gas Sales Agreement (GSA), which are unilateral and lopsided, besides being heavily tilted in favour of AGL. The opposite party (AGL), in the garb of executing GSA, has imposed its diktat upon the buyers of natural gas, who are members of FIA.

6. It is also alleged that terms of GSA have been drafted unilaterally by AGL, without leaving any scope for the members of FIA, who are hapless buyers of gas and are solely dependent for supplies upon the opposite party.

7. Accordingly, it is alleged that AGL being in the driver's seat, is imposing its terms in complete disregard of basic principles of law of contract and has created a situation of 'take it or leave it' for the buyers of gas in Faridabad.

8. Referring to the various clauses of GSA as detailed in the information, the informant has alleged that the said clauses and conduct of the opposite party are only illustrative examples of abuse of dominant position by the opposite party in imposing unfair and discriminatory conditions in GSAs executed by it with the members of the informant association.

9. The informant has also made various other allegations which are not necessary to be reproduced here.



10. Based on the above averments and allegations, the informant had alleged contravention of the provisions of section 4 of the Act and has sought *inter alia* the following reliefs:

a) To pass an order under section 26(1) of the Act directing the Director General to cause an investigation to be made into the matter.

b) To direct the opposite party *i.e.* AGL to discontinue such abuse of its dominant position.

c) To impose an exemplary penalty upon the opposite party in terms of the provisions of section 27(b) of the Act.

d) To direct the modification of the impugned clauses of the agreement.

e) To require the opposite party to provide terms in GSA, which are fair and non-discriminatory between the supplier and the buyer, as required under the provisions of section 4 of the Act.

f) To direct the opposite party to pay to the informant such costs as may be deemed reasonable by the Commission, keeping in view the financial loss suffered by the individual industrial units on account of the highly discriminatory conditions imposed by AGL in the sale of natural gas by it abusing its dominant position.

g) To direct the opposite party to remove the unfair and discriminatory conditions imposed by it in the Gas Sales Agreement.

h) To direct the opposite party to transparently share the data relevant to the fixation of prices before revising the natural gas prices.



i) To pass any other or further order(s) which the Commission deems fit and proper.

Directions to the DG

11. The Commission after considering the entire material available on record *vide* its order dated 27.12.2012 directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report within a period of 60 days from receipt of the order.

Investigation by the DG

12. The DG, after receiving the directions and subsequent extensions from the Commission, investigated the matter and filed the investigation report on 07.02.2014. The findings and conclusions of the DG have been summarized in the succeeding paras.

13. The DG identified Relevant Market in the instant matter to be the market of supply and distribution of natural gas to industrial consumers in district Faridabad in terms of the definition of Relevant Market as provided in section 2(r) of the Act.

14. Investigation also concluded that the opposite party is in a dominant position in the said relevant market in terms of Explanation (a) to section 4 of the Act.

15. The DG concluded that sub-clause 9.4 of Clause 9 (Quality), sub-clauses 10.2, 10.5 & 10.6 of Clause 10 (Measurement and Calibration), sub-clause 11.2.4 of Clause 11 (Shutdown and Stoppage of Gas), sub-clause 12.6 of Clause 12 (Contract Price), sub-clauses 13.4, 13.6 & 13.7 (partially) of Clause 13 (Billing and Payment) and sub-clause 14.1 of Clause 14 (Payment Security) of Gas Sales Agreement (GSA) of the opposite party with its industrial consumers



are not reflective of the abusive conduct of the opposite party attributable to its dominant position.

16. The DG further concluded that sub-clause 13.5 of Clause 13 (Billing & Payment) of GSA to the extent of stipulating 'any such rates as may be decided by the Seller in future' and sub-clause 13.7 of Clause 13 (Billing & Payment) to the extent of absolving the opposite party from paying any interest on excess amount in dispute paid by the consumers, amounts to imposition of unfair conditions by the opposite party upon consumers in contravention of section 4(2)(a)(i) of the Act.

17. The DG has concluded that sub-clause 16.3 under Clause 16 of GSA to the extent that the opposite party has reserved the right at its sole discretion to accept or reject request of customers for force majeure and sub-clause 11.2.1 under Clause 11 of GSA to the extent that the Buyer is obliged to meet its Minimum Guaranteed Off-take (MGO) payment obligation even in the event of emergency shutdown calling for complete or partial off take of Gas, amounts to imposition of unfair conditions in contravention of section 4(2)(a)(i) of the Act.

18. The DG has also concluded that sub-clause 17.4 of Clause 17 (Expiry and Termination) of GSA empowering the opposite party to terminate the agreement in the event of Buyer's failure to take 50% or more of the cumulative Daily Contracted Quantity (DCQ) during a period of forty five consecutive days amounts to imposition of unfair condition by the opposite party upon consumers in contravention of section 4(2)(a)(i) of the Act.

19. Lastly, investigation concluded that in so far as the allegations of the informant regarding irrational and arbitrary increase in gas prices by the opposite party are concerned, the conduct of the opposite party in the said matter cannot be construed to be a reflection of abuse of its dominant position. Further, the



investigation also concluded that the allegations of the informant regarding non-adherence to the PNGRB Regulations by the opposite party in the matter of fixation of Transportation/ Network tariff are not based on facts.

Consideration of the DG report by the Commission

20. The Commission in its ordinary meeting held on 19.02.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections thereto. The Commission also directed the parties to appear for oral hearing, if so desired. Subsequently, arguments of the parties were heard on 19.03.2014.

Replies/ Objections/ Submissions of the parties

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

Replies/ objections/ submissions of the informant

22. The informant, while agreeing with the findings of the DG where contraventions were found, filed its objections to the report with reference to other findings. The informant, at the outset, submitted that it is presumed that only in case of duress a buyer signs a sale agreement with unfair or discriminatory conditions incorporated by a dominant enterprise and that such act of the dominant enterprise amounts to abuse of dominance under the Act. It was submitted that in such cases what needs to be ascertained is whether those clauses directly or indirectly impose an unfair or discriminatory conditions in the sale of goods and not whether the dominant enterprise has, in practice, abused those clauses. The informant has contended that even if the Gas Sale Agreement provides for recourse to arbitration in case of disputes, the abusive action of the opposite party in incorporating unfair and discriminatory conditions in the agreement cannot be negated.



23. The informant further contended that the DG has failed to examine the real contention of the informant. It argued that even though the opposite party had provided the details of key quality parameters of gas in the invoices based on the certificate provided by GAIL, clause 9.4 of the Agreement still stands to be abusive since it gives unfettered discretion to the opposite party to issue certificate without any reference to the certificate provided by GAIL. In other words, there is no stipulation in clause 9.4 which puts the opposite party under obligation to base the certificate on the certificate provided by GAIL to the opposite party. The informant further stated that the DG's finding that under clause 9.4 consumers have alternate option to corroborate the quality certificate provided by the opposite party's supplier is based on hearsay and imagination since no prudent man can find such conclusion from a reading of the said clause.

24. The informant pointed out that the contract did not even provide the consumers any privilege either to demand the certificate quality from the opposite party's supplier or to demand corroboration to the same with certificate. The informant has also refuted the DG's reference to the letter dated 11.03.2010 from the opposite party to one of its industrial consumers, wherein it was mentioned that the opposite party had no objection on the measurement of gross calorific value of the gas by the consumers. The informant stated that such act of the opposite party was at its own volition and not an obligation under the agreement.

25. The informant further submitted that the DG's finding that clause 10.6 does not bestow upon the opposite party absolute authority to decide and impose its decision upon consumers on the basis that consumers being signatory to the agreement were well aware of the recourses available in the same does not hold any ground. It contended that the DG has ignored the fact that clause 10.6's stipulation that seller's decision in all such matters shall be final and binding makes the opposite party the sole judge in the dispute and that such stipulation



amounts to abuse of dominance. That the abusive nature of clause 10.6 cannot be disregarded by mere reasoning that the informant has the option of clauses 19 and 20 in the agreement for recourse.

26. With regard to the DG's finding that the informant's allegation of the opposite party revising gas prices arbitrarily was an outcome of its ignorance of full facts, the informant submitted that the DG failed to analyse the specific instances of arbitrary pricing quoted in the information provided by the informant. The informant submitted that the price of the gas charged by the opposite party from a consumer should have the component of cost price, tariff for transporting the gas in the CGD network in Faridabad and profit charged by the opposite party at a reasonable percentage of the cost price. That as per the established principle, reasonable tariff rate for CGD network is applied since no exact amount has been fixed by PNGRB till date and that the said tariff must remain constant for it to be reasonable. The informant submitted that had the DG sought the break- up of the price charged by the opposite party in the above form mentioned, it would have figured out that the margin and tariff charged by the opposite party were at fluctuating rates and not constant, hence proving the informant's contention that the pricing of gas were unfair and arbitrary.

27. The informant has drawn attention to para 6.10 of the written submission dated 27.05.2013 of the opposite party wherein the opposite party has provided list of factors that constitute the end user price of natural gas. The informant has pointed out that the opposite party itself has admitted that 'future supplies and extension of infrastructure' is a part of end user price of natural gas which is self-evidence of unfair pricing of gas. It has contended that any extension of infrastructure in future has to be undertaken by the opposite party from its own capital and the return on the capital employed can be thereafter built into the CGD tariff to be charged from its customer in the price of natural gas. The informant submitted that the DG failed to take into account that the act of



charging consumers in the name of future supplies and extension of infrastructure amounts to an unfair gain to the opposite party.

28. The informant has also submitted that the variation in tariff and margins with the variation in the input cost price of gas by the opposite party itself establishes irrational and arbitrary pricing. For that purpose, the informant referred to Haryana City Gas Distribution Ltd. (HCGDL)'s standard gas pricing mechanism wherein it is stated that price revision are basically due to variation in gas prices by GAIL on account of international crude price and dollar variation. The informant submitted that this implies that the CGD network tariff and the margins are kept constant and such is not the case with the opposite party. The informant alleged that the opposite party admittedly changes both the CDG network and the margins with every variation in the gas price charged by GAIL since price stack and margins are a percentage function of the price of gas charged by the opposite party from the industrial consumers.

29. The informant has reiterated that the revision of gas prices by the opposite party amounts to abuse of its dominant position since any pricing in which the transmission charges are not constant and fluctuates with the sale price are termed to be unfair. The informant also submitted that the DG has failed to touch upon the transportation and the profit margin charged by the opposite party which are integral parts of the gas pricing. That the DG did not make any effort to explore the constancy of the transmission charges and the percentage marketing margin.

30. The informant has further argued that the DG in its report and the opposite party by its own admission have concluded that natural gas is not substitutable with any other source of energy. Reference was made to the opposite party's response dated 15.02.2013 wherein the opposite party has stated that alternative fuel is one of the factors to be considered for pricing natural gas



for industrial consumers. The informant submitted that apart from the DG's conclusion that natural gas is not substitutable, it also noted that it is not the industry practice to determine gas price for industrial consumers on the basis of any linkage with any alternative/competing fuel prices like furnace oil, LPG, *etc.* Prices are altered taking into account change of price of crude oil in international market or changes in the price of dollar. That this practice is also followed by HCGDL and Indraprastha Gas Ltd. which was also noted in the DG's report. The informant has submitted that this reasoning has escaped the notice of the DG in reaching its conclusion that the opposite party's conduct is not abusive in nature.

31. With regard to the submission of Bank Guarantee for 45 days, the informant has submitted that the DG failed to analyse on it and contended that a bank guarantee upto 30 days of daily contract quantity of natural gas can be justified and not of 45 days.

32. The informant contended that the DG's conclusion that clause 11.2.4 of the GSA is not abusive, is not valid. It was submitted that the wordings '*due to any reason whatsoever*' clearly corroborated the contention of the informant that the opposite party has incorporated unfair provisions in the agreement. The intent of the opposite party as extracted from other clauses of the GSA cannot undo the conclusion and the consequent establishment of abuse of dominance by the opposite party.

33. In view of the above submissions, the informant prayed to the Commission to arrive at the appropriate findings.

Replies/ objections/ submissions of the opposite party

34. At the threshold, the opposite party denied that the issues raised by the informant involved any competition law concerns as the same are contractual disputes. Thus, it was submitted that the very maintainability of the information



is under challenge given that the terms of the said agreement were purely commercial in nature and cannot be raised under the provision of the Act. It was submitted that the informant has failed to show that the conduct of the opposite party entering into the alleged abusive terms of the agreement has caused any adverse effect on competition. By filing such information, the informant has only restricted the ability of the opposite party to conduct business independently.

35. The opposite party further contended that as a CGD operator, it has the right to protect its legitimate interest and safeguard the commercial viability of its CGD business. The informant has filed this complaint only to mislead the Commission and to deprive the legitimate right of the opposite party to conduct its business independently.

36. On merits, the opposite party challenged the DG's conclusion that the market of natural gas in Faridabad is the relevant market. It was argued that the DG has made an incorrect assessment of the relevant market and has wrongly held AGL guilty of abusing its dominance. It was submitted that since the primary application of natural gas is for heating, chilling and electricity generation, it can be interchanged with alternate fuels like coal and lignite, liquid fuels and grid electricity. It further added that many industrial consumers maintain multi-fuel systems simply to retain flexibility to shift to another fuel based on economic viability. Further, the opposite party accounts for merely 5-6% of Faridabad's industrial consumers and 90-95% of them still use alternate fuels are ample evidence to indicate that natural gas is not the only choice of the consumers.

37. The opposite party further submitted that the DG has incorrectly considered price as the criteria to segregate gas as a separate market. It was also highlighted that the opposite party has provided a list of lower off-takes by customers on account of shift to other fuels or due to closure of certain



applications for natural gas which indicate that increase in price of natural gas leads to diversion to other fuels by industrial consumers. It was also submitted that the DG's failure to take into account other fuel sources commonly used as substitutes by industrial consumers, led to the flawed finding on the question of dominance. It was also submitted that in the absence of correct assessment of the relevant market, there can be no meaningful assessment of dominance.

38. The opposite party further contended that the DG has not provided any evidence to establish abuse of dominance by way of the impugned clauses in the GSA and that the said clauses have been analysed without looking at the GSA holistically. The opposite party has referred to the order of the Commission in *Neeraj Malhotra v. North Delhi Power Limited*, Case No. 06 of 2009 wherein the Commission has held that sufficient evidence is required to establish that any practice followed by an enterprise tantamounts to abuse of dominant position. The opposite party contended that such clauses are inserted to protect the reasonable interest of the opposite party. That the DG's conclusion without demonstrating an abuse of dominance by the opposite party either by object or effect is devoid of merit and against the principles of competition law.

39. With regard to clause 13.5 where the DG has concluded that it is an unfair condition under section 4(2)(a)(i) of the Act, the opposite party submitted that the said clause was inserted in order to ensure timely payment of the amount due so that payments are not withheld by customers unnecessarily. That the penal interest is charged only to deter them from defaulting on their payments to the opposite party and that it is to protect the legitimate interest of the opposite party as customers may withhold payment with no fear of imposition of penalty. The opposite party further added that, in turn, it is also subjected to late payment with its supplier, GAIL, if payment is not made in time. The opposite party stated that, in general experience, customers in



Faridabad have made either short payments or late payments and there has never been an instance of excess payment by customers.

40. The opposite party further explained that any delay in payment only adds to the opposite party's outstanding and creates management issue. It would also increase the opposite party's working capital requirement, which the opposite party borrows from the banks at interest. Therefore, it is in the larger interest of all the customers that a fine balance in the flow of resource is not disrupted as otherwise increased operational costs incurred by the opposite party will (need to) be passed to the customers through revision in gas prices for all. The opposite party further submitted that irrespective of the language of clause 13 of the GSA, if customer had any issue they had the recourse under clauses 19 and 20 of the same.

41. The opposite party further submitted that the intention behind the said clause is not to restrict competition in the market but to protect its interest and avoid any free riders. To substantiate its submission, the opposite party has referred to cases *i.e. Association of Indian Mini Blast Furnaces v. National Mineral Development Corporation Limited, M/s Raunaq International Ltd. I.V.R. Construction Ltd and United Brands* cases (EU) where the emphasis was laid on the fact that in order to protect its commercial interest an enterprise is free to take prudent and sound commercial decisions.

42. The opposite party has further clarified that it has never levied penal interest on the customers in relation to a disputed claim. Issues have been resolved with mutual agreement without levying any penalty. To corroborate, it has placed reliance on the letter dated 11.03.2010 where the opposite party had accepted only part payment against the disputed invoice, as opposed to insisting on full payment and charging interest thereon. The opposite party has also referred to the order of the Commission in *Dhanraj Pillay & Ors. v. Hockey*



India where the Commission had opined that restrictive conditions are inherent and proportionate to the objectives of HI (enterprise) and cannot be termed as foul unless there are instances where they were applied in disproportionate manner, for which there is no evidence.

43. The opposite party has further submitted that the DG, while coming to the conclusion that clause 17 of the GSA which deals with Expiry and Termination is unfair, discriminatory and unreasonable to the extent that the opposite party has the sole option to terminate the contract with the customer, failed to consider the clause dealing with 'Buyer's failure to off-take gas' from the revised GSA. The revised GSA was introduced from April 1 2013 for all its new customers and earlier GSAs which were due to expire on April 1 2014 will be renewed on the revised terms. In the said revised agreement, the customer has the option to terminate the contract by giving 30 days notice to the opposite party in the event the opposite party is unable to supply 50% or more of the cumulative DCQ during the period of 180 consecutive days. It was argued that technically the customers are free to enter and exit their contracts with the opposite party.

44. The opposite party contended that all the clauses in the GSA should be read in the context of the underlying risk that each party is exposed to. It was submitted by the opposite party that it is at greater risk than retail buyers *i.e.* customers when it comes to the arrangement of gas supply. The opposite party has stated several factors like the ability of customers to switch fuels whereas CGD entities like the opposite party are solely dependent on GAIL and other suppliers for supply of natural gas and more stringent repercussion in the event it fails to comply with contractual obligations which will have cascading effect on the business of all the opposite party's downstream whereas in case when a customer defaults on its contractual obligations the effect of the same is restricted to the business of such customer and not on other industrial units. The fact that natural gas cannot be stored by the gas distribution company, the level



of financial risk undertaken by the opposite party is much higher than any retail customer. Thus, it was suggested that any direction to alter the terms of GSA will amount to interference with the opposite party's commercial relationship with customers which is beyond the scope of the DG's investigation.

45. The opposite party further contended that the clause was to protect its interest for commercial reasons and in practice it has not terminated any agreement with its customers on this basis. The DG has failed to show any illegal object or effect of the impugned clauses on the customers and has certainly not shown any adverse effect on competition in the relevant market.

46. With regard to clauses 11.2.1 and 16.3, the opposite party submitted that the DG did not mention them in its request for information. The opposite party was not provided any opportunity to present its case relating to the same and this amounts to denial of principles of natural justice. It was submitted that the DG has cherry-picked clauses from GSA with the sole intent to wrongly implicate the opposite party for an alleged abuse of dominance. The opposite party further submitted that this act of DG is clearly prejudicial in nature and shows biased and pre-conceived notion in the mind of the DG.

47. The opposite party has contended that given that clause 11.2.1 has never been used by the opposite party, there is no abuse of dominance by the opposite party. Further, the opposite party submitted that taking into account the huge financial risk involved with the nature of the industry it becomes important for the opposite party to protect its interest by ensuring that the buyers do not exploit the clauses to circumvent their liability to pay the amount due.

48. In support of its submissions, the opposite party further explained that unplanned interruption or emergency shutdown varies from customer to customer and depends on the nature of the industry. By giving complete leeway



to customers to claim for any such events and avoid their contractual obligations, it would become physically impossible for the opposite party to verify the genuineness of the matter and/ or make exception for each customer on account of such events, depending on the nature of the work undertaken by each of its customers. The opposite party further explained that by releasing the customers of their liability to off-take gas even in case of unplanned interruption or emergency shutdown, it would incur huge financial liabilities and would be subject to a significant burden making CGD business unviable for the opposite party. By releasing customers from their obligations under GSA, the legitimate interest of the opposite party would be jeopardised. However, the opposite party claimed that on numerous occasions it has accommodated its customers by treating emergency breakdown situation as 'Planned Maintenance' as contemplated under GSA and allowed customers to save on payment of Minimum Guaranteed Off-take (MGO) liability.

49. With regard to clause 16.1 which deals with *force majeure* where the DG has deduced that this clause raises competition law concerns to the extent that the opposite party has the sole discretion to accept or reject customer's request for *force majeure*, the opposite party submitted that the conclusion was wrong based on the following grounds:

- (a) No instance of accepting/rejecting such request.
- (b) Purely commercial issue and beyond the scope of the Commission.
- (c) Such clause is intended to protect the opposite party from illegitimate claims of customers and the opposite party has the expertise to know under what circumstances such claim can be availed of.



(d) Given the nature of the industry it is important for the opposite party to determine the merits of the customer's claims.

(e) Similar clauses exist in agreements of other service providers such as insurance, electricity, water, *etc.*

50. The opposite party has also drawn comparison of the said clause with the agreement the opposite party has with its supplier stating that customers have been given wider scope.

51. Finally the opposite party concluded by stating that it has given enough flexibility to the customers to make judicious decisions in choosing the fuel types, source and manage their business effectively. It has provided few instances where the customers were allowed to draw gas upto 110% of their DCQ without any additional charge, something not afforded by GAIL to the opposite party and the stabilization period of 2 months during which time the customers incur no MGO liability. It submitted that despite the flexibilities offered, filing of information clearly indicates that customers simply want to arm-twist and exploit the opposite party by use of the provision of the Act in an extremely technical and unfair manner.

Analysis

52. On a careful perusal of the information, the report of the DG and the replies/ objections/ submissions filed 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 party is dominant in the said relevant market?



(iii) If finding on the issue No.(ii) is in the affirmative, whether the opposite party has abused its dominant position in the relevant market?

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

53. "Relevant product market" has been defined in section 2(t) of the Act meaning 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 industrial products.

54. The DG noted that the opposite party supplies natural gas in Faridabad through its City Gas Distribution network catering to the requirements of various categories of consumers *viz.* industrial consumers, domestic consumers, commercial consumers and transportation consumers. Further, it was noted by the DG that since interchangeability or substitutability of a product in terms has to be seen from the perspective of consumers while determining the relevant product market, investigation considered industrial consumers as a category of consumers different and distinct from domestic consumers, commercial consumers and transportation consumers.

55. The opposite party argued that the relevant market, as considered by the DG, is flawed and based on an incorrect appreciation of facts and competitive constraints that operate on the supply of natural gas. The DG's assessment of the relevant market also lacks economic analysis. It was argued that the relevant product market would not only constitute the product or service in question, but



would also include all the products/services which are regarded as interchangeable or substitutable. It was pointed out that for the purpose of the present case, the relevant market has been restricted to the market for supply of natural gas to industrial customers. Furthermore, it was argued that once the market determination has identified 'industrial' customers as the focal point, the relevant product market must be analyzed from the perspective of the specifically identified customers *i.e.* industrial customers, and must take into account the end-use of natural gas as used by the customers, characteristics and the influence that pricing plays on fuel choices of the customers. It was pointed out that based on the end-use, natural gas competes with other fuels available in the market such as Furnace Oil (FO), electricity, High Speed Diesel (HSD), coal, and naphtha, where the customers have the ability to switch to alternate fuels without incurring substantial costs.

56. The Commission has examined the rival submissions. On a careful perusal of the material on record, the Commission is in agreement with classification of consumers made by the DG as the intended use and price of natural gas for each of these categories of consumers is different. As noted by the DG, while industrial consumers use gas to meet the energy requirements in their plants for heating *etc.*, the end use of gas for domestic consumers is cooking for self-consumption which is different from commercial consumers such as restaurants, malls, hospitals *etc.* who use it for commercial purposes. Similarly, consumption of gas by consumers for meeting their transportation requirements makes these consumers a different segment of consumers. The price at which natural gas is supplied to these different consumer segments too being different and the technical considerations involved in supply and distribution of gas to the different segments being different, further necessitates a distinction to be made between consumers under the above categories.



57. The Commission is also in agreement with the DG on natural gas being distinct and distinguishable from other sources of energy in as much as natural gas in terms of its characteristics is a flammable gaseous mixture composed mainly of methane which is made available to consumers through a network of pipelines. It was noted by the DG that unlike other liquid hydrocarbons such as Furnace oil, Light Diesel Oil *etc.* which could be considered as substitutes, natural gas being a product in gaseous state does not require any storage facilities at the end of these consumers. Further, being almost free from sulphur compounds, natural gas is cleaner, smoke-free and soot-free environmentally clean fuel as compared to liquid hydrocarbons. Being available on tap, natural gas ensures an uninterrupted supply of fuel unlike liquid fuels which need to be periodically transported and stored by consumers at their premises. Further, natural gas by burning more completely than other liquid fuels, also results in better efficiencies.

58. In view of the above, the Commission is of opinion that relevant product market in the present case may be taken as the market of supply and distribution of natural gas to industrial consumers.

59. Further, "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', 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.



60. It was noted by the DG that the Government of Haryana having authorized only one service provider (the opposite party) to build and operate a CGD network in district Faridabad makes district Faridabad the relevant geographic market in the instant case. The Commission agrees with the DG that there being no other authorized entity in Faridabad permitted to lay its CGD network, the opposite party faces no competition from any other entity in the said geographical area and the factor regarding conditions of competition being homogeneous is inconsequential.

61. Accordingly, the Commission holds Faridabad as the relevant geographic market.

62. In the result, the Commission is of opinion that the relevant market in the present case is the market of supply and distribution of natural gas to industrial consumers in the district Faridabad.

(ii) Whether the opposite parties are dominant in the said relevant market?

63. On the issue of dominance, the DG noticed the opposite party to be the only enterprise in the defined relevant market, enjoying a position of strength unchallenged by any competitors in the said market thereby enabling it to affect the consumers and the relevant market in its favour.

64. The opposite party contended that given that the DG report incorrectly considered the relevant market to be the market solely for natural gas and failed to take into account other fuel sources commonly used as substitutes by industrial customers, any determination of 'dominance' in the 'relevant market' by the DG will also be flawed and without any basis in law. As such, the opposite party did not canvass the issue of dominance any further.



65. The Commission observes that by virtue of explanation (a) 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 to affect its competitors or consumers or the relevant market in its favour.

66. Further, the Commission, while inquiring whether an enterprise enjoys a dominant position or not under section 4 of the Act, is required to have due regard to all or any of the following factors as mentioned in section 19 (4) of the Act *viz.* market share of the enterprise; size and resources of the enterprise; size and importance of the competitors; economic power of the enterprise including commercial advantages over competitors; vertical integration of the enterprises or sale or service network of such enterprises; dependence of consumers on the enterprise; monopoly or dominant position whether acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition; and any other factor which the Commission may consider relevant for the inquiry.

67. In the present case, the Commission observes that the opposite party has 100% market share in the relevant market being the only entity authorized by Government of Haryana to set up and operate CGD network in Faridabad. Further, it appears that distribution of natural gas is regulated by the Petroleum and Natural Gas Regulatory Board (PNGRB) established under the Petroleum



and Natural Gas Regulatory Board Act, 2006 (PNGRB Act). As per the provisions of the PNGRB Act and the regulations framed thereunder, PNGRB is empowered to register and authorize downstream market activities such as laying, building and operating natural gas distribution networks, ensure access to customers on a common carrier basis, register entities to market natural gas subject *etc.* It may also be noticed that the regulations contain provisions to grant 25 years infrastructure exclusivity to lay, expand or operate a CGD network. Moreover, the Authorization Regulations provide up to three years marketing exclusivity from the date of authorization to an existing CGD networks and five years from the date of authorization to a new CGD network from the purview of common or contract carrier, after which there is a provision for "open access", which allows competition and choice to the consumer.

68. In the aforesaid circumstances and after further taking into account the absence of any countervailing buying power, market structure and size thereof as also the entry barriers, the Commission holds the opposite party to be in dominant position in the defined relevant market.

(iii) If finding on the issue No. (ii) is in the affirmative, whether the opposite party has abused its dominant position in the relevant market?

69. The DG examined the various clauses of Gas Sales Agreement (GSA) entered into by and between the members of the informant and the opposite party which were alleged to be abusive and found some of them to be in contravention of the provisions of the Act. The findings of the Commission thereon seriatim are as under:



Clauses 9 (Quality of Gas) / Clause 10 (Measurement and Calibration)

Clause 9. Quality of Gas

9.4 Actual specifications of Gas including Gross Calorific Value to be considered for the purpose of this agreement shall be as per the certificate provided by the Seller/ Transporter/ Seller's Supplier of the Gas.

Clause 10. Measurement and Calibration

10.2 The Gas composition and Gross Calorific Value to be considered for the purpose of this agreement shall be as per the certificate provided by the Seller's Supplier/ Transporter/ Seller.

10.5 If the Buyer has any doubt as to the accuracy of the MRS, it shall communicate the same to the seller in writing and request the Seller to either check or re-calibrate the MRS. The Seller shall undertake such check/re-calibration of the MRS within a reasonable period of receipt of such request. The cost of conducting such checks/ re-calibration shall be borne by the Buyer. However, if at the time of carrying out such check of the MRS, it is discovered that the error in the readings of the MRS exceeds $\pm 2.0\%$ the MRS shall be re-calibrated at Sellers cost.

10.6 If on carrying out the check/re-calibration of the MRS as aforesaid it is discovered that either the percentage of inaccuracy exceeds $\pm 2\%$ (Two percent) or that the MRS is out of service, the following procedure in order of priority, whichever is feasible, for arriving at the computation, of quantity of Gas during the period between the last calibration and the present, shall be followed:



(a) By correcting the error if the percentage of error is ascertainable by calibration, tests or mathematical calculation;
or

(b) By estimating the volume of Gas delivered by comparison with deliveries during the period under similar conditions when the MRS was registering accurately.

Seller's decision in all such matters shall be final and binding.

70. The DG upon analysis concluded that the allegations of the informant regarding unilateral self-declaration of the quality/measurement of the gas supplied by the seller and the stipulation regarding the opposite party's decision being final and binding are not based on facts and appreciation of the nature of gas distribution business. Accordingly, it was concluded by the DG that the conduct of the opposite party cannot be construed to be contravening the provisions of section 4(1) of the Act.

71. The Commission observes that the allegations of the informant appear to be based on selective reading of GSA. To begin with, it may be noted that the clauses in terms provide certification of quality of gas as per the certificate provided by the seller or its supplier. It has to be noted that the opposite party is not producer of gas and is only a supplier of gas sourced by it from GAIL. It is pertinent to note that the opposite party is relying upon the certificate of gas quality issued by its supplier (GAIL) based on the testing equipments installed by the said supplier. Considering that the opposite party itself is relying on certificate of gas quality of its supplier, and the opposite party shares/is willing to share the said certificate with its consumers thereby enabling them to corroborate the gas quality being reflected in the opposite party's invoices, and further considering that gas supply is effected through a closed piped network, it is evident that the allegations of the informant on this count are misconceived.



So far as the alleged finality of the decision of the seller in the matter of measurement and calibration is concerned, suffice to note that clause 19 (Mutual Consultation) of GSA provides for resolution of disputes related to validity, interpretation, implementation or alleged breach of any provisions of the agreement amicably. Further, in the event of failure in reaching an amicable resolution, clause 20 (Arbitration) provides for arbitration under the Arbitration and Conciliation Act, 1996 by a panel of three arbitrators- one each to be appointed by buyer, seller and the third jointly by the so appointed arbitrators. As such, the buyer may take recourse to the remedies provided under these clauses.

Clause 11 (Shut Down and Stoppage of Gas)

11.2 Shutdown, Unplanned Interruptions and Disruptions

11.2.4 No compensation shall be given to the Buyer in any form i.e. for loss due to production or reimbursement for alternative fuels during the disruption of Gas supply, due to any reason whatsoever.

72. The DG did not find the above impugned clause to be reflective of abuse of dominant position by the opposite party.

73. It was alleged by the informant that the above clause absolved the seller of any liability for its failure to supply gas and the phrase 'due to any reason whatsoever' was clearly reflective of the abuse of dominance by the opposite party in as much as no contract entered into by parties who were on the same pedestal could concede to such a clause.

74. *Per contra*, the opposite party submitted its clarifications to the DG with respect to the alleged unfairness of clause 11 of GSA stating that gas supply disruption could occur due to varied reasons, the most common



being damage caused to pipelines by third parties and the unauthorized digging of roads in city limits over which the opposite party had no control.

75. The Commission has perused the clause. It may be noted that though clause 11.2.4 absolves the opposite party from consequential damages in the event of disruption of supply, clause 21.5 (Exclusion of Consequential Loss) of GSA executed between the opposite party and its industrial consumers provides that neither party shall be liable for any indirect, incidental or consequential loss or damage or loss of opportunity or profits. Moreover, this clause is a reflection of the upstream agreement of the opposite party with its supplier *i.e.* GAIL. In these circumstances, it may be observed that the impugned clause, in light of conspectus of various clauses as discussed, appears to be evenly balanced and no contravention of the Act can be found on this count.

Clause 12 (Contract Price)

12.6 The seller shall have at all times unrestricted rights to change/modify/revise the Contract Price and Excess Gas Price. Seller shall intimate change in the Contract Price and Excess Gas Price to the Buyer through modification/ revision of prevailing tariff which shall be communicated via Price Side Letter sent via E- mail, Fax Letter and the Buyer shall be liable to pay to Seller at such revised Contract Price and Excess Gas Price.

76. The DG did not find the above clause to be abusive.

77. The Commission observes that the opposite party is not engaged in production of gas which it sources through multiple upstream contracts with its supplier GAIL and cost of gas to the opposite party is reflected in the invoices



raised by GAIL upon the opposite party on a fortnightly basis. The Commission agrees with the conclusion of the DG that by virtue of the peculiarities of the gas industry which makes it impractical to have a fixed formula based pricing mechanism for fixation of gas prices as also the fact that the gas prices are market driven, and the one-to-many relationship of the opposite party with its consumers spread across various business segments makes price negotiation an impractical proposition. It may be noted that the opposite party itself is bound by clauses in its agreement with its supplier (GAIL) which provide for revision in the prices by the supplier from time to time and the same is passed on to the end consumers as and when it is effected by the opposite party.

78. In the result, the Commission finds no merit in the allegations of the informant on this count as well.

Clause 13 (Billing and Payment)

13.4 The Buyer agrees that, notwithstanding any dispute in relation to any amount invoiced, it shall not withhold any payment in accordance with the provisions of this Section of any amounts. Only after making full payment of such invoice, the Buyer shall lodge the claims in writing with the Seller giving full particulars within a period of fourteen (14) days from the date of generation of disputed invoice, and if such claims are found correct, the Seller shall adjust the same against the next invoice. It is further agreed that no interest will be payable by the Seller on any such amounts adjusted in the subsequent invoices.

13.5 The Buyer shall pay interest on all payments delayed beyond Due Date of invoices at the uniform rates equivalent to PLR of SBI + 2.0% p.a. or any such rates as may be decided by the Seller in future.



13.6 If full payment of the invoice is not made by the Buyer as stipulated in Section 13 (Section 13 Billing & Payment) by due date, the Seller may, in its sole discretion and without prejudice to any other rights under this Agreement, discontinue the supply of Gas to the Buyer and shall be entitled to invoke the Security Instrument for any unpaid amounts which shall be replenished in accordance with this Agreement. The Seller shall be under no obligation to resume supply of Gas to the Buyer till such time that the Buyer has paid all amounts due to Seller as per the Invoices, interest and any penalty applicable thereon and security instrument replenished in accordance with the terms of this Agreement and to the satisfaction of the Seller.

13.7 The Buyer shall not have recourse to the Arbitration mechanism under Section 20 (Section 20 Arbitration) for any dispute relating to payments and/or invoices, unless the invoiced amounts have been paid in full with interest and penalty. The amounts so paid or the relevant portion thereof shall be refunded to the Buyer in the event it is decided that such amounts are not payable, or that a reduced sum is payable by the Buyer.

79. The DG found the allegations of the informant based on the above clauses to be imposition of unfair conditions in contravention of the provisions of section 4(2)(a)(i) of the Act.

80. It was argued by the opposite party that there has never been a case where the customer has made any excess payment to AGL. Thus, it was argued that any allegation of abuse by AGL of the provisions of clause 13.5 is without any basis in fact. It was also contended that the stipulation "any such rates as may be communicated by the Seller in future" cannot be read in isolation. Such a provision has to be read in the context of the GSA as a whole. It was submitted



that clause 19 of GSA (Mutual Consultation) provides a right to both the parties (*i.e.* AGL and its Customers) to reach to an amicable resolution in relation to any dispute relating to validity, interpretation, implementation or alleged breach of the provisions of GSA. Therefore, any rate as communicated by AGL, if not acceptable to the Customer, can be contested by the Customer and the Customer can reach out to AGL for a mutual settlement. In case the issue remains unresolved, clause 20 of the GSA (Arbitration) provides for a dispute resolution by 3 arbitrators. Therefore, irrespective of the language of clause 13, Customers do have recourse under clauses 19 and 20 of GSA. It was also pointed out that similar clauses also exist in AGL's GSA with GAIL. In any event, it was submitted that the DG has failed to quote a single instance where AGL has imposed its decision upon the Customers or denied the Customers the opportunity of an amicable resolution or pursuing arbitration.

81. The Commission notes that the terms and conditions contained in the afore-quoted sub-clauses provide that an excess payment by the buyer to the seller due to erroneous billing/ invoicing on the part of the seller gives rise to no liability whatsoever on the part of the seller including interest, whereas a delayed payment by the buyer renders him liable to pay interest on 'such rates as may be decided by the seller in future'.

82. In view of the above, the Commission observes that in the event of any dispute regarding amount payable, if any amount eventually becomes payable or reimbursable by the opposite party to consumers, there is no obligation on the part of the opposite party to pay interest on the said amount in terms of sub-clause 13.7. Hence, the provisions of sub-clause 13.7 of GSA are found to impose unfair conditions upon the buyers in contravention of the provisions of section 4(2)(a)(i) of the Act. Further, despite specifying rate of interest to be levied in the event of delayed payment, the further stipulation in sub-clause 13.5 to the effect that the interest rate may also be 'any such rates as may be



communicated by the Seller in future' also amounts to imposition of unfair conditions in contravention of section 4(2)(a)(i) of the Act.

83. Further, the Commission also agrees with the finding of the DG in not holding the provisions of clause 13.7 (which mandate the buyer to pay the invoiced amount alongwith interest and penalty before taking recourse to the arbitration mechanism provided thereunder for disputes relating to payments/ invoices) as abusive. In this regard, the Commission has taken into account the finding of the DG that the opposite party too in terms of its agreement with GAIL is bound by similar stipulation.

Clause 14 (Payment Security)

14.1 The Buyer shall at all time during the Agreement Period maintain an interest free cash deposit with the Seller or open and maintain a Bank Guarantee in favor of the Seller, with any bank acceptable to the seller, to secure any payments as may be due and payable by the Buyer to the seller from time to time under this agreement and in a form acceptable to the Seller (hereinafter referred to as the "Security instrument")

84. The DG did not find the above clause to be abusive.

85. The Commission notes from the replies furnished by the opposite party before the DG that currently 30% of its consumers in Faridabad have furnished cash deposits on which it was paying interest at the rate of 7.5% p.a. - a rate higher than that available for most other forms of stable investments. The opposite party has further informed that it had itself furnished an irrevocable revolving Letter of Credit of 90 days to its supplier GAIL who in turn had given a larger payment security to its suppliers.



86. The Commission agrees that such arrangements are necessitated by the extremely inter-dependent and inter-linked nature of the business. If the opposite party were to default on its payments to GAIL and GAIL in turn on its commitments to its supplier, the entire supply chain would be disrupted.

87. In the result, no contravention of the provisions of the Act can be found against the opposite party on such grounds. Besides, as noted above, the opposite party is paying interest upon the cash deposits for Payment Security notwithstanding the contra stipulation in the agreement.

Clause 17 (Expiry and Termination)

17.2 Seller's Failure to Deliver Gas

If the seller fails (other than as a consequence of the Buyer's default or failure due to Force majeure or due to planned Maintenance Period) to tender for delivery fifty percent (50%) or more of the cumulative DCQ for a period of one hundred and eighty (180) consecutive Days, then without prejudice to any other rights or remedies that the Buyer may have under this Agreement or by law, the Buyer may, at its sole option, terminate the Agreement upon not less than thirty (30) days prior written notice to Seller.

17.4 Buyer's Failure to Take Gas

If the Buyer fails (other than as a consequence of Force Majeure or Planned Maintenance) to take fifty percent (50%) or more of the cumulative DCQ during a period of forty - five (45) consecutive days, then without prejudice to any other rights or remedies that the Seller may have under this Agreement or law, the Seller may, at its sole option, terminate this Agreement upon not less than thirty (30) days prior written notice to Buyer.



88. The above clauses were found by the DG to be in contravention of the provisions of section 4(2)(a)(i) of the Act.

89. At the outset, it was contended by the opposite party that it has deleted the clause dealing with "Buyer's failure to off-take gas" from the revised GSAs it has entered with its customers. This revised GSA is stated to be introduced from 1 April 2013 for all its new customers and to date, 32 new revised GSAs have been executed by AGL with its Customers. Further, all of AGL's earlier GSAs are due to expire on 1 April 2014 and AGL will roll over/ re-execute GSAs with such old Customers on revised terms *i.e.* with the "Buyer's failure to offtake gas" clause being deleted. In the revised agreement, the Customer can terminate the agreement by giving 30 days notice to AGL in the event AGL is unable to supply 50% or more of the cumulative DCQ during the period of 180 consecutive days. Further, the revised GSA specifically provides a right to the customer to terminate the GSA by giving 30 days written notice to AGL at any time.

90. Furthermore, it was submitted that the findings of the DG in relation to the impugned clause are wrong and baseless. It was submitted that all the clauses in the GSA should be read in the context of the underlying risk that each party is exposed to. Although the contract as AGL has with its supplier provides AGL a longer duration to offtake gas, it is important to note that retail buyers (*i.e.* the customers) of AGL are different from the customers of GAIL. Furthermore, AGL faces more stringent repercussions in the event it fails to comply with its contractual obligations with GAIL as any such failure by AGL will tend to have a cascading effect and affect the business of all of AGL's downstream customers, whereas when a customer defaults on its contractual obligations, the effect of the same is restricted to the business of such customer and not the other industrial units, domestic and commercial customers of AGL in Faridabad. It was also pointed out that given the peculiar characteristics of natural gas industry, which is based on projections/estimates of demand/consumption by the consumers



leading to back-to-back contracts at every level of the value chain, the fact that natural gas cannot be stored by the gas distribution company (*i.e.* there is no physical hedging mechanism available to CGD companies), the level of financial risk undertaken by CGD entities, including AGL, is much higher than any retail customer.

91. The Commission has taken note of the submissions of the opposite party regarding deletion of clause dealing with buyer's failure to take gas. However, such modification in GSA may not have any consequence in relation to the allegations which date back prior to such amendments. Though, while considering the issue of penalty, the same may be given due weightage.

92. From the report of the DG, it appears that the investigation examined the various clauses of the agreement executed by the opposite party with its supplier which revealed that a corresponding clause of the said agreement stipulated that in the event of the opposite party failing to off-take 50% or more of the cumulative DCQ during the specified period, the opposite party's supplier can terminate the agreement by giving 30 days prior notice. Thus, it is evident from the two corresponding agreements *viz.* GSA between the opposite party and its consumers and the agreement between the opposite party and its supplier GAIL, that while the opposite party enjoys longer period from GAIL for meeting the cumulative DCQ obligation, it provides only 45 days to do so for its industrial consumers. The wide disparity between the two periods *i.e.* as available to the opposite party from GAIL as against the opposite party providing to its consumers, is not warranted by the risk to which the opposite party is exposed due to the nature of gas business where based on the projections/estimates of demand/consumption by the consumers, entities engaged at different levels of the supply chain enter into back to back contracts with upstream suppliers leaving little room for frequent rescheduling as most such contracts are on take or pay basis.



93. In view of the above, the Commission is of the opinion that the clause regarding likely termination of contract by the opposite party on account of failure to off-take 50% or more of the cumulative DCQ by the buyer during a period of 45 consecutive days as against the longer period available to the opposite party from GAIL, amounts to imposition of unfair conditions in contravention of section 4(2)(a)(i) of the Act. As the opposite party had uniformly stipulated the said condition in the GSAs executed with all its industrial consumers, the allegations of the informant regarding discriminatory conduct of the opposite party in terms of section 4(2)(a)(i) of the Act is not made out.

Other Clauses

94. Besides the above clauses, the DG also examined some other clauses of GSA.

Clause 16 (Force Majeure)/ Clause 17 (Shutdown etc.)

95. Sub-clause 16.1(e) of clause 16 (*Force Majeure*) of GSA provides for *force majeure* events like breakage of or of accident to or failure or breakdown of any part of the opposite party's facilities, including but not limited to, machinery, production facilities, processing facilities, gas pipelines ancillary and any other facilities upon which the opposite party is relying to satisfy the requirements of the agreement.

96. The DG noticed sub-clause 16.3 of GSA which stipulates that besides the obligation of the parties to notify within 3 days the occurrence of any *force majeure* event to the other party, it shall be the sole discretion of the opposite party to accept or reject the customers' request for *force majeure*.

97. It is evident that the seller has in terms of clause 16.3 reserved the right to accept or reject at its sole discretion the request of customers even with respect



to *force majeure* events. Furthermore, under clause 11.2.1 (Shutdown, Unplanned interruption and Disruption), even in the event of unplanned interruption and emergency shutdown of facilities calling for complete and partial off-take of gas by the buyer, it has been stipulated by the opposite party that the provisions relating to payment of Minimum Guaranteed Off-take (MGO) by the buyer shall continue to be applicable.

98. The Commission, in agreement with the analysis of the DG, observes that sub-clause 16.3 of GSA to the extent the opposite party has reserved the right at its sole discretion to accept or reject request of customers for *force majeure* amounts to imposition of unfair conditions in contravention of section 4(2)(a)(i) of the Act. Furthermore, the Commission holds sub-clause 11.2.1 of GSA to the extent that the buyer is obliged to meet its MGO payment obligation even in the event of emergency shutdown calling for complete or partial off-take of gas, amounts to imposition of unfair conditions in contravention of section 4(2)(a)(i) of the Act.

Irrational and arbitrary increase in gas prices

99. The informant alleged that the opposite party in abuse of its dominant position had not only reserved to itself the unrestricted right to change/modify/revise the Contract Price and Excess Gas Price in an opaque and non-transparent manner, but was also revising gas prices arbitrarily and irrationally from time to time. The informant on the basis of certain data furnished by it with respect to crude oil prices as correlated with the price of gas being charged by the opposite party from time to time, has alleged that the opposite party had been providing mutually contradictory information to the informant whereby no rational conclusion could possibly be drawn regarding pricing mechanism followed by the opposite party.



100. The DG concluded that in the matter of revision of gas prices, the opposite party's conduct cannot be construed to be reflection of abuse of its dominant position.

101. The Commission observes that due to the peculiarities of the gas industry, it is impractical to have a fixed formula based pricing mechanism for fixation of gas prices. As rightly noted by the DG, the cost of gas to the opposite party is prone to frequent fluctuations, the opposite party is constrained to average out the commodity cost over a period of time and to factor in the uncertainties and risks involved by resorting to revision of gas prices from time to time which it does less frequently as compared to the frequency at which it itself is subjected to by GAIL. Taking into consideration the aforementioned facts and circumstances which reveal that gas prices for consumers are not solely linked to crude oil prices, the Commission notes that the allegations of the informant that the opposite party is revising gas prices arbitrarily/ irrationally appear to be misconceived.

102. Lastly, it may be noted that though allegations were made by the informant regarding non-compliance of the PNGRB Regulations by the opposite party, the Commission is of view that the issue of compliance with the regulations framed by the PNGRB is not within the scope and domain of the Commission. As such, it is not necessary for the Commission to embark upon any such inquiry.

Conclusion

103. In view of the above discussion, the Commission is of opinion that the opposite party has contravened the provisions of section 4(2)(a)(i) of the Act by imposing unfair conditions upon the buyers under GSA, as adumbrated *supra*.



104. In view of the above, the Commission passes the following.

ORDER

105. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite party is directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act in this order.

(ii) The gas supply agreements are ordered to be modified in light of the observations and findings recorded in the present order.

106. Furthermore, in terms of the provisions contained in section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such person or enterprises which are parties to such agreements or abuse.

107. It is evident that the legislature has conferred wide discretion upon the Commission in the matter of imposition of penalty as can be noticed from the phraseology employed in the provision noted above.

108. It may be noted that the primary objectives behind imposition of penalties are: to impose penalties on infringing undertakings which reflect the seriousness of the infringement; and to ensure that the threat of penalties will deter both the infringing undertakings and other undertakings that may be considering anti-competitive activities from engaging in them.



109. The imposition of penalty has to relate to the mitigating and aggravating circumstances of the case. In the present case, the Commission has also noted the changes effected by AGL during the course of the investigation and pendency of proceedings in the agreements and other flexibilities extended on certain aspects as mentioned in earlier part of the order and the report of the DG. The Commission has also noted that only few clauses out of the agreement have been found to be in contravention of the provisions of the Act.

110. Considering the totality of facts and circumstances of the present case, the Commission decides to impose penalty on the opposite party at the rate of 4% of the average turnover of the last three years. The total amount of penalty is worked out as follows:

S. No.	Name	Turnover for 2009-10 (in Lakhs)	Turnover for 2010-11 (in Lakhs)	Turnover for 2011-12 (in Lakhs)	Average Turnover for Three Years (in Lakhs)	@ 4% of average turnover (in Lakhs)
1.	AGL	36638.12	57212.70	98694.91	64181.91	2567.2764

111. The opposite party is further directed to file an undertaking in terms of the directions contained in para 105(i) above within a period of 30 days from the date of receipt of this order. The opposite party is further directed to modify the agreement in terms of the directions contained in para 105 (ii) within a period of 60 days from the date of receipt of this order.

112. The Commission further directs the opposite party to deposit the penalty amount within 60 days of receipt of this order.



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

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(Anurag Goel)
Member

Sd/-
(M. L. Tayal)
Member

Sd/-
(S. L. Bunker)
Member

New Delhi

Date: 03/07/2014