COMPETITION COMMISSION OF INDIA

Case Nos. 05, 07, 37 & 44 of 2013

Case No. 05 of 2013

In Re:

Madhya Pradesh Power Generating Company Limited **Informant**

And

1. South Eastern Coalfields Ltd. **Opposite Party No. 1**

2. Coal India Ltd. **Opposite Party No. 2**

WITH

Case No. 07 of 2013

In Re:

Madhya Pradesh Power Generating Company Limited **Informant**

And

1. South Eastern Coalfields Ltd. **Opposite Party No. 1**

2. Coal India Ltd. **Opposite Party No. 2**

WITH

Case No. 37 of 2013

In Re:

West Bengal Power Development Corporation Ltd.	**Informant**

And

1. Coal India Ltd.	**Opposite Party No. 1**
2. Eastern Coalfields Limited	**Opposite Party No. 2**
3. Bharat Coking Coal Limited	**Opposite Party No. 3**
4. Mahanadi Coalfields Limited	**Opposite Party No. 4**

WITH

Case No. 44 of 2013

In Re:

Sponge Iron Manufactures Association	**Informant**

And

1. Coal India limited	**Opposite Party No. 1**
2. Central Coalfields Limited	**Opposite Party No. 2**
3. Eastern Coalfields Limited	**Opposite Party No. 3**

4. Western Coalfields Limited	**Opposite Party No. 4**
5. South Eastern Coalfields Limited	**Opposite Party No. 5**
6. Northern Coalfields Limited	**Opposite Party No. 6**
7. Mahanadi Coalfields Limited	**Opposite Party No. 7**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Justice G. P. Mittal
Member

Appearance: Shri Varun K. Chopra, Shri Yashovardhan Oza and Shri Kamal Singh, Advocates alongwith Shri Haji I. A. Khan, Additional Chief Engineer (FM) and Shri Rajesh Tiwari, Senior Chemist for Madhya Pradesh Power Generating Company Ltd.

Shri Ramji Srinivasan, Senior Advocate with Shri Harman Singh Sandhu, Shri Yaman Verma, Shri Toshit Shandilya, Shri Vivek Paul, Shri Tushar and Ms. Gauri Mehta, Advocates alongwith Officials [Shri L. K. Mishra, G.M. (S & M), Shri Amit Roy, Senior Manager (S & M) and Shri G. K. Vashishtha, GM (S & M) for CIL, Shri S. Chandramouli, GM (S & M) and Shri P. Das, Senior Manager (QC) for MCL, Shri Sunil Kumar Roy, Senior Manager (S & M) for SECL, Shri George Mathew, Senior Manager (S & M) and Shri T. H. Mohan Rao, Manager (S & M/ QC) for WCL, Shri Sunil Rai, Senior Manager (S & M), SECL and Shri M.G.M. Swamy, Assistant Manager (Q C), SECL] for CIL and its subsidiaries.

Order under Section 27 of the Competition Act, 2002

1. The Commission in this batch of informations filed by the power utilities (Madhya Pradesh Power Generating Company Limited/ West Bengal Power Development Corporation Ltd.) and Sponge Iron Manufacturers Association *vide* its order dated 15.04.2014 had found CIL and its subsidiaries operating independently of market forces and thus, enjoying an undisputed dominance in the relevant market of production and supply of non-coking coal to the thermal power producers and sponge iron manufacturers in India. The Commission also held the Opposite Parties to be in contravention of the provisions of Section 4(2)(a)(i) of the Act for imposing unfair/ discriminatory conditions and indulging in unfair/ discriminatory conduct in the matter of supply of non-coking coal, as detailed in the order.

2. The aforesaid order of the Commission was put in appeal by the parties before the Hon'ble Competition Appellate Tribunal whereupon the Hon'ble Appellate Tribunal *vide* its common order passed on 17.05.2016 in a batch of appeals arising out of the orders of the Commission dated 09.12.2013, 15.04.2014 and 16.02.2015 in C. Nos. 03, 11 & 59 of 2012, C. Nos. 05, 07, 37 & 44 of 2013 and C. No. 08 of 2014 (the present case) respectively set aside the impugned order and noted as follows:

> *"25. In the result, the appeals are allowed. The impugned orders are set aside and the matters be remitted to the Commission for deciding the issues arising out of the informations filed by Maharashtra State Power Generation Company Limited, Gujarat State Electricity Corporation Limited, Madhya Pradesh Power Generating Corporation Limited, West Bengal Power Development Corporation Limited, Sponge Iron Manufacturers Association and GHCL Ltd. afresh.*
>
> *26. We hope and trust that the Commission will make an endeavour to hear the parties and pass appropriate orders as early as possible not later than 2 months of the receipt of this order.*
>
> *27. It is made clear that neither of the parties shall be entitled to adduce any additional evidence before the Commission nor the Coal India Ltd. and its subsidiaries shall be allowed to withdraw the amendments / modifications made in the fuel supply agreements or concessions granted during the pendency of the cases before the Commission.*

3. Accordingly, the Commission heard the appearing parties in this batch of information together with two other batches afresh on various dates and decided to pass appropriate order in due course.

4. At the outset, the Commission notes that the Informant in C. No. 37 of 2013 *viz.* West Bengal Power Development Corporation Ltd. and the Informant in C. No. 44 of 2013 *viz.* Sponge Iron Manufacturers Association did not appear in the hearings consequent upon the remand order, despite due service of notice.

Facts

5. In the aforesaid backdrop, facts, as stated in the informations, may be briefly noticed in the ensuing paragraphs.

Case No. 05 of 2013

6. The information in Case No. 05 of 2013 has been filed under Section 19(1)(a) of the Competition Act, 2002 ('the Act') by Madhya Pradesh Power Generating Company Limited against South Eastern Coalfields Ltd. ('the Opposite Party No. 1'/SECL) and Coal India Ltd. ('the Opposite Party No. 2'/ CIL) alleging *inter alia* contravention of the provisions of Section 4 of the Act.

7. The Informant has alleged that SECL being the monopoly supplier was neither willing to negotiate the terms of coal supply agreement nor ensuring the supply obligations and therefore, the terms and conditions of SECL were not only unfair but also not according to the object for which the Informant was acquiring coal. The Informant also stated that the boilers of its power plant at Sanjay Gandhi Thermal Power Station (SGTPS) were designed for

calorific value of around 3700 kcal/kg of coal, however, CIL was supplying coal of higher calorific value *i.e.* 5800 kcal/kg which was not only economically unviable for the company but also caused various technical problems to its power plant.

8. Further, it was alleged that SECL increased the price of grade A and grade B coal by more than 155% *vide* notification dated 26.02.2011 resulting in huge financial burden upon the Informant and thereby impacting the price of electricity being produced and supplied by it. After hike in price by the Opposite Parties, buying 1000 kcal in GCV band G2 to G5 (equivalent to grades A to C) was costing the Informant more than double of buying the same heat in G6 to G12 band (equivalent to grades D to F). It was alleged that CIL also increased the supply of grade A and B coal from 2010-11 after price hike. After changing the pricing mechanism, it was stated that the supply of G3, G4, G5 band coal was increased to 47% in 2011-12 and 62% in 2012-13 (up to October) of the total supply.

9. Letters were written repeatedly to CIL intimating that the Informant required coal of a lower grade and supply of grade A and B coal be reduced and that of lower grade coal be increased. Further, it was alleged that the joint sampling process provided for in the coal supply agreement was totally redundant and an asymmetrical process which otherwise was a very important process for assessing the quality of coal being supplied. In the absence of proper protocol for joint sampling, there were chances of degradation of quality of coal including the size of coal and physical quality of coal. Prior to present coal supply agreement, joint sampling was provided for at both loading and unloading points and further provision was made for reconciling the results and coming to a conclusion by using mean method. Lastly, it was averred that clause 3.11 of the present coal supply agreement provided for a deemed

delivered condition *i.e*. whatever be the grade of coal supplied, purchaser was supposed to accept the same and in case, the purchaser refused to accept the coal, it would be treated as deemed delivery and the purchaser would be liable to pay for it.

Case No. 07 of 2013

10. The information in Case No. 07 of 2013 has also been filed under Section 19(1)(a) of Act by Madhya Pradesh Power Generating Company Limited against South Eastern Coalfields Ltd. ('the Opposite Party No. 1'/ SECL) and Coal India Ltd. ('the Opposite Party No. 2'/ CIL) alleging contravention of the provisions of Sections 4 of the Act.

11. In this case, the Informant submitted that prior to 2007, the procedure of sampling and testing of coal supplied being followed by the parties was that the sampling was done both at loading as well as unloading end. This procedure helped in reconciliation of discrepancies and working out an average/mean grade or quality. It was also submitted that clause 4.7.1 of the coal supply agreement provided for installation of Augur Sampling Machines (AMS) but CIL had not been following the sampling procedure as per this clause. Currently, sampling was being done only at the loading end within the colliery. CIL even excluded the Informant from participating in the testing process and it was turned into a spectator having no say in the method adopted for collection, testing and analysis of samples.

12. It was further averred that under clause 4.3 of the coal supply agreement, CIL was supplying oversized coal containing big lumps and stones which had potential of damaging Informant's plant and machinery thereby affecting the generation of electricity. The Informant wrote several letters to CIL in this regard but received no reply. It was also submitted that coal supplied by CIL

was quite different from the quality that the Informant had to purchase under the coal supply agreement. Further, the quality of coal for which CIL was billing was also different from what was actually being received by the Informant at the unloading end.

Case No. 37 of 2013

13. The information in Case No. 37 of 2013 has been filed under Section 19(1)(a) of the Act by the West Bengal Power Development Corporation Ltd. against Coal India Ltd. ('the Opposite Party No. 1'/ CIL), Eastern Coalfields Limited ('the Opposite Party No. 2'/ ECL), Bharat Coking Coal Limited ('the Opposite Party No. 3'/ BCCL) and Mahanadi Coalfields Limited ('the Opposite Party No. 4'/ MCL) alleging contravention of the provisions of Section 4 of the Act.

14. Challenging the various terms of Fuel Supply Agreements (FSAs) executed between the Informant and the coal company, it was alleged that these are standard agreements containing identical terms and conditions with no negotiations with the buyers. The Informant alleged that CIL and its subsidiaries short-supplied to some of the power plants of the Informant and over-supplied to other power plants, causing serious difficulty in stocking coal as well as in management of raw material.

15. Further, clause 10.1 of the FSAs stipulates that penal freight for overloading as imposed by the Indian Railways is to be borne by the purchaser whereas overloading happens at the seller's end. Such penal overloading charges of Railways are two to four times of the normal freight charges. This clause clearly shows unfair and discriminatory conditions of FSAs. In terms of clause 3.3.1 of FSAs, CIL and its subsidiaries have to endeavour to supply coal from their own sources. In case CIL and its subsidiaries are not in a

position to supply coal through their own sources, then they have the option to supply the balance quantity of coal from alternate sources. It is stated that in case CIL and its subsidiaries supply coal through an alternate source, the additional cost of supply through the alternate source is liable to be borne by the purchaser. Further, such supply from the alternate source can be at any delivery point, at the sole discretion of CIL and its subsidiaries.

16. The Informant has also raised the issue of deemed delivery clauses in FSA. It is stated that clauses 3.6, 3.11.1 (iii) and 12 of the FSAs indicate that the quantity of coal not supplied by CIL and its subsidiaries *i.e.* the seller owing to purchaser's failure to pay dues is considered as 'Deemed Delivered Quantity' (DDQ'). Such DDQ shall also be considered for calculation of penalties for short lifting as well as for calculation of the quantity supplied for ACQ. In addition to this, not only the interest will be payable upon delayed payment, but also, in terms of clause 14 of the FSAs, CIL and its subsidiaries shall be entitled to suspend further delivery of coal in case the purchaser fails to make any payment by the due date.

17. It was further averred that clauses 3.6, 3. 11.1 (iii) and 3.12 provide for calculation of performance incentive for proper supply and compensation for short lifting. The incentives were being calculated by the Opposite Parties not only on the basis of actual quantity of coal supplied to each plant but on the basis of deemed supply under the agreement also. Thus, even when total quantity of coal supplied fell below total ACQ, BCCL claimed performance incentive for plants which received coal over their individual ACQ in this manner and compensation for plants which received lesser than their individual ACQ. As a result, performance incentive of 2.17 crores for year 2009-10, Rs.132 crores for 2010-11 and Rs.5.77 crores for 2011-12 was

claimed. ECL claimed a compensation of Rs.52.16 crores, despite the fact that it had failed to supply the total ACQ.

18. Further, clauses 4.1, 11.2.2, 4.6.2 and 9.1 of the FSAs provided for issuance of credit notes in the event of deviation by the Opposite Parties from declared grade of coal and for stones of more than 250 mm size. Since the quality of coal blocks supplied had oversized coal blocks mixed with huge boulders, (which caused a lot of damage to different equipments *i.e.* unloading and conveyor systems, power plants *etc*.), the Opposite Parties were supposed to issue credit notes but no credit notes were issued in favour of the Informant as per the agreement.

Case No. 44 of 2013

19. The information in Case No. 44 of 2013 has been filed under Section 19(1)(a) of the Act by Sponge Iron Manufactures Association against Coal India limited ('the Opposite Party No. 1'/ CIL), Central Coalfields Limited ('the Opposite Party No. 2'/ CCL), Eastern Coalfields Limited ('the Opposite Party No. 3'/ ECL), Western Coalfields Limited ('the Opposite Party No. 4'/ WCL), South Eastern Coalfields Limited ('the Opposite Party No. 5'/ SECL), Northern Coalfields Limited ('the Opposite Party No. 6'/ NCL) and Mahanadi Coalfields Limited ('the Opposite Party No. 7'/MCL) alleging contravention of the provisions of Section 4 of the Act.

20. The Informant, a registered association of sponge iron manufacturers, was formed with a view to promote and protect the interest of sponge iron industry. It has alleged various anti-competitive practices *e.g.* one sided/onerous FSAs and MoUs, short supply of coal despite assured quantity under FSA and the NCDP, diverting coal mandated to be supplied under FSA to sale through e-auction to earn super normal profits; poor/ inferior quality of

coal sold and supplied in contravention of FSA, differential pricing of coal *etc*. It has also alleged that Captive Power Plants are subjected to differential treatment in respect of prices and terms and conditions for supply of coal in comparison to Independent Power Producers and state-owned Power Producers. All these, as per the information, resulted in anti-competitive effects leading to constraint on national growth and massive wastage of manpower and resources involved in production of sponge iron leading to enormous energy loss.

Directions to the DG

21. In Case Nos. 05 and 07 of 2013, the Commission, after consolidating the two matters and considering the entire material available on record, *vide* its common order dated 21.03.2013, directed the Director General (DG) to cause an investigation to be made into the matters. In Case No. 37 of 2013, the Commission *vide* its order dated 05.07.2013 directed the DG to cause an investigation into this matter as well. In Case No. 44 of 2013, the Commission *vide* its order dated 23.07.2013 directed the DG to investigate into the matter. The Commission *vide* the said order further clubbed the investigation in this case with the pending investigations in the three previous cases *viz.* Case Nos. 05, 07 and 37 of 2013.

22. The DG, after receiving the directions from the Commission, investigated the matters and filed a common investigation report in all these cases on 23.12.2013.

Investigation by the DG

23. The DG delineated *supply of non-coking coal to the consumers including thermal power producers and sponge iron manufacturers in India* as the relevant market. Further, the DG noted that there are no competitive forces against the Opposite Parties and as such, CIL and its subsidiaries are in a position to affect consumers/ the relevant market in their favour. Thus, the DG found the Opposite Parties to be in a dominant position in the said relevant market. On analysis of the terms and conditions of FSAs, the DG concluded that CIL and its subsidiaries have violated the provisions of Section 4(2)(a)(i) of the Act by imposing unfair or discriminatory conditions in the relevant market. The following terms and conditions were found by the DG to be unfair or discriminatory:

(i) CIL by virtue of its dominance and on account of lack of competitive process in the relevant market has not tried to evolve/draft/finalize the terms and conditions of FSA by way of any mutual or bilateral process. FSA was drafted by CIL for all the consumers according to its own priorities and convenience without giving consideration to the interest of all the stakeholders.

(ii) The terms and conditions relating to review of declared grade were found to be discriminatory. There is no provision for non-power sector in review the grade and the terms and conditions in this regard were found to be discriminatory in nature.

(iii) Investigation revealed that the procedure for sampling and analysis of quality of coal in FSA on one side does not obligate the seller to provide for the best and fair sampling methods and on the other side it also dilutes the consequences of poor quality supply. The Opposite

Parties have also discriminated between consumers on the issue of sampling and analysis of coal without any satisfactory reason and hence, Opposite Parties were found to be imposing discriminatory terms and conditions.

(iv) The provisions in FSA relating to oversized coal and stones were found to be unfair as the Opposite Parties were not obligated to ensure the quality of coal supplied to their buyers. Further, in the event of supply of oversized coal or stones, the provisions relating to compensation were also found to be unfair and discriminatory.

(v) The terms and conditions of MoU which were meant for new consumers were found to be tilted in favour of the coal companies and indicated exploitative conduct of the Opposite Parties. The conduct of the Opposite Parties regarding MoU was found to be unfair and in violation of the provisions of Section 4(2)(a)(i) of the Act.

(vi) The clauses relating to compensation for short supply and performance incentive were found to be unfair to the extent that while calculating the Delivered Quantity (DQ), the ungraded coal and stones were included in DQ *i.e.* Actual Delivered Quantity and therefore, the terms and conditions of FSA in this regard were found to be in contravention of the Section 4(2)(a)(i) of the Act.

24. The investigations, thus, concluded that the Opposite Parties have violated the provisions of Section 4(2)(a)(i) of the Act by imposing unfair/ discriminatory provisions upon buyers in the FSAs.

Consideration of the DG report by the Commission

25. The Commission in its meeting held on 10.01.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their replies/ objections thereto. Thereafter, the Commission heard the parties on various dates and passed an order on 15.04.2014 holding the Opposite Parties to be in contravention of the provisions of Section 4 of the Act. This order, as stated earlier, was set aside by the Hon'ble Competition Appellate Tribunal on 17.05.2016 and the matters stood remanded back to the Commission for fresh consideration. Accordingly, the parties were issued notices and heard afresh on various dates. As stated above, the Informant in C. No. 37 of 2013 *viz.* West Bengal Power Development Corporation Ltd. and the Informant in C. No. 44 of 2013 *viz*. Sponge Iron Manufacturers Association did not appear in the hearings consequent upon the remand order, despite due service of notice. Thus, after hearing the appearing parties afresh, the Commission decided to pass an appropriate order in due course.

Replies/ Objections/ Submissions of the parties

26. Earlier, the parties filed their respective replies/ objections to the report of the DG. The Opposite Parties filed a common reply in all the cases. The common Informant in Case Nos. 05 and 07 of 2013 also filed replies/ written submissions. The Informant in Case No. 44 of 2013 has also filed its reply/ written submissions. The Informant in Case No. 37 of 2013 has not filed any reply/ written submissions.

Replies/ objections/ submissions of the Opposite Parties

27. CIL filed its common reply reiterating its stand on market definition and dominance as taken in Case Nos. 03, 11 and 59 of 2012 and as such, it is not necessary to elaborate upon the same again in this order.

28. Specifically, it was pointed out that the process of joint sampling and assessment of quality of coal was fair and transparent. The entire process of sampling was done jointly and a documentary record of the samples collected was kept. Samples were jointly sealed and jointly analysed. Customer representatives had full freedom to raise objections about any part of the process at any point of time. Vehemently opposing the plea of the Informants seeking sampling at unloading end, it was submitted that acceding to such claim of the Informants would tantamount to imposing an obligation upon CIL to provide sampling and analysis at the unloading end. This would be grossly unfair, as it would lead to shifting of burden upon CIL of ensuring safe transit from seller to the customer, which is not provided for in the contract. As in any commercial relationship, the goods are inspected at the time of purchase and transfer of title, and not at the time of delivery. Further, there are a number of problems associated with sampling at the unloading end. Alternatively, it was submitted that CIL has changed its sampling process and introduced an independent third party sampling at the loading end to further increase transparency in the process. In this regard, it was submitted that the DG, without even analysing the new sampling process, has rejected the same. It was pointed out that both MPPGCL and WBPDCL are also participating in the third party sampling process and signing the sampling reports.

29. It was highlighted that non-power customers consuming above 4 lac tonnes of coal, were also entitled to and provided similar third party sampling and

analysis as the power sector consumers. CIL always tries to ensure that no stones are dispatched when coal is being transported. However, given the nature of mining process and because, at times, thin bands of shale, stone and shaly coal are present in coal seams, there are chances that stones are also mined along with coal. With a view to minimize the supply of stone to the maximum extent possible, CIL takes various steps. The DG's finding that CIL should compensate for all stones supplied, apart from being practically not possible would also constitute double compensation and therefore, ought to be rejected.

30. On the process of grade declaration by various subsidiaries of CIL, it was submitted that the same has been done in compliance with the rules laid down by the Office of the Coal Controller (CCO) and in accordance with the Colliery Control Rules, 2004. Further, the gradation process provides that where a customer is not satisfied with the quality and grade of coal being supplied through a particular coal mine, it may institute a statutory complaint requesting the CCO to assess the grade of coal being supplied. It was also submitted that the provisions in the FSAs relating to the charging of freight and other taxes for ungraded coal are fair. Given the heterogeneous nature of coal, slippages in grade of coal supplied cannot be completely ruled out. Adequate compensation is provided to the customers for such grade slippages.

31. Lastly, it was submitted that the supplies of coal through MoU was a temporary arrangement and only related to a waiver of the condition in relation to imported coal. This was imperative and in fact in customer's interest because if the waiver on imported coal is not given, even the domestic component of the supply will not commence. Therefore, to ensure that the customers are at least start getting the coal from domestic sources, MoU has been entered into with minimal obligations.

Replies/ objections/ submissions of the common Informant in Case Nos. 05 and 07 of 2013

32. The common Informant has broadly supported the findings of the DG. However, it had disagreed with the findings of the DG in respect of allegations relating to sources of supply and supply of higher grade coal to MPPGCL wherein it was concluded by the DG that in a situation where the production of coal is much below the demand of coal, the Opposite Parties cannot be blamed for not accepting the request of specific purchaser for supply from specific mine only.

Replies/ objections/ submissions of the Informant in Case No. 44 of 2013

33. Supporting the conclusion of the DG on relevant market, it was submitted that coal is an essential raw material for the preparation of sponge iron. Though natural gas can also be used as a raw material for production of sponge iron, the capital cost for setting up a coal based project is much cheaper than gas based project and gas is not fully explored and not abundant. Hence, effectually, gas or any other resource does not qualify to be a perfect substitute for coal and therefore, the relevant product market would only be non-coking coal.

34. Agreeing with the DG's finding that imported coal is not an alternative or substitute for domestic coal, it was submitted that some of the sponge iron manufacturers have imported coal from other countries but if the reason for such import is analysed, it can be seen that such an eventuality has arisen only because CIL has short supplied coal to the extent of 75% of the ACQ. The short supply of coal by CIL and the very high price of e-auctioned coal/ open market coal has compelled sponge iron manufacturers to import some quantity to continue with the production, to sustain in the market.

35. The Informant, however, argued that the report of the DG is flawed on certain key aspects and is based on certain assumptions and erroneous facts provided by CIL rendering the report fundamentally flawed and contrary to well-established market principles in the power sector on pricing and quantity. Besides, submissions have been made to substantiate the allegation that the customers were forced to sign one-sided FSAs. Submissions on pricing were also made by the present Informant.

Analysis

36. Before examining the allegations and the impugned abusive conduct of the OPs, it is observed that *vide* separate order dated 24.03.2017 passed by the Commission in Maharashtra State Power *Generation Company Ltd. etc.* v. *Mahanadi Coalfields Ltd. & Ors. etc.* in Case Nos. 03, 11 & 59 of 2012, the relevant market has been defined by the Commission as "production and sale of non-coking coal to thermal power generators in India" after considering in detail the pleas advanced by CIL seeking to expand the relevant geographic market as global. While rejecting the plea, the Commission noted that imported coal cannot be considered a substitute for domestic coal on account of various factors as discussed therein.

37. Accordingly, in the present batch also, where the consumers of non-coking coal are thermal power producers and sponge iron manufacturers for their captive power plants, '*production and sale of non-coking coal to consumers including thermal power producers and sponge iron manufacturers in India'* may be taken as the relevant market.

38. Similarly, the Commission in Case Nos. 03, 11 and 59 of 2012 after considering the statutory landscape and the purported constraints faced by

CIL opined that CIL and its subsidiaries enjoy dominance in the relevant market. Thus, the Commission does not deem it necessary to once again revisit similar pleas which have been advanced by CIL in the present batch to dispute its dominance.

39. Resultantly, the Commission holds CIL and its subsidiaries to enjoy dominance in the relevant market of '*production and sale of non-coking coal to consumers including thermal power producers and sponge iron manufacturers in India'* in the present batch also.

40. Adverting to the instances of abuse of dominant position by CIL and its subsidiaries, it may be observed that in the present case also, the allegations essentially centre around the terms and conditions of the FSAs which are stated to be unfair and discriminatory. Before proceeding any further, it may be pointed out that most of the instances of abuse alleged against the Opposite Parties stand covered by the order of the Commission passed today in Case Nos. 03, 11 and 59 of 2012 and as such, no separate or further order is required to be passed in this regard. In sum, the Commission has held that CIL did not evolve/ draft/ finalize the clauses of FSAs through a mutual bilateral process and the same were imposed upon the buyers without seeking/ considering their inputs in any effective manner. Besides, the Commission also gave findings on various terms of FSAs, as detailed therein.

41. On grading of coal, in Case Nos. 03, 11 and 59 of 2012, it was held by the Commission that in light of availability of statutory mechanism (Office of the Coal Controller) to redress the issues arising out of grading of coal, no case of unfair or discriminatory conduct is found.

42. In the present case, however, it is noted that there is no such similar mechanism for non-power sector for review of declared grade. It may be

pointed out that in the present case, sponge iron manufacturers have complained stating that there is no similar provision for non-power sector buyers for review of grade of coal. The Commission is of the considered opinion that credibility of declared grade of coal is of paramount importance. No rationale has been ascribed by the Opposite Parties for such hostile discrimination against the non-power sector buyers and none can be gathered even otherwise. In these circumstances, the Commission is of the opinion that there is a contravention of the provisions of Section 4(2)(a)(i) of the Act on the issue of grade review for non-thermal power buyers as the terms are patently discriminatory in nature.

Issue of supply through MoU

43. Specific challenge was laid by SIMA that CIL and its subsidiaries have been insisting on consumers for executing additional Memoranda of Understanding (MoUs) in addition to FSAs. These MoUs *inter alia* provide that:

(i) MoU will form an integral part of FSA executed by the consumer;

(ii) The quantum of supply of indigenous coal from time to time, under the respective FSA shall be at the sole discretion of the coal company but shall not exceed 50% of ACQ in any case;

(iii) MoUs framed provide that for calculation of compensation for short-supply or short-lifting, ACQ under the FSA shall be reckoned as being reduced by 50%. MoUs framed contain different wordings which also operate to reduce the quantity of supply below which compensation becomes payable or alternatively are worded to ensure

that no compensation will be paid in spite of there being short supply of an agreed ACQ.

44. The DG observed that the clauses of MoUs show that the purchaser has no option but to accept the terms and conditions of MoUs as there is no scope for negotiation given the upper hand of the seller. Further, by incorporating the clauses relating to reduction in supply of indigenous coal by 50% and also linking the MoUs with penalty on short-supply, the OPs have diluted their obligation on commitments of supply of coal. The DG noted that the coal companies presumed that the share of imported coal will be 50%, although there is no such provisions in FSA. There is no data of past supply to show that the share of imported coal is about 50% which may necessitate the reduction in indigenous coal by 50%. The information gathered during investigation showed that on an average not more than 20-30% imported coal was used by consumers.

45. The Commission notes that the very insistence by CIL and its subsidiaries upon consumers for executing MoUs in addition to contractual arrangements agreed between the parties by way of FSAs, was subversive of contractual obligations and was a clear indication of abuse of market power by State monopoly. As shown above, the only purpose of MoUs was to dilute the contractual obligations of the seller and to bail them out from legal commitments. The terms and conditions of MoUs were *ex facie* disposed favourably towards the coal companies and the consumers had no option except appending signatures thereon. No justification for restriction in the indigenous coal in MoUs by the coal companies can be gathered. The impugned conduct appears to be unfair being in contravention of the provisions of Section 4(2)(a) (i) of the Act.

Supply of coal of higher grade or from specific mine/source

46. The common Informant in Case Nos. 5 and 7 of 2013 *i.e.* MPPGCL has alleged that the Opposite Parties manipulate the quantity and quality of coal in order to maximize profit and exploit the dependency of the consumers. MPPGCL further alleged that after hike in price, SECL increased the supply of grade A and B coal to make extra profit. After changing the pricing mechanism, the supply of G3, G4, G5 band coal was increased to 47% in 2011-12 and 62% in 2012-13 (up to October) of the total supply. It was further submitted that letters were written repeatedly to SECL intimating that it required coal of a lower grade and that supply of grade A and B coal be reduced and of lower grade coal be increased, however of no avail.

47. The DG has examined this aspect in great detail and noted that it may not be practically possible for the coal companies to accommodate demand of all the buyers for supply of coal from a particular mine only and accordingly in the FSAs there is an option clause with CIL to supply coal from any mine and of any grade.

48. From the replies, the Commission notes that increase in supply of coal from Korea-Rewa was also a result of less materialization of coal dispatches from Korba coalfields which was attributable to unavailability of sufficient number of railway rakes. It appears that Railways have not been able to supply/allot sufficient number of rakes required at Korba coalfields to facilitate evacuation of coal.

49. As such, the Commission is of the considered opinion that no evidence has been adduced by the Informant or otherwise brought on record by the DG to

establish that the impugned conduct of OPs was unfair or discriminatory which can be said to be in violation of the provisions of the Act.

Manipulation in supply of coal to maximise the profit

50. In Case No. 37 of 2013, the Informant *i.e*. WBPDCL has alleged manipulation of the quantities of coal by the subsidiaries of CIL to maximise the profit. The DG did not find the allegations levelled by WBPDCL on the issue of manipulation in supply and differential treatment substantiated and accordingly, found no contravention of the provisions of Section 4(2) of the Act by the Opposite Parties. The Commission has perused the investigation report very carefully and notes from the material available on record that no evidence was adduced to establish such allegations. Thus, the Commission does not find any merit on this count as the allegations remained unsubstantiated.

Provisions of deemed delivery

51. It was alleged by WBPDCL that clauses 3.6, 3.11.1 (iii) and 12 of the FSAs dealt with deemed supply of coal *i.e*. quantity of coal though not supplied by CIL and its subsidiaries to the Informant due to failure of the Informant to pay dues, but counted as supplied. The deemed delivery quantity was also taken into consideration by the Opposite Parties for calculation of penalties arising due to short-lifting and ACQ. Clauses 3.6, 3.11.1 (iii) and 3.12 provided for calculation of performance incentive for proper supply and compensation for short-lifting. Further, it was alleged that the incentives were being calculated by the Opposite Parties not only on the basis of actual quantity of coal supplied to each plant but also on the basis of deemed supply under the

agreement. It has also been alleged that clauses relating to deemed delivery are one-sided resulting in 'double jeopardy' to the consumers.

52. In the present case, the provisions relating to deemed delivered quantity, as defined in clause 3.11, are for the purpose of computing compensation for short delivery/ lifting (clause 3.6), calculating the level of delivery (clause 3.7) and the level of lifting (clause 3.8). It may be noted that deemed delivered quantity differs from actual delivered quantity with respect to the quantity of coal ready for delivery on part of the seller but inability on part of the purchaser to lift the coal on account of the conditions enumerated in clauses 3.11.1 and 3.11.2.

53. The Commission notes that such provisions appear to safeguard the interest of the purchaser and seller in case there is short delivery or lifting on account of certain conditions which may not be in t control of either party and as such, they do not appear to be abusive. The Commission finds no merit in the allegation that DDQ is included for claiming performance incentive by CIL. A plain reading of clause 3.12.3 of FSAs makes it clear that performance incentives are payable on the basis of actual quantity physically delivered only.

54. However, on perusal of clause 3.7 of FSAs (which provides calculation formulae for level of delivery), it was observed by the DG that the ungraded coal or stones supplied to the purchasers are not reduced from the delivered quantity. The FSAs provide for supply of graded coal and therefore ungraded coal or stones should not be considered while calculating the actual delivered quantity for the purpose of compensation for short-supply or performance incentives.

55. The Commission does not find any infirmity in the findings of the DG that the clauses relating to compensation for short-supply and performance incentive are unfair to the extent that while calculating the delivered quantity, ungraded coal and stones need to be reduced therefrom *i.e.* Actual Delivered Quantity. To this extent, the terms and conditions of FSAs in this regard appear to be in contravention of the provisions of Section 4(2)(a)(i) of the Act.

Conclusion

56. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of the market forces and enjoys dominance in the relevant market of sale of non-coking coal to the thermal power producers and sponge iron manufacturers in India. The Commission hence, holds the Opposite Parties to be in contravention of the provisions of Section 4(2)(a)(i) of the Act for imposing unfair/ discriminatory conditions through FSA's and indulging in unfair/ discriminatory conduct in the matter of supply of non-coking coal, as detailed in the order.

57. Accordingly, the Opposite Parties are directed to cease and desist from indulging in the aforesaid conduct which has been found to be in contravention of the provisions of the Act and to effect the changes in the fuel supply agreements in light of the observations and findings recorded in the present order. For effecting these modifications in the agreements, CIL is further directed to consult all the stakeholders including the Informants herein.

58. As a penalty of Rs. 591.01 crore has already been imposed upon the Opposite Parties *vide* separate order dated 24.03.2017 of the Commission passed in the previous batch of informations (*i.e*. in Case Nos. 03, 11 and 59 of 2012) with respect to substantially similar conduct, the Commission deems it appropriate not to impose any further monetary penalty upon the Opposite Parties..

59. The Secretary is directed to inform the parties, accordingly.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(Justice G. P. Mittal)
Member

New Delhi
Date: 21/04/2017