COMPETITION COMMISSION OF INDIA

Case No. 08 of 2014

In Re:

GHCL Limited	**Informant**
And	
1. Coal India Limited	**Opposite Party No. 1**
2. Western Coalfields Limited	**Opposite Party No. 2**

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 M. A. Venkatasubramanian, Advocate alongwith Shri Ranjan Tiwari, AGM (Legal) for GHCL Limited.

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 George Mathew, Senior Manager (S & M) and Shri T. H. Mohan Rao, Manager (S & M/ QC) for WCL] for CIL and WCL.

Order under Section 27 of the Competition Act, 2002

1. The Commission in this case, filed by GHCL Limited ('the Informant'/ GHCL) against Coal India Limited ('the Opposite Party No.1'/ OP-1/ CIL) and Western Coalfields Limited ('the Opposite Party No.2'/ OP-2/ WCL), *vide* its order dated 16.02.2015 found CIL and its subsidiaries to operate independently of market forces and thus enjoying undisputed dominance in the relevant market of 'production and supply of non-coking coal to thermal power producers including captive power plants 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 Opposite 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 2013and 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 .x x x x x

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 parties in this case afresh together with two other batches on various dates and decided to pass appropriate order in due course.

Facts

4. The Informant is a company incorporated under the Companies Act, 1956 and is *inter alia* engaged in the business of manufacture and sale of soda ash, which is a basic industrial raw material in the manufacture of glass, detergent, chemicals, silicates and other basic chemicals. The Informant commenced its commercial production of soda ash in 1986 at its manufacturing facility at Sutrapada, Distt. Somnath Gir (earlier in Junagadh Distt.) in the State of Gujarat.

5. The Informant requires coal for running its captive power plant. It was issued a Letter of Assurance (LoA) No. NGP/WCL/S&M/C-12(348-

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

6. It is alleged that a plain reading of the said letter clearly demonstrates that the Opposite Parties had coerced the Informant into extending the

Bank Guarantee issued by the Informant by threatening to encash the same even though there was no default or failure on the part of the Informant. The Informant replied to the said letter on 04.10.2012 explaining its position yet complied with the unreasonable demand of the Opposite Party No.2 with regard to extension of the Bank Guarantee to avoid encashment of the same.

7. It is alleged that after complying with the conditions precedent and meeting even the unreasonable demands of the Opposite Party No.2 with regard to extension of Bank Guarantee, the Informant was provided a model draft FSA for its approval. Since, there were few clauses in the said FSA which were absolutely one sided, the Informant wanted the Opposite Party No.2 to redraft the said clauses to make it more balanced. However, the Opposite Party No.2 made it clear to the Informant that these were standard terms of coal supply under the FSA and as such were not negotiable and that any delay or failure to execute the FSA within the stipulated time period would result in the invocation of the bank guarantee issued by the Informant. Being left with no alternative, the Informant sent its duly authorized representative to execute the FSA, which was mandatory for commencing supply of coal under the New Coal Distribution Policy, 2007 (NCDP). However, the authorized representative was given to understand that the Informant will have to execute a Memorandum of Understanding (MoU) along with FSA. Since, there had been no previous mention at all about this requirement and as the terms and conditions of the said MoU were absolutely one-sided and loaded against the Informant, the representative of the Informant expressed his inability to execute the MoU without obtaining clearance from the Informant. It is alleged that a plain reading of MoU would clearly establish that the conditions relating to quantity and quality of coal to be supplied under the FSA were substantially diluted.

8. It is further alleged that upon hearing the response of the informants

representative, the Opposite Party No.2 referred to Para 3.4.2 of LoA and threatened to encash the Bank Guarantee if the representative of the Informant refused to execute the MoU alongwith the FSA. Eventually, the Informant under coercion and threat of encashment of BG by the OP, signed the MoU/ FSA on 08.11.2012.

9. The Informant is aggrieved by the fact that the Opposite Party No.2 instead of executing the FSA, as mandated under the NCDP, required the Informant to execute an MoU alongwith the FSA diluting the terms and conditions of FSA on issues like quality control, grade failure, short supply, joint sampling *etc*., which are material terms and conditions of supply of coal under the agreement.

10. Based on the above allegations and averments, the Informant has filed the instant information against the Opposite Parties alleging abuse of dominant position. Besides, the Informant has also made several other allegations against the Opposite Parties relating to Deemed Delivered Quantity (DDQ), non-fulfilment of contractual obligations in respect of Annual Contracted Quantity (ACQ) and diversion of coal *etc*.

Directions to the DG

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

Investigation by the DG

12. To investigate the alleged abusive conduct, the DG determined the

relevant market as 'production and supply of non-coking coal to thermal power producers including the captive power plants in India'. The OPs were found to be in a dominant position in the said relevant market. On abusive conduct, to begin with, it was noted by the DG that the terms and conditions of LoA, FSA and MoU have been drafted by the OPs unilaterally and there was no consultation with the customers/ other parties either at the time of drafting the FSA or at the time of modifications. It was noted in the report that the dependence of consumers on the OPs and the ability of the latter to act independently of market forces allowed them to decide the one sided terms and conditions of LoA, FSA and MoU without any corresponding obligations. It was further held that the conditions imposed by the OPs in LoA, FSA and MoU were unfair and in violation of the provisions of Section 4(2)(a)(i) of the Act.

13. The DG found that the OPs have imposed unfair and discriminatory conditions by reducing the quantity of supply and trigger level for penalty for short delivery. The clauses of MoU relating to reduction in quantity [clause 6 (vi)], trigger level for compensation [clause 6 (vii)] and DDQ [clause 6 (viii)] were found to be unfair.

14. Similarly, the conduct of WCL by issuing letter dated 12.09.2012 to the Informant for extending the CG or to face consequence of encashment, even when the delay in execution of the FSA was purely on account of the OPs, was found to be exploitative.

15. Further, the provisions in the FSA relating to Security Deposit (SD) were found to be discriminatory. It was observed that where as in few cases SD is refunded to the consumers, in the case of the Informant the amount of SD was further increased. It showed differential treatment against the Informant without any justification.

16. Also, the provisions relating to quality, sampling & analysis, grading, over-sized coal and compensation of stones were found to be lacking in the FSA for small and medium consumers, such as the Informant. The conduct of the OPs was, therefore, found to be unfair and discriminatory.

17. Accordingly, the investigation concluded that the OPs have on several counts, as noted above, violated the provisions of Section 4(2)(a)(i) of the Act by imposing unfair and discriminatory provisions.

Consideration of the DG report by the Commission

18. The Commission in its ordinary meeting held on 09.10.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto. The Commission heard the parties on 25.11.2014 and passed an order on 16.02.2015 holding the Opposite Parties to be in contravention of the provisions of Section 4 of the Act. This order, as stated earlier in para 2 of this order, was set aside by the Hon'ble Appellate Tribunal and the matter was remanded back to the Commission for fresh consideration. Accordingly, the parties were issued notices and heard on various dates whereupon the Commission decided to pass appropriate order in due course.

Replies/ Objections/ Submissions of the parties

19. Earlier, the parties filed their respective replies/ objections to the report of the DG.

Replies/ objections/ submissions of CIL

20. CIL, in its reply filed earlier, essentially reiterated the same 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 the same again in this order. On the issue of abuse, it was submitted that it has not abused its market position and has conducted all its business activities in a fair and transparent manner, and in the best interests of its customers. CIL also made detailed submissions on various aspects of the alleged abuse and the same shall be adverted to in the latter part of the order.

Replies/ objections/ submissions of WCL

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

22. It was argued that the execution of MoU was imperative as WCL was not in a position to supply 100% indigenous coal to its consumer due to its already existing commitment towards power producers. Therefore, it

was not possible for WCL to enter into an agreement with any consumer, the essential term of which would have been supply of 100% indigenous coal, without execution of MoU, which brought down the level of commitment required on the part of WCL and made the implementation of the FSA possible.

23. It was submitted that WCL has not only provided the complete quantity of promised 50% of indigenous coal but has also on occasions, when it had surplus quantity of coal, invited the consumers to lift 100% of indigenous coal from its depots and to accordingly get their MoUs modified.

24. The allegation of the Informant that the coal was being diverted towards e-auction, was denied as false.

25. Dealing with the condition of DDQ, it was submitted that the reason behind insertion of DDQ clause emanates from the rationale behind the execution of MoU itself, which was to balance the interest of both the parties. Any difference between the committed 50% of ACQ and the actual quantity delivered would not be on account of any fault on part of WCL but as a result of the difference between the quantity of coal produced by WCL and the number of consumers attached with it. It was submitted that WCL cannot be penalized for any such eventuality because it does not have the liberty to deny supply of coal to any consumer linked/ directed towards it by Standing Linkage Committee (Long Term) [SLC (LT)].

26. Lastly, it was submitted that clause 5.1 of NCDP requires the consumers to furnish an Earnest Money Deposit (EMD) and the same is discharged only when the FSA is concluded. It is only in compliance of the aforestated clause that WCL requested the Informant to extend the validity of CG beyond the period of 24 months till the time of execution

of FSA. It has been overlooked by the DG that the alleged delay in execution of the FSA was only due to want of certain clarifications from MoC/CIL and the same was executed within a month of extension of the CG.

Replies/ objections/ submissions of the Informant

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

Analysis

28. The gravamen of the instant information centres around the alleged unfair and discriminatory treatment meted out by the OPs to small consumers like the Informant (who require coal for captive power plants) *vis-à-vis* the power producers and are allegedly forced to sign MoUs which dilute the obligations assumed by the OPs under LoAs/ FSAs.

29. 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.

30. Accordingly, in the present case also where the consumer of non-coking coal is a soda ash manufacturer who requires coal for its captive power plant, '*production and sale of non-coking coal to thermal power producers including captive power plants in India'* may be taken as the relevant market. The Commission finds no merit in the contention of the Opposite Parties that the DG kept on adding categories to the earlier defined relevant markets. The Commission notes that the same was done only by way of exemplification and the market essentially remained that of production and sale of non-coking coal.

31. Similarly, the Commission in Case Nos. 03, 11 and 59 of 2012 after considering the statutory landscape including the purported constraints faced by CIL opined that CIL and its subsidiaries enjoy dominance in the relevant market. As such, it is unnecessary to revisit the similar pleas which have been advanced by CIL in the present batch to dispute its dominance.

32. Resultantly, the Commission holds CIL and its subsidiaries to enjoy dominance in the relevant market of '*production and sale of non-coking coal to thermal power producers including captive power plants in India'* in the present case also.

33. Adverting to the instances of abuse of dominant position by CIL and its subsidiaries, it may be observed that in Case Nos. 03, 11 and 59 of 2012, the Commission held that CIL had drafted/finalized the clauses of FSAs unilaterally and the same were imposed upon the consumers without seeking/ considering their inputs in any effective manner. In the present case also, it has been noted by the DG that CIL, due to its dominance and lack of competitive pressure in the supply of non-coking coal, has not evolved the terms and conditions of FSA by way of a bilateral mutual process. The Commission notes that the FSA was drafted by CIL by giving priority to its own convenience and strategy and without any consideration of the interests of its consumers. It was also noted that the

OPs have not produced any document material to substantiate that the FSA or LoA/ MoU for supply of coal was prepared through a bilateral and consultative process. The conduct of the OPs was found to be unilateral as no input from the Informant was obtained or allowed during drafting of the agreements or at the time of further modifications of the clauses of the FSA. Though clause 4 of the NCDP clearly provides for a 'transparent bilateral commercial arrangement' between the parties, the position on ground appears to be totally to the contrary *i.e* opaque, unilateral and arbitrary. Thus, the allegation of the Informant that the OPs have finalized the agreements relating to supply of coal unilaterally was found to be correct by the DG. The Commission also, having gone through the matter agrees with the findings of the DG for the above reasons.

34. CIL, has submitted that the limited purpose of LoA as acknowledged by the DG was to act as a bankable document for financial institutions to sanction the projects. LoA merely contains the broad scope of the terms and conditions that would be contained in the FSAs and, therefore, there is no question of them being unfair or discriminatory. It was also argued that the provisions in relation to the submission of CG and achievements of the milestones were fair as by committing to supply coal to its customers, CIL was taking the risk of apportioning a quantity of coal for supply in an otherwise supply deficit coal market. Therefore, the purpose of the milestones in LoA and the CG was to have an assurance from a dedicated buyer for coal, and to ensure that only serious buyers who could actually buy coal were signing up for linkages. Further, it was submitted that since CIL is already mining coal and supplying to other customers, there is no question of milestones for CIL. It was also pointed out that where separate mines were to be opened for supplies to a particular customer, the FSAs had specific conditions precedent that had to be fulfilled by CIL as well.

35. It was further submitted that CIL is engaged in consultation with non-power sector consumers through Credit Rating Information Services of India Limited (CRISIL).

36. The Commission has examined the rival submissions. On perusal of clause 2 of LoA, it is found that it puts obligations upon the buyer to complete various activities specified therein in a time bound manner and to further report the status of each activity/ milestone alongwith documentary evidence. However, the LoA imposes no corresponding obligations on the coal company. As per the LoA, whereas the Informant was required to complete all the milestones set therein within 24 months, no corresponding time-limit was required to be adhered to by the supplier. Similarly, the coal supplier has taken CG from the Informant which is liable to be encashed in case the Informant fails to fulfil the milestones prescribed in the LoA. However, there was no similar obligation or penal provisions in case of failure on the part of the coal supplier.

37. The Commission notes that the NCDP provides for issuance of a LoA by CIL for new consumers and timely achievement of project milestones by the latter, failing which the LoA will be terminated and SD forfeited. However, whereas all responsibilities in the LoA have been fixed on the consumer there are absolutely no responsibilities fixed for WCL in case of any lapse on its part which could delay the signing of the FSA between the parties. In view of the above, the Commission is of the opinion that the terms and conditions as incorporated in LoA and as elaborated above, are not evenly balanced and the same are held to be unfair in contravention of the provisions of Section 4(2)(a)(i) of the Act.

Dilution of contractual commitments/ obligations of Annual Contracted Quantity (ACQ) through MoU

38. The Informant has alleged that the Opposite Parties have sought to dilute

the contractual commitments of Annual Contracted Quantity (ACQ) through the MoU. It was pointed out that the Informant was granted linkage of 92,100 MT coal by SLC (LT) and accordingly, LoA for the said quantity was issued by WCL. In FSA also, the ACQ was mentioned at 92,100 MT. However, in the provisions relating to compensation on failure to supply the ACQ by WCL, the trigger level was mentioned at 50% of ACQ. Thus, in effect, the OPs' obligation for minimum supply was set at 46,050 MT as against the ACQ of 92,100 MT.

39. In this respect the conduct of the OPs in forcing the buyers to execute an MoU alongwith the FSA whereby such quantity and trigger levels have been further diluted/ reduced, as detailed below, was found by the DG to be in contravention of the provisions of Section4(2)(a)(i) of the Act.

40. The Commission notes that as per the provisions of the FSA, if the OPs fail to supply 50% of ACQ, they will be liable to pay penalty to the Informant. Thus, the FSA ensured a regular supply of at least 50% of the quantity mentioned in LoA *i.e.*, 46050 MT of coal by the OPs. However, the Informant was asked by WCL to also sign a MoU alongwith the FSA which was stated to be an integral part of FSA. The power utilities were not required to sign such a MoU alongwith the FSA. For the Informant, who is having a captive power plant, the condition of signing MoU was made mandatory by the Opposite Party No. 2 and the said MoU was made part of FSA. In this regard, the Commission notes that the NCDP not only dispensed with the classification of core and non-core sectors but also categorized the Captive Power plants (CPPs) in the same category as Power Utilities including IPPs. However CIL did not consider the CPPs as power utilities and imposed different conditions in the FSA of CPPs. This discriminatory treatment resulted in reduced level of ACQ for the CPPs.

41. The aforesaid discriminatory conduct was sought to be justified by CIL by pointing to the adverse coal balance in the country. It was submitted that in order to fulfill the demand of all the consumers of CIL, an MoU was signed between GHCL and WCL at the time of signing of FSA, according to which the quantity of coal to be supplied to the Informant from indigenous sources was set at 50% of the ACQ.. Further, without prejudice to the submissions that CIL has tried to fulfill all its supply commitments with respect to its customers, it was pointed out on behalf of CIL that GHCL has admittedly not even lifted even 30% of its ACQ in the past two years.

42. The Commission has noted the plea of CIL. It is indeed surprising that adverse coal balance is being taken as a ground by CIL to resile from its contractual obligations with the buyers of coal. The Commission is constrained to note that with over 250 billion tonnes of coal reserves, the coal companies are barely able to mine 540 million tonnes a year, and despite the domestic demand for coal growing by 8% annually, output has been increasing at under half that level.

43. Be that as it may, the Commission is of opinion that consequent upon signing of the MoU, the following conditions were incorporated therein by OP-2:

Clause 6 of MoU

(vi) Quantum of supply of Indigenous coal under the Agreement dated 8th November2012 shall be at the sole discretion of Seller from time to time, but shall not exceed 50% of ACQ in any case.

(vii) For the purpose of calculating the compensation arising out of short supply or short lifting, ACQ under the Agreement dated 08th November, 2012 shall be reckoned as reduced to 50%. In other words,

compensation shall be payable if supply/lifting fall below 25% of ACQ as given in FSA.

44. Subsequently, an Addendum dated 08.02.2013 to the original FSA was executed between WCL and GHCL, the effect whereof was that effective ACQ stood reduced by half. Hence, the cumulative effect of FSA, MoU and Addendum was that the OPs have reduced the quantity of coal to 50% of the original ACQ and the trigger level of compensation for short supply was also reduced from 50% to 25% of ACQ. The Commission notes that the purchaser had no option but to accept the terms and conditions of MoU as there was no scope for negotiations. The cumulative effect of FSA, the Addendum read with MoU was that the net effective ACQ, which was originally 96,100 MT under the FSA came down to 46,050 MT after surrender of imported coal by the Informant and this revised ACQ of 46,050 MT was further reduced by 50% in view of the condition imposed by MoU bringing the ACQ to 23,025 MT. The obligation to pay compensation was also diluted under MoU whereunder the OPs had no obligation to compensate the Informant unless the supply of coal falls below 25% of ACQ which meant that WCL could unilaterally increase or reduce the supply of coal between 23,025 MT *i.e.* 50% of the revised ACQ of 46,050 MT and 11,512.50 MT *i.e.* 25% of the revised ACQ of 46,050 MT per annum. This small quantity of 11,512.50 MT becomes less than 1000 tonnes on monthly basis which cannot be transported through Railways and transportation by roads results in higher cost rendering the whole process unviable. This also knocks out the contention of CIL that GHCL has not even lifted even 30% of its ACQ in the past two years as misconceived besides being a brazen attempt on part of CIL to take advantage of its own wrong.

45. In the result, the Commission is of opinion that the conduct of the OPs by unilaterally reducing ACQ of coal agreed to be supplied by them by forcing the buyers to execute the MoU alongwith FSA, is unfair besides

being discriminatory *vis-à-vis* the power utilities which are not required to sign such MoU alongwith FSA. Moreover, the NCDP 2007 which lays down the new transparent framework for coal distribution in the country has nowhere envisaged for such a mandatory MoU to be signed by any consumer, big or small as a pre-condition to the FSA. Thus, such conduct is in contravention of the provisions of Section 4(2)(a)(i) of the Act.

Deemed Delivered Quantity (DDQ)

46. The Informant also challenged the clause relating to DDQ in MoU as being unfair and in contravention of the provisions of the Act. The Informant has raised the issue of additional provisions of DDQ in MoU. It is observed that in addition to the provisions in FSA, the MoU also contained following provisions relating to DDQ at clause 6(viii):

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

47. The above clause was found by the DG to dilute the provisions of FSA and give advantage to the OPs as the difference between 50% of ACQ and the actual quantity allocated is also deemed as quantity delivered. Thus, the OPs safeguarded their position by incorporating such deeming provision in MoU.

48. The Commission observes that unlike DDQ clause in FSA, this

additional clause relating to DDQ was inserted in MoU which gives advantage to the OPs to consider the shortage in coal supply as DDQ. The condition in MoU is unfair in as much as the same was unilaterally imposed by CIL upon the Informant to safeguard its position and to further dilute the contractual obligations assumed by the parties under FSA. In these circumstances, the Commission is of opinion that such conduct is in contravention of the provisions of Section 4(2)(a)(i) of the Act.

Commitment Guarantee (CG) and Security Deposit (SD)

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

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

communicated to the Informant that in case of non-extension of validity period of CG, the same might be encashed by WCL.

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

52. It was, however, contended on behalf of CIL that the amount of SD is kept with it for the entire duration of the agreement in case of customers in non-power sector, to ensure seriousness and commitment of the buyer. A fine distinction was also sought to be drawn between different sets of buyers *i.e.* the buyers of coal in power sector and the buyers of coal for captive power plants. It was argued that while the power sector is a regulated sector which needs constant supply of coal, captive power plants only cater to their parent industry whose end-product is non-regulated. Therefore, it was argued that having greater level of commitment and assurance from such buyers cannot be termed as abusive.

53. From the series of events projected by the Informant, the Commission notes that the OPs issued a direction *vide* letter dated 12.09.2012 seeking

extension of validity period of CG with the threat of encashment thereof in case of non-compliance even though the failure to sign FSA was not attributable to the Informant and was on account of the OPs. Such a conduct is *ex facie* exploitative and in contravention of the provisions of Section 4(2)(a)(i) of the Act.

54. Further, it may be noted that the OPs are treating the buyers differently in respect of SD. In December 2012, CIL amended the provisions relating to SD. Prior to the amendment, SD was to be refunded only after the expiry of the agreement. The amended provision in the FSA, however, provided that the SD shall be refundable to the purchaser at the end of 30 days from the first delivery date. However, similar amendments were not made in case of other buyers like the Informant whose SD amount which is a non-interest bearing deposit is locked-in for the entire period of agreement. Thus, the condition relating to SD was found to be discriminatory by the DG. The Commission is in full agreement with the DG on this count as the difference in treatment with different class of buyers does not appear to be founded upon any justifiable basis.

55. Thus, the Commission notes that the OPs have contravened the provisions of Section 4(2)(a)(i) of the Act by imposing unfair and discriminatory condition relatable to SD in FSA upon the buyers such as the Informant.

Provisions relating to sampling, testing and grade of coal

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

57. In this connection, it may be noted that the Informant alleged that there

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

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

59. The Commission notes that no discernable logic has been provided by the OPs as to why such hostile discrimination has been made against the small buyers such as the Informant when it is self-evident that assessment of quality of coal has to be a necessary part of all FSAs irrespective of the size of the buyers. Resultantly, the Commission, in agreement with the DG, is of opinion that the OPs have imposed unfair

and discriminatory conditions relating to quality, sampling & analysis, stones and oversized coal upon the Informant in contravention of the provisions of Section4(2)(a)(i) of the Act. Further, the Commission also notes that on the issue of grade of coal also, there is no similar provision in the FSA entered with the Informant, as in the case of power producers for review of grade in case of continuous grade slippage. For the reasons given earlier, it needs no elaboration that the declared grade of coal is of great importance as the same is the basis of price/ bills for the entire year. Once the grade of coal is declared, the same remains basis for billing for that financial year. In the case of power producers, there is a provision for review of grade if there is continuous grade slippage (more than 3 months) in the coal supplied to the consumers. The purchaser may request the coal company for re-declaration of the grade of coal.

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

Conclusion

61. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys dominance in the relevant market of '*production and sale of non-coking coal to thermal power producers including captive power plants in India'*. The Commission also 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 and indulging in unfair/ discriminatory conduct in the matter of supply of non-coking coal, as detailed in the order.

62. Accordingly, the Opposite Parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act; 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 Informant herein.

63. 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), the Commission deems it appropriate not to impose any further monetary penalty upon the Opposite Parties.

64. 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