



COMPETITION COMMISSION OF INDIA

Case Nos. 55 & 56 of 2015

In Re:

Case No. 55 of 2015

M/s Gujarat Industries Power Company Limited (GIPCL)

P.O. Petrochemical, Baroda, Gujarat - 391346

Informant

And

M/s Gail (India) Limited

16, Bhikaji Cama Place, New Delhi - 110066

Opposite Party

WITH

Case No. 56 of 2015

M/s Gujarat State Fertilizers & Chemicals Limited (GSFCL)

Fertilizer Nagar, Baroda, Gujarat – 391750

Informant

And

M/s Gail (India) Limited

16, Bhikaji Cama Place, New Delhi - 110066

Opposite Party

CORAM

Mr. Ashok Chawla

Chairperson



Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. M. S. Sahoo
Member

Justice (Retd.) Mr. G. P. Mittal
Member

Appearances:

For GIPCL:

Ms. Ritwika Nanda, Advocate
Ms. Petal Chandhok, Advocate
Mr. Ashwin C. Shan, CS & DGM (Legal)
Mr. K. S. Munshi
Mr. Alok Krishna Agarwal

For GSFCL:

Mr. Dushyant Dave, Sr. Advocate
Mr. Gopal Jain, Sr. Advocate
Ms. Aayushi Sharma, Advocate
Ms. Misha Rohatgi, Advocate
Ms. Kunal Vyas, Advocate
Mr. A.T. Das, Dy. Manager
Mr. V.V. Vachchajami, V.P.





Mr. H. D. Dalsania, V.P.
Mr. K. K. Dagar, Sr. Manager
Ms. Swarnali Chanda, Legal Officer

For GAIL:

Mr. Ramji Srinivasan, Sr. Advocate
Mr. Kapil Kher, Advocate
Ms. Sara Sundaram, Advocate
Ms. Nitika Vaid, Representative of GAIL
Mr. Chandra Prakash, Manager (Marketing)

Order under Section 26(2) of the Competition Act, 2002

This order shall dispose of the informations filed by M/s Gujarat Industries Power Company Limited ('GIPCL') in case no 55 of 2015 and M/s Gujarat State Fertilizers & Chemicals Limited ('GSFCL') in case no. 56 of 2015 (hereinafter, the 'Informants') under section 19(1)(a) of the Competition Act 2002 (hereinafter, the 'Act') against M/s GAIL (India) Limited (hereinafter, 'OP') alleging, *inter alia*, contravention of the provisions of section 4 of the Act in both the matters.

2. The Informant in case no. 55 of 2015, GIPCL, is a public limited company incorporated under the Companies Act, 1956 and has been engaged in the business of power generation. It is stated that to operate its 310 megawatt gas based power plant at Vadodara, GIPCL requires continuous supply of Re-Liquefied Natural Gas (hereinafter 'RLNG') of 1.65 Million Metric Standard Cubic Meter per Day ('MMSCMD'). The Informant in case no. 56 of 2015, GSFCL, is a public limited company incorporated under the Companies Act, 1956 and has been engaged in business of manufacture of fertilizers and chemicals



सत्यमेव जयते



since 1962. It requires RLNG as one of the primary inputs for its production activities.

3. M/s GAIL (India) Limited, the Opposite Party in both the cases, is a company incorporated under the Companies Act, 1956 and is engaged in distribution and marketing of gas including exploration, transmission, extraction and processing of natural gas and related products in India. It is stated to own a huge pipeline infrastructure for transportation of natural gas in India, stretching 10,977 kms with a capacity of 210 MMSCMD. Further, OP has a pan India presence with its pipeline covering several states such as Andhra Pradesh, Delhi, Goa, Gujarat, Haryana, Karnataka, Kerala, Madhya Pradesh, Maharashtra, Punjab, Rajasthan, Uttar Pradesh *etc.* having a turnover of around Rs. 32,500 crores. It is stated to own world's longest exclusive Liquefied Petroleum Gas ('LPG') transmission pipeline in Gujarat running from Jamnagar to Loni.
4. Both the Informants purchase RLNG from M/s Petronet LNG Limited (hereinafter 'PLL') which procures RLNG from M/s Ras Laffan Liquefied Natural Gas Company Limited, Qatar (hereinafter, 'RasGas'). As per the information available on PLL's website, it is formed as a joint venture by the Government of India to import LNG and set up LNG terminals in the country. Its promoters are M/s GAIL (India) Limited (*i.e.*, OP), M/s Oil & Natural Gas Corporation Limited (ONGC), M/s Indian Oil Corporation Limited (IOCL) and M/s Bharat Petroleum Corporation Limited (BPCL). As per the recitals in the Gas Sales Agreement (hereinafter, 'GSA') of OP with the Informants, OP has entered into a gas sales and purchase agreement ('GSPA') with PLL to purchase natural gas following regasification of LNG at PLL's Dahej Terminal purchased from RasGas. The Informants, *vide* their respective GSAs, have agreed to purchase and receive a part of OP's share of natural gas received at the Dahej Terminal at the delivery point.



5. GIPCL and GSFCL have entered into GSAs with OP on 12.02.2004 and 17.01.2004 respectively, with similar terms and conditions. As per Article 9.3 of the GSA, mutual discussions were to be held between OP and its customers (Informants herein) to decide price of gas effective from 01.01.2009, but it is alleged that no such discussions were held. Both the Informants requested OP to provide them with a copy of draft GSA to be effective from 01.01.2009. The Informants were allegedly informed by OP that the agreements were non-negotiable. It was also urged that after 2009, OP continued to increase the price as the contract was silent on that point and ultimately in 2014 it became unviable for the Informants to operate on the prices set by OP. Thereafter, in 2015, OP raised huge demands running into crores of rupees for 2014 by invoking Article 14.1(c) of the GSA under the 'Pay if Not Taken Liability' as the Informants failed to off take the minimum guaranteed/ committed quantity of gas.
6. The Informants have alleged that OP has abused its dominant position and imposed arbitrary and one sided conditions on its consumers through GSA. The Informants have stated that OP has incorporated anti-competitive clauses in GSA by way of which it is trying to force the Informants to purchase a specified quantity of natural gas from it each year for a period of twenty years, failing which it is raising arbitrary demand for shortfall by way of off-take under the 'take or pay' clause introduced in the GSA. The Informants have also alleged that OP has adopted anti-competitive practices like unfair and discriminatory pricing.
7. Based on the above averments, the Informants have prayed that the Commission may investigate into the matter and direct OP to waive off the demands raised under 'Pay if Not Taken Liability'. It has been further requested that the clauses of GSA be declared null and void being in contravention of the provisions of the Act. The Informants have also sought interim relief in the matter.



सत्यमेव जयते



8. The Commission has perused the material placed on record in the present two cases and heard the Informants as well as OP through their representatives on 13.08.2015.
9. As per the facts available on record, it appears that the Informants, industrial consumers belonging to the priority sector, are primarily aggrieved of the alleged unfair and discriminatory terms and conditions in the GSAs for supply of natural gas. Now the issue is whether the Commission can scrutinize the GSAs under the provisions of section 4 of the Act which were entered into prior to the provisions of section 4 of the Act were notified on 20.05.2009. In any case where the alleged abusive conduct took place prior to 20.05.2009, the provisions of section 4 of the Act are not applicable, unless its effect is continuing post 20.05.2009.
10. In the present case, it is apparent that some of the terms and conditions in the GSAs with respect to both the Informants are one sided and tilted in favour of OP. At the outset, the Commission would like to point out that the GSAs in question were executed prior the relevant provisions of the Act (*i.e.*, sections 3 and 4) were notified. In case no. 55 of 2015, the GSA was entered into between GIPCL and OP on 12.02.2004 and was further renewed on 26.12.2008 alongwith certain modifications. In case no. 56 of 2015, GSA was entered between GSFCL and OP on 17.01.2004 and was further renewed on 26.12.2008 alongwith certain modifications. It may be noted that the two GSAs were evidently entered into before 20.05.2009. Therefore, provisions of the Act, being prospective in effect would not be applicable to the GSAs in present informations.
11. Further, the Informants have failed to provide any cogent evidence to highlight any anti-competitive conduct on part of the OP which occurred post 20.05.2009 *i.e.*, after the provisions of sections 4 of the Act coming into force. However, considering that the said GSAs were entered into for a period of 20 years and are in existence at present, the Commission analysed the terms and conditions of both



सत्यमेव जयते



the GSAs to gauge if they go against the principles of competition law as enshrined in the Act.

12. For the purposes of examining the allegations of the Informants under the provisions of section 4 of the Act, it is necessary to determine the relevant market. Relevant market is to be determined keeping in view the relevant product market and relevant geographic market. The Commission has dealt with similar issue in various earlier cases. In case no. 71 of 2012 (*Faridabad Industries Association (FIA) vs M/s Adani Gas Limited*), the Commission while examining the relevant product market categorised the consumers of natural gas into two different categories *i.e.*, industrial and domestic on the basis of intended use and the price of natural gas for each of these categories of consumers. It was opined by the Commission that 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.* Also, it was held that the price at which natural gas is supplied to these different consumer segments is different and the technical considerations involved in supply and distribution of gas to the different segments further necessitates a distinction to be made between consumers under the above categories. Similarly, in case no. 20 of 2013 (*M/s Saint Gobain Glass India Limited vs M/s Gujarat Gas Company Limited.*), the Commission elucidated the same principles while opining that natural gas is distinct and distinguishable from other sources of energy in terms of product's characteristics. The Commission had also segregated the relevant product market on the basis of price mechanism applicable to various segments of consumers *i.e.*, Administered Price Mechanism (APM) and Non-Administered Price Mechanism (Non-APM). It was noted that APM natural gas is meant for a select group of consumers such as consumers of power sector, fertiliser sector, consumers covered under court orders and those having allocation of less than 0.05 MMSCMD of natural gas, therefore it should not be clubbed with non-APM natural gas to form a single relevant product market.



13. The Commission notes that in the present cases, the prices of RLNG imported in the country by PLL are governed by the fuel oil linkages as part of the contracts signed between individual companies like RasGas and PLL¹. The end user price of RLNG is not subsidized by the Government of India and is a complex mix of various components such as purchase price, exchange rate, regasification charges, transmission charges, taxes, contractual risks, competing fuel pricing *etc.* Accordingly, the relevant product market in the instant case does not need categorization on the basis of pricing mechanism. Accordingly, the relevant product market in the present case would be market for ‘*supply and distribution of natural gas (RLNG) to industrial consumers*’.

14. As far the relevant geographic market is concerned, the Commission finds the relevant geographic market proposed by the Informants *i.e.*, ‘India’, is incorrect. It is understood that natural gas is generally transported through either city gas distribution network or through pipeline. The Commission observes that the laying down of city gas distribution network or pipeline is usually authorised by Petroleum and Natural Gas Regulatory Board (PNGRB) in every city/ state. The determination of relevant geographic market is therefore, dependent on the facts and circumstances of every particular case. While the city gas distribution network is confined to a particular city, a pipeline may pass through various states. The geographic market in the present case cannot be taken to be the whole of India but has to be limited to the particular geographic city/ State in which the actual consumer(s) are located. It may be noted that as per the preliminary analysis based on the information available in public domain, it appears that the city of Vadodara, where both the Informants have their respective plants, constitutes a separate and distinct relevant geographic market. It is so because the Informants cannot choose a supplier operating in a different city. From the suppliers’ side also, because of infrastructural constraints, it is not plausible that they can supply gas outside a particular city in which they are operating.

¹ This is based on the information available on GAIL’s (OP) website, available at http://gailonline.com/final_site/ratechart.html



सत्यमेव जयते



Accordingly, the geographic market in the present case appears to be ‘region of Vadodara’. Thus, the relevant market in the present case would be market for ‘supply and distribution of natural gas (RLNG) to industrial consumers in Vadodara.’

15. From the information available on record, it appears that OP holds a position of strength in the relevant market. As per the information submitted by the Informants, there are three major pipeline entities engaged in gas transportation across the country *i.e.*, OP, Reliance Gas Transportation Infrastructure Limited (RGTIL) and Gujarat State Petroleum Corporation (GSPCL). OP is operating the Hazira Vijapipur Jagdishpur (HVJ) and Dahejpur Vijaipur (DVPL) pipelines which constitute about 10841 km (about 70.67%). The recently commissioned Dhabhol-Banglore Pipeline is also owned and operated by OP. RGTIL is operating 1469 km (about 9.57%) East West pipeline (EWPL) to evacuate gas from KG-D6 gas in Andhra Pradesh. GSPL is mainly focused in the state of Gujarat consisting about 1874 km (about 12.22%).
16. The brief overview of the sector suggests that the pipelines operated by the three entities mentioned above are peculiar to the states through which they pass. Therefore, if one entity operates in one state and owns the infrastructure (*i.e.*, the pipeline) in that state, it faces no competition from other entities. As per the information available in public domain, there are two suppliers of natural gas in various regions of Gujarat, namely GAIL (*i.e.*, OP) and GSPCL. Further, as per the information available on the website of GSPCL, it does not supply in the city of Vadodara (Baroda). It has been stated on its website that GSPL is developing state-wide gas grid for supply of natural gas to customers and has already commissioned pipeline network of approximately 2084 km. GSPL is currently transporting about 36-38 MMSCMD natural gas. Presently the transportation is being carried out for industrial customers like power, fertilizer, steel ,chemical plants and also for downstream sector and gas is being made available upto



Mehsana, Himmatnagar, Rajkot, Jamnagar, Morbi, Mundra and Vapi from various source centers like Hazira , Dahej, Attakpardi and Bhadbhut.



17. It is apparent that GAIL is supplying to the Informants which have their plants located in the city of Vadodara. In view of the above discussion, the Commission is of the view that in the absence of any other major player *i.e.*, natural gas supplier in the city of Vadodara, OP *prima facie* appears to be dominant in the relevant market of ‘*supply and distribution of natural gas (RLNG) to industrial consumers in Vadodara*’.

18. The Informants have highlighted various terms and conditions in the GSA to allege that OP has abused its dominant position in the relevant market. It was alleged that the clauses *e.g.*, take or pay liability for annual contract quantity, unconditional letter of credit to be furnished by buyers, exorbitant prices charged by OP, refusal to furnish details regarding computation of price of RLNG, no provision of modification or termination, payment of full amount before resolution of disputes, continuous performance of obligations, OP exempted from its obligations during Force Majeure, etc. are unfair, one-sided and discriminatory in nature.

19. In case no. 55 of 2015, the Commission notes that by its letter dated 27.02.2015, OP invoked clause 14.1 of the GSA and made a demand of Rs. 49.81 crores out of a total liability of Rs. 237.93 crores which was due under the ‘Pay For If Not Taken’ liability. GIPCL by its letter dated 07.03.2015 requested OP to waive off the claim against the said liability. GIPCL also proposed to surrender the entire contracted quantity of long term RLNG for 2015 by its letter dated 06.04.2015. By another letter dated 08.05.2015, GIPCL informed OP that GIPCL has been unable to sell power generated by it to Grid Authorities and it is not possible to consume the contracted quantity of RLNG. Though OP expressed its inability, vide its letter dated 02.06.2015, to waive off the entire 237.93 cores but reduced the same to Rs. 49.81 crores and waived of the remaining though it was due.



20. In case no. 56 of 2015, the Commission notes that OP *vide* its letter dated 11.11.2013 proposed to revise the contracted quantity of RLNG due to the irregular consumption pattern of GSFCL. However, this proposal of OP was rejected by GSFCL by its letter dated 31.12.2013, wherein GSFCL categorically stated that its plants are running to full capacity and there is no need for revision of existing RLNG contract. Further, *vide* its letter dated 03.03.2015, GSFCL requested OP to waive off the claim against 'Annual Take or Pay' liability for year 2014 and also not invoke the same in future. *Vide* its communication dated 02.06.2015, though OP expressed its inability to waive off the entire 275.74 cores but reduced it to Rs. 105.45 crores. It was further clarified to the Informant by OP that the Informant can exercise the make-up gas facility for the shortfall in off take.

21. From the above material and letters/ emails exchanged between the Informants and OP, the Commission is unable to construe abusive conduct on the part of OP. Safeguarding commercial interest or invoking contractual clauses which were not unfair *per se* cannot be termed as unfair just because they are invoked by one of the parties to the contract. The GSAs, when they were entered into appears to have been entered into after thorough negotiations and discussions. Further, it is apparent from the records that OP had proposed to reduce the quantity of natural gas to be supplied to GSFCL by its letter dated 31.12.2013. However, this proposal was rejected by GSFCL by its letter dated 31.12.2013, stating that its plants are running to full capacity and there is no need for revision of existing RLNG contract. In such a scenario, if OP has invoked 'Pay for if not taken' liability under the GSA, it does not appear to be abusive. Further, in view of the fact that such liability was substantially reduced by OP shows that the behaviour of OP was rational and not arbitrary. The Commission also notes that there was a make-up facility available with the Informants.

22. Based on the aforesaid, the Commission is of the view that no case of contravention is made out against OP under section 4 of the Act. Accordingly,
C. Nos. 55 & 56 of 2015



सत्यमेव जयते



both the cases are hereby directed to be closed under section 26(2) of the Act. Further, it may be noted that in view of the *prima facie* order by the Commission under section 26(2) of the Act in the present cases, the prayer of the Informants regarding interim relief has become infructuous.

23. The Secretary is directed to inform all concerned accordingly.

Sd/-

(Ashok Chawla)
Chairperson

Sd/-

(S. L. Bunker)
Member

Sd/-

(Sudhir Mital)
Member

Sd/-

(Augustine Peter)
Member

Sd/-

(U. C. Nahta)
Member

Sd/-

(M. S. Sahoo)
Member

Sd/-

New Delhi
Date: 08/09/2015
C. Nos. 55 & 56 of 2015

(Justice (Retd.) G. P. Mittal)
Member
Page 12 of 12