COMPETITION COMMISSION OF INDIA

Case No. 63 of 2014

In Re:

Shri Saurabh Tripathy **Informant**

And

Great Eastern Energy Corporation Ltd. **Opposite Party**

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. U.C. Nahta
Member

Mr. Justice G. P. Mittal
Member

Appearances: Shri Sharad Gupta and Shri Vinayak Gupta, Advocates for the Informant alongwith Shri Saurabh Tripathy, Informant-in-Person.

Shri Ramji Srinivasan, Senior Advocate with Shri P. Ram Kumar, Shri Avinash Amarnath and Shri Tushar Bhardwaj, Advocates; Shri Amit Sharma, Head (Legal) & Company Secretary and Shri Amit Kumar, Deputy Manager (Legal & Secretarial) for Great Eastern Energy Corporation Ltd. ('GEECL'/ 'OP').

ORDER

1. The present information has been filed by Shri Saurabh Tripathy ('the Informant') under Section 19(1) (a) of the Competition Act, 2002 ('the Act') against Great Eastern Energy Corporation Ltd. (**'**the Opposite Party'/ OP/ 'GEECL') alleging *inter alia* contravention of the provisions of Section 4 of the Act.

Facts

2. Facts, as stated in the information, may be briefly noticed.

3. GEECL is a company incorporated under the provisions of the Companies Act, 1956, having its registered office at M-10, ADDA Industrial Estate, Asansol- 713305, West Bengal. Founded in 1993, it is stated to be the first commercial producer of Coal Bed Methane (CBM) gas in India and is engaged in exploration, development, production, distribution and sale of CBM gas. It currently owns 100% stake in two CBM gas blocks in Raniganj (South), West Bengal and Mannargudi, Tamil Nadu. In addition, it has a 25% participating stake in Raniganj (North) block along with Oil and Natural Gas Corporation (ONGC). The company started producing CBM gas commercially at Raniganj (South) block in 2007. It has an estimated 2.4 trillion tcf of original gas reserve in this block, spread over 210 square kilometres and hasproduced 88.02 million metric standard cubic meters (mmscm) in FY13. The company delivers CBM gas to more than 31 industrial consumers through its own pipeline network in Asansol-Durgapur industrial belt, which includes steel plants, steel rolling mills, glass, chemical and food industries.

4. The Informant is an employee of SRMB Srijan Ltd. (SRMB), a company incorporated under the provisions of the Companies Act, 1956, having its registered office at 7, Khetra Das Lane, Kolkata-700012, West

Bengal. SRMB is described as a leading rolling mill comprising two rolling units based out of Sagar Bhanga, Durgapur in Bardhaman district of West Bengal. The rolling process comprises of reheating of raw material *i.e.*, billets, slab *etc*. through a re-heating furnace at temperature in the range of 1000 degree celsius to 1200 degree celsius. The re-heated material is then channelled through various rolling stands divided into three zones *viz*. roughing zone, intermediate zone and convenient zone. Thereafter, the finished material reaches the cooling bed and final packaging happens after the cooling of the finished product. The fuels used in the re-heating furnace are furnace oil, coal, gas *etc*. It is submitted that SRMB is an intensive user of energy for its activities. Earlier, the source of energy utilized by it was coal. However, keeping in view the polluting nature of coal and various problems associated with its use, it shifted to a comparatively much cleaner fuel *viz*. CBM.

5. It is stated in the information that GEECL is in a dominant position in the relevant market of supply and distribution of CBM gas in Asansol-Raniganj- Durgapur belt. Further, it is alleged that GEECL by abusing its dominant position in the relevant market has put unconscionable terms and conditions in its Gas Sale and Purchase Agreement (GSPA) executed with the buyers such as SRMB. The Informant has alleged that GEECL besides imposing unfair conditions upon the buyers is also charging unfair and discriminatory prices. The alleged abusive terms of the agreement have been detailed in the information.

6. Based on the above averments and allegations, the Informant has filed the instant information against GEECL alleging abuse of dominant position.

Directions to the DG

7. This matter was referred to the Director General (DG) *vide* order dated 29.12.2014 passed under Section 26 (1) of the Act for investigation with directions to submit the investigation report. Accordingly, the DG conducted the investigation and submitted investigation report on 29.12.2015. Subsequently, an application dated 06.01.2016 was filed on behalf of OP in terms of the provisions contained in Regulation 35(10) of the Competition Commission of India (General) Regulations, 2009 against an order dated 28.12.2015 passed by the DG on the issue of grant of confidential treatment. This application stood disposed of *vide* order of the Commission passed on 25.02.2016 whereby the DG was directed to prepare confidential and non-confidential version of the investigation report in light of the directions contained therein. Accordingly, the DG submitted the non-confidential version of the investigation report to the Commission on 11.03.2016.

Investigation by the DG

8. To investigate the matter, the DG took the relevant market as "supply of CBM gas to industrial customers in the area of Asansol- Raniganj-Durgapur area". In this relevant market, the DG concluded that OP has been in a dominant position during the period 2009 to 2012.

9. The DG examined the clauses of GSPA executed between OP and SRMB. Comparison was also made with the corresponding clauses of GSPAs executed by OP with other industrial consumers of CBM in the contemporary period to analyse the relevant issue at hand. On the basis of analysis of the clauses of GSPA, the DG opined that the following clauses of GSPA executed between OP and SRMB appeared to be unfair/ discriminatory and one-sided in favour of OP and accordingly, in contravention of Section 4(2)(a)(i) read with Section 4(1) of the Act:

a) Clause 2.0 empowering OP to unilaterally revise the terms and conditions of GSPA after expiry of the initial period of one year;

b) Clause 4.4 giving the power to OP to appoint third party inspector in case of any dispute about tampering with gas metering equipment;

c) Clause 5.2 imposing MGO liability on the industrial consumers;

d) Clause 6.1 about non-linkage of gas price to the calorific value;

e) Clause 8.2 casting no liability (including payment of differential cost of fuel) upon the OP, towards the industrial customers for the losses suffered by them if there is stoppage of CBM supply by OP;

f) Clause 9.2 stipulating *force majeure* conditions with discriminatory conditions of action due to labour at the end of the SRMB;

g) Clause 11.2 regarding discrimination in interest payment on overcharged amount and giving no right to terminate GSPA to SRMB; and

h) Clause 15.0 empowering OP to terminate GSPA in case of non-payment of dues by SRMB.

10. So far as the allegation regarding the discriminatory pricing of gas by OP to various industrial customers was concerned, it was noted by the DG that the prices charged by OP cannot be said to be discriminatory owing to the varying terms and conditions of the relevant agreements, location of the consumers concerned, the quantity of off-take of gas *etc*.

11. Based on the evidences/ material/ statements of parties discussed in the

report, it was concluded by the DG that OP has violated provisions of Section 4(2)(a)(i) read with Section 4(1) of the Act. Lastly, the DG also identified the persons for the purposes of Section 48 of the Act.

Consideration of the DG report by the Commission

12. The Commission in its ordinary meeting held on 29.03.2016 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto.

Replies/ Objections/ Submissions of the Parties

13. The parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions. The same shall be referred to while examining the points arising for determination.

Points for determination

14. Before adverting to the points arising for determination in the present case, it is necessary to deal with preliminary objections/ submissions made on behalf of OP challenging the maintainability of the present proceedings. It was argued by OP that an unrelated third party has alleged and challenged imposition of unfair terms and conditions in a contract signed between two commercial entities, even when the entity which has signed the contract itself has not complained before the Commission. The Informant has throughout submitted that he is an employee of SRMB. However, he has not been authorised by SRMB to file this information. In fact, by the Informant's own admission, neither SRMB nor any of GEECL's other customers has raised any complaint before the Commission in relation to any purported abuse of dominance by GEECL. Given this admission, the DG has committed a grave error

by treating the Informant and SRMB interchangeably. The DG has relied on the submissions of the Informant regarding proceedings between GEECL and SRMB and has drawn adverse inferences against GEECL. The Informant is an unrelated third party who would not have had knowledge of the proceedings between GEECL and SRMB. Furthermore, the DG has failed to examine the Informant on oath to establish his knowledge of the facts of the case. The case at hand should be differentiated from a situation where a public spirited person files an information before the Commission keeping the larger consumer interests in mind. In the present case, the Informant has raised a purely private grievance *qua* a single private party which he has no *locus* to raise and which that private party is also not raising. It is not the Informant's case that GEECL generally imposes abusive terms in the market; rather, the allegation is that a specific contract entered into between GEECL and a specific customer is abusive. It was, however, submitted that whilst there is no strict *locus standi* requirement to file an information under the Act, the Commission cannot allow itself to be used by meddlesome interlopers to interfere and modify contractual terms voluntarily entered into between commercial entities. In *Hiranandani Hospital* v. *CCI* & *Anr.*, the Hon'ble Competition Appellate Tribunal has held that "*...even though the Act does not prescribe any qualification to identify the locus of an Informant, the Commission is expected to act with caution where the Informant is a third party or a busy body, who may be espousing the cause of someone else with ulterior motive*" (emphasis added) [Para 25 at P. 81 of the judgment].

15. The Commission has carefully noted the preliminary submission made by OP in regard to the *locus* of the Informant to institute the present proceedings. Admittedly, under the scheme of the Act, any person may approach the Commission with an information bringing to the notice of the Commission any anti-competitive conduct in the market. It is not

necessary for such a person to be personally aggrieved of such a conduct. This is also the scheme of the Act. In the present case, the Commission notes that the Informant has virtually challenged the entire agreement making various allegations from purely theoretical and academic perspective. This is further evident from the fact that SRMB *i.e.* the buyer who executed the agreement with OP itself has not alleged anything and has also not otherwise come forward to impugn the terms. Moreover, SRMB does not even appear to have authorised the Informant to file this information on its behalf. However, as the Commission has examined the matter on merits and therefore at this point of time when a detailed investigation has already taken place and parties have been heard at length, it is not necessary to dilate any further on this aspect.

16. Thus, the Commission proceeds to examine the matter on merits.

17. On a careful perusal of the information, the report of the DG and the replies/ objections filed thereto and submissions made by the parties thereon and other materials available on record, the following issues arise for consideration and determination in the matter:

(i) What is the "relevant market" in the present case?
(ii) Whether OP is in a dominant position in the relevant market?
(iii) If so, whether OP has abused its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act?

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

18. Essentially, the Informant who is an employee of SRMB has filed the instant information against GEECL alleging abuse of dominant position in the relevant market of supply and distribution of CBM gas in Asansol-Raniganj- Durgapur region. It is the case of the Informant that GEECL by abusing its dominant position in the relevant market has put

unconscionable terms and conditions in GSPA executed with the buyers such as SRMB. The Informant has alleged that GEECL has imposed unfair conditions upon the buyers besides charging unfair and discriminatory prices. The alleged abusive terms of the agreement have been elaborated in greater detail in the information.

19. The DG concluded that the relevant market in the instant case would be the "market for supply of CBM to industrial customers in Asansol-Raniganj-Durgapur industrial area".

20. GEECL, however, submitted that the correct relevant market should have been the market for all fuels such as CBM, Coal (gassifier), furnace oil, LDO, LPG, naphtha, propane gas, petrol, diesel and electricity in an area wider than Asansol-Raniganj-Durgapur industrial area.

21. It was further submitted that the Commission's previous findings that natural gas constitutes a separate product market cannot be treated as precedent in the instant case as the geographic area and the facts in this case are different from previous cases. It is a well established principle of competition law that the relevant market must always be defined with reference to the facts prevailing at the time and not by reference to precedents. In support of its plea, GEECL pointed out that there was actual evidence of customers switching from CBM to alternative fuels (13 customers) and *vice versa* (35 customers), which was submitted to the DG. It was argued that SRMB itself was using coal gassifier before switching to CBM supplied by GEECL. After submission of information to the DG, two more customers are stated to have shifted from CBM to alternative fuels. It was alleged that the DG has rejected this evidence on irrelevant grounds. Further, it was pointed out that information was submitted before the DG from an independent third party stating that the cost of switching (from CBM to alternative fuels and *vice versa)* is minimal, which was not considered by the DG.

22. The Commission has considered the plea of OP on the relevant market in light of the findings recorded by the DG.

23. To begin with, it may be observed that the DG identified the relevant product market in light of the factors mentioned in Section 19(7) of the Act. In this connection, DG first took into account physical characteristics or end-use of goods as a criterion to determine the relevant product market and it was noted that coal bed methane is mainly methane gas extracted from coal deposits. It is a member of the hydrocarbon gas family which includes LPG and Natural gas. These gases produce different amount of heat and can be put to industrial or commercial use. The rolling mills have been using coal in the past as a primary fuel for heating the furnace. In some cases, furnace oil and LDO are also used. It was, however, pointed out that owing to several advantages of CBM over other fuels, there has been a growing preference for CBM. It was also pointed out that the process of extraction process of CBM from the mines is entirely different from other hydrocarbons.

24. In regard to price of fuels, it is seen that price of CBM is much less in comparison to other fuels. This is evident from the indicative pricing of different fuels as tabulated below by the DG:

Table-1

S. No.	Fuel Type	Calorific Value (kcal/ kg)	Indicative Pricing USD per mmbtu
1.	Coal	4000	3-5
2.	LNG	12300	12.3
3.	LDO	10530	29.47
4.	Furnace Oil	9041	22.62
5.	CBM	8500	3-8

25. In this connection, it may be noted that as per Government pricing policy for mineral fuels, it (Government) administers natural gas prices whereas CBM has been allowed to be priced by the market. Even the Income Tax rules treat CBM as a different class, which enjoys incentives due to its unconventional nature and high investment requirement. Therefore, pricing of CBM is not similar to the pricing of other gas fuels.

26. While ascertaining the consumer preference, it is observed that consumers prefer fossil fuel gases over other liquid or solid fuels like coal, diesel, LDO, furnace oil *etc*. due to the less polluting nature of gases. However, the most significant factor in the choice of fuels by industrial consumers like SRMB is the price of fuel. This fact is found to be corroborated by the statements of third parties who are consuming CBM in the area. These statements have been extracted in the Investigation Report at pp.43-44.

27. Furthermore, DG has noted that in the Asansol-Raniganj-Durgapur industrial area there is no other piped gas supply except CBM. Other fuels used by the industries for firing the furnaces are coal, furnace oil, LDO, LPG and Coke oven gas. It was noted that though coal is available from Coal India Ltd. through auction at a lesser price as compared to other fuels, yet due to logistical and environmental problems, industries prefer piped CBM. Furnace oil is a petroleum product and is available in abundant supply from the oil marketing companies. However, its price was stated to be high and it varied fortnightly in line with the petroleum prices. LPG was also available but it is comparatively costly for the industries and is used only in small quantities in a contingency. The DG has dealt with the submission of OP that CBM is easily interchangeable and substitutable with other fuels and rejected the same by noting that it is possible that the industries in the area can use other fuels like LPG, LDO, furnace oil in place of CBM. However, looking at the price

difference and the statements of third parties, it is clear that other fuels are used only as stop gap arrangement and not as a regular fuel. Therefore, it was opined by the DG that these may not be substitutable for the purpose of competition law analysis. Further, on the contention of OP on switching of fuels, DG has referred to Para 10 Sec. II of the Draft Red Herring Prospectus of OP itself which came out in 2009 wherein it was mentioned that there are costs required to switch from other fuel sources to natural gas.

28. While examining the demand side substitutability, it was noted by the DG that several third parties stated in their depositions that they would not switch to other available fuels even if the gas prices were raised 5-10% by the supplier. From this, it was inferred by the DG that CBM is not substitutable with other fuels for the industrial consumers of the area. It was, however, noted that applying small but significant and non-transitory increase in price (SSNIP) test in the present case may not yield meaningful outcome due to the peculiar nature of the market *i.e*. inelastic nature of demand. Further, it was noted that price is not dependent on a global market benchmark but is based on mutual negotiations and is usually fixed for a year or more. Also, there are no close or perfect substitutes to CBM in the area concluded the DG.

29. So far as the dual fuel arrangement plea of OP was concerned, it was noted by the DG that such arrangements are due to technical requirement owing to uncertainty in supply of CBM. It was noted that the industries need to keep stop gap arrangement in case of emergency so that their plants are not shut. For such emergencies, even much costlier fuel like LPG may be used for short periods. But these cannot be regular fuels. Resultantly, it was concluded that the dual fuel arrangement may not suffice as arrangement of substitute fuel on a regular basis. Further, DG did not find that CBM prices are constrained by prices of alternate fuels and also added that merely indexing the price of one product with that of

another may not make the products substitutable.

30. In view of the above discussion and on a careful perusal of the analysis conducted by the DG, Commission is of considered opinion that CBM cannot be regarded as interchangeable or substitutable by the consumers with any other fuel and accordingly, the relevant product market may be defined as "*market for supply of CBM to industrial customers*".

31. On the issue of relevant geographic market, it was noted by the DG that there are no distribution network of natural gas in the Asansol-Raniganj-Durgapur industrial belt. Further, it was noted that there is a cluster of industries in Asansol-Raniganj-Durgapur which is not bordering any other area which is so industrially dense. The consumer preference for CBM in comparison to other available fuels is due to price, logistics and environmental concerns and CBM suppliers are located in the vicinity in Asansol-Raniganj-Durgapur industrial belt providing supplies and after-sales services.

32. For the reasons given by DG and as noted above, Commission agrees with the delineation of the relevant geographic market by the DG which may be determined as the Asansol-Raniganj-Durgapur industrial area.

33. Resultantly, the relevant market in the instant case may be determined as 'market for supply of CBM to industrial customers in Asansol-Raniganj-Durgapur industrial area'.

Issue No. (ii): Whether OP is in dominant position in the relevant market?

34. The DG found OP to be in a dominant position in the relevant market for supply of CBM to industrial customers in Asansol-Raniganj-Durgapur industrial area.

35. Challenging the findings of DG on the issue of dominance, OP, in line with its stance on the relevant market, argued that GEECL is not

dominant in the wider energy market. In the relevant market identified by GEECL, its market share is 0.40% by volume of the overall energy market. GEECL is a relatively new entrant in a market dominated by established fuel suppliers such as CIL, IOCL, BPCL and HPCL. It has no financial strength compared to these players who possess huge resources. GEECL has incurred significant capital expenditure (approx. INR 1560 crores) which it is yet to recover and its net cash generation is still negative. Out of approximately 1076 industrial units in this area, GEECL had only 33 customers as of 2011-12. Further, it was submitted that DG should have also examined the issue of dominance post-2012 when Essar entered the market and garnered a significant market share in a short span of time.

36. Without prejudice to GEECL's position that the relevant market is wider, it was argued on its behalf that there are several defects in the DG's analysis of dominance even in the so-called narrower CBM market.

37. In this regard, it was submitted that GEECL cannot act independently of its customers. The DG has failed to satisfy definition of 'dominance' under the Act as GEECL is not able to act independently of its customers as evidenced by the fact that even smaller customers are able to negotiate terms and conditions with GEECL. The evidence has been summarily rejected by the DG. Further, GEECL cannot dictate terms even to smaller customers as will be seen from the analysis of the prices agreed with the top 10 and bottom 10 customers of GEECL. This shows that all the GEECL's top 10 customers and 7 out of 10 of GEECL's bottom customers, have had a negotiated fixed price arrangement *i.e.* the price of gas is fixed for a certain period of time before being re-negotiated. This shows their countervailing buyer power. Thus, GEECL is not able to squeeze or dictate terms to smaller customers, leave aside the big customers.

38. Specifically, OP has referred to the negotiations held with SRMB. It was pointed out that GEECL offered the draft GSPA for SRMB's comments. There were as many as 5 versions of GSPA that were exchanged between GEECL and SRMB. SRMB had full opportunity to raise the concerns it had in relation to the clauses of GSPA during these negotiations. It was only after detailed negotiations with SRMB that GSPA was finalised on 11.05.2011. In fact, perusal of GSPA would show some of the last minute hand written changes made by SRMB including an exit option after one year.

39. It was further contended that SRMB was not in a 'take-it-or-leave it' situation and that there was a fundamental logical inconsistency in the Informant's story. The Informant has attempted to give a picture that after incurring costs of switching to CBM gas, SRMB was locked in and GEECL exploited this situation by imposing unfair terms and conditions in GSPA to the detriment of SRMB. The fact is that when SRMB and GEECL were negotiating GSPA in 2011, SRMB had, by that time, not incurred any cost for switching over to CBM. At that time, if SRMB was aggrieved with the terms and conditions of GSPA, it could have either: a) negotiated these terms and conditions with GEECL and have these clauses modified; or b) not procured CBM gas and continued using the fuel it was using earlier *i.e.* coal (gassifier). There was no lock-in of SRMB at the time of negotiation of the contract. SRMB did neither and instead, based on its own commercial considerations, signed GSPA voluntarily with open eyes as it was beneficial to SRMB at that time. In fact, SRMB, in its deposition before the DG admits that "in the year 2011, GEECL approached us to enter into agreement for sale of CBM gas at attractive commercial terms". Further, SRMB continued to procure CBM gas under these terms and conditions for over 3 years until 2014. No new substantive terms and conditions were introduced into GSPA during this period. Yet, against all logic, the same terms which

were admittedly commercially attractive in 2011, suddenly became abusive, one-sided and unfair in 2014. In any event, in 2012, as per the terms of GSPA, SRMB had a right to exit the contract if the price revision was not acceptable to it. SRMB chose not to exercise this option and continued procuring gas under GSPA. Only in 2014, after it had started negotiations with Essar, did SRMB request that the MGO liability in GSPA be removed. GEECL was willing to accede even to this unilateral demand but subject to a price increase to cover its own commercial risks; however, SRMB rejected this offer. Despite this, GEECL was agreeable to lower the MGO liability from 80% to 75% of the prevailing price. If GEECL was dominant, it could have easily adopted an inflexible approach towards SRMB and refused to modify any of the terms and conditions of the contract. However, it is evident that GEECL was constantly willing to modify its terms and conditions at SRMB's request and therefore, did not possess any negotiating power *vis-a-vis* SRMB. In addition, it should be noted that the DG has found that GEECL was in a dominant position only between 2009 and 2012.

40. Criticism was also made by GEECL of DG excessively relying upon market share. It was pointed out that DG has relied excessively on market share and that other factors under Section 19(4) of the Act have not been analysed in the proper context. DG has mechanically found that since GEECL was a monopoly in the so-called market for CBM gas, it is in a dominant position. It is a well-established principle of competition law that market shares are only a starting point for the analysis of dominance and cannot be the sole criterion. In *Saint-Gobain Glass India Limited* v. *Gujarat Gas Company Limited*, the Commission found that Gujarat Gas was not dominant on the basis that one customer had switched from Gujarat Gas to a competing supplier. In the present case, there is evidence that as many as 13 customers have switched from CBM gas to alternative fuels.

41. Lastly, on the issue of dominance, it was submitted that GEECL has no financial strength. The DG has relied on financials as reported in the annual reports to show GEECL's financial strength. Mere profitability on the books of accounts cannot lead to an inference of dominance. A more accurate measure is the net cash generation which has been negative till date for GEECL. This shows that GEECL is still in the process of recovering its initial capital investment. Further, GEECL has had to flare up to 28.48% of the gas produced in 2015-16 as it had no market for the same in the face of competing products.

42. The Commission has carefully considered the submissions made on behalf of OP on the issue of dominance.

43. The DG has proceeded to analyse the issue of dominance of OP in the relevant market in light of the factors enumerated in Section 19(4) of the Act. In this connection, it was noted by the DG that OP was the first producer of CBM gas in the country in 2007, and it started supplying in the Asansol area in 2009. Its only competitor Essar, started supplying gas only in 2011-12. Therefore, during 2009-2012, OP enjoyed 100% market share in the relevant market during the relevant period when the agreement was entered into (11.05.2011) between GEECL and SRMB for supply of CBM purportedly imposing unfair/ discriminatory terms.

44. Referring to the size and importance of the competitors, it was pointed out by the DG that OP started supplying gas from 2009 and till 2013, there was no competitor in the relevant market. Essar Oil & Gas Ltd. entered the market in the year 2011-12. It has 15 customers as of July 2015. As such, it does not appear to pose any competitive constraint on OP. In any event, OP enjoyed monopoly in the market from 2009 to 2012 including the year *i.e.* 2011 when the agreement was entered into.

45. Furthermore, it was noted that during the period 2009-2012, the

consumers of CBM gas in the relevant market were solely dependent on OP for their needs of gas.

46. The DG has also referred to other factors such as size and resources of the enterprise, economic power of the enterprise including commercial advantages over competitors, vertical integration of the enterprise, entry barriers, countervailing buying power *etc*. and concluded that OP enjoyed position of dominance during the period 2009-2012 in the relevant market of supply of CBM to industrial consumers in Asansol-Raniganj-Durgapur area.

47. Looking at the market share and number of players, dependence of consumers during the relevant time upon OP in the relevant market and other factors as analyzed by the DG, Commission is of opinion that at *the relevant time* (2009-2012), OP was enjoying dominant position in the relevant market which enabled it to operate independently of competitive forces prevailing in the relevant market and affect its competitors or consumers/ the relevant market in its favour.

Issue No. (iii): If so, whether OP has abused its dominant position in the relevant market in contravention of the provisions of Section 4 of the Act?

48. Various clauses of GSPA between SRMB and GEECL are examined in *seriatim* which have been alleged to be unfair and one-sided by the Informant in light of the conclusions drawn by the DG thereon. As noted earlier, DG has examined the clauses of GSPA executed between OP and SRMB. However, comparison was also made with the corresponding clauses of GSPAs executed by OP with other industrial consumers of CBM in the same period to analyse the relevant issue at hand. On the basis of analysis of clauses of GSPA, the investigation has opined that various clauses of GSPA executed between OP and SRMB are unfair/ discriminatory and one-sided.

Period of Contract

49. Adverting to clause 2.0 of GSPA, it was vehemently contended by the learned counsel appearing on behalf of the Informant that the same is unilateral and arbitrary as it empowers the seller to revise the terms and conditions contained in GSPA without any role for the buyer to negotiate. To examine the contention, it would be appropriate to excerpt the clause:

> *2.0 Period of Contract*
> *This CONTRACT shall come into force from the date it is signed. ...*
>
> *This CONTRACT shall remain in force till twenty five (25) years subject to revision of terms and conditions including price as mentioned in clause 10.1. The SELLER reserves the right to review and may revise the terms and conditions contained herein including price of the GAS after expiry of fixed price period as defined in clause 10.2.*

50. As far as the duration of the agreement (25 years) is concerned, DG did not find anything which indicated any form of coercion. However, as far as the last part of the clause is concerned, it was noted by the DG that it allowed OP to unilaterally revise the terms and conditions of the contract after expiry of initial period of 1 year without concurrence of the buyer. Hence, last part of the clause was noted by the DG as an unfair condition.

51. The DG has pointed out that this clause is common in all agreements of GEECL except the two agreements with M/s Shyam Steel wherein the revision can be done after a mutual agreement with the buyers.

52. The Commission is of the considered opinion that DG has misread the

agreement while returning the aforesaid finding. It may be observed that the DG found this clause to be unfair as it allows power to GEECL to alter the terms of the contract. The Informant agrees with the conclusion of DG and has further argued that this clause is discriminatory because while SRMB's agreement has this condition, two of the other agreements of GEECL with other customers, do not have this condition. On an holistic reading of the agreement, it may be noted that Clause 2 does not imply that GEECL can revise terms of the contract without the concurrence of the buyer. In fact, Clause 18 of GSPA specifically provides that either party can propose any amendments to the contract and such amendments can only be made by mutual consent. For ready reference, the same is noted below:

> *Clause 18.0 Amendments*
> *Any amendments to any of the clause of the CONTRACT shall be proposed and sent in writing to the other party by the party proposing such amendment and if both the SELLER and the BUYER agree to such amendment, then the same shall be incorporated in the CONTRACT.*

53. Thus, SRMB could have proposed an amendment if it so wanted to the agreement under Clause 18. Moreover, as found by the DG, amendment to the price after 1 year from the date of signing was made on a mutual agreement by both the parties. If SRMB was not agreeable to the price revision, it had the right to exit the contract. Therefore, there is no case that this clause allowed GEECL to unilaterally revise terms and conditions. Further, the Commission notes that there is no question of discrimination as the terms with other customers have been entered into individually after negotiations.

Delivery and Pressure of Gas

54. It was submitted on behalf of the Informant that the following sub-clause in clause 4 is widely worded and as it confers upon the seller absolute

power to decide on the defects in arrangement or gas using equipments at the buyer's end and to also further decide whether the defects have been properly rectified or not:

> *4.0 Delivery and Pressure of Gas*
>
> *4.2 The BUYER shall make all proper and adequate arrangements for receiving GAS at the outlet of Gas Metering cum Regulating Station at his own risk and cost. Should any defect in the BUYER'S intake arrangements or gas using equipments arise, the same shall be rectified by the BUYER. The SELLER shall have an option to stop supply of GAS to the BUYER without any notice to the BUYER when an emergency and/or safety issue arises otherwise a week notice shall be given by SELLER to BUYER to rectify the defects in arrangement or gas using equipments, the decision with respect to which shall be that of the SELLER alone and the same shall be absolute and binding upon the BUYER. The BUYER shall also make provision for DUAL FUEL intake arrangements at his own risk and cost.*
>
> *Notwithstanding the stoppage of supply as aforesaid the BUYER shall continue to be liable to pay for the Minimum Guaranteed Offtake (MGO) of GAS in accordance with Clause 5.2 hereof irrespective of the fact of stopping of supply of GAS by the SELLER on account of defect or unsafe operation in the BUYER'S intake arrangements or gas using equipment.*

55. The DG in his investigation did not find the clause to be unfair or onerous for the buyer. The DG notes that this clause appears in all the agreements of GEECL and is meant to ensure quick rectification of the defect in the equipment at the buyer's end. Besides, it was noted that this also appeared to be an effort by the seller to plug the loophole which may be used by buyers to stop taking gas.

56. The Commission notes that in case of fault in the gas intake arrangement of the buyer which could give rise to security of supply, OP has kept the option to stop supply without any notice. Otherwise, a week's notice is to be given before stoppage. Moreover, in case of fault in buyer's equipment, MGO liability would continue.

57. No unfairness is thus seen in this clause and the same appears to be justified commercially.

58. Further, the Informant has referred to the following sub-clause 4.3 of the agreement and has argued that it exempts the seller from its responsibility for any production loss or any kind of losses attributable to the functioning of the equipment/ installations. It is alleged by the Informant that the very acceptance of such terms by the buyer is a pointer towards the abusive behavior of a dominant enterprise which is taking undue advantage of the compulsion of the buyer.

> *4.3 The BUYER under no circumstances shall sublet/ lease/ sell/ create a change over on part or whole with the gas-related property at any given time, without the prior written consent of the SELLER.*
>
> *Any production losses or any kind of losses whatsoever attributable to the functioning of the equipment /installations mentioned in 4.2 for any reason whatsoever shall, in no way, be the SELLER's responsibility and accordingly the SELLER shall not be held responsible for any such losses or damages in any circumstances.*

59. The DG in his investigation has not found the clause unfair or discriminatory. It was noted by the DG that though the gas meter is seller's property, it is installed in the premises of the buyer and the buyer

exercises significant control over the access and operation of the equipment. The seller is required to insulate itself from the risk of damages to equipment which is installed in the premises of another entity. Further, it was noted that prudent practices require the consumers to take all steps to insulate themselves from all possible losses arising out of breakdown in supply of CBM which may occur due to malfunction of gas metering equipment. Moreover, this clause was found in all the agreements executed by OP.

60. In view of the above reasons, Commission notes that this clause also does not appear to be unfair or discriminatory and as such does not contravene the provisions of Section 4 of the Act.

61. Further, the following sub-clause 4.4 has been alleged to be abusive by the Informant:

> *4.4 Notwithstanding anything contained in any of the clauses of this contract, in case the BUYER is found to have tampered with the gas metering equipment, the gas supply to the BUYER will be immediately discontinued by the SELLER at his absolute discretion. An Inspection of the metering system & related pipeline shall be carried out by SELLER and his decision in this regard shall be final. However, if BUYER does not agree with the decision of SELLER, the BUYER may ask in writing for a third party inspection. SELLER will then appoint a third party to do inspection and ascertain the cause of tampering and decision of such third party will be binding on both the parties. All expenses of such third party will be borne by BUYER. The BUYER shall pay the penalty and losses occurred or occurring to the SELLER before resumption of the supply. If the amount is not paid by the BUYER within 7(seven) days from the receipt of Debit Note from the SELLER, this contract shall be liable to be terminated at the absolute discretion of the SELLER and the*

equivalent amount shall be deducted from the deposit given to the SELLER by the BUYER.

62. This clause was noted by the DG to be both discriminatory and unfair. The DG finds this clause to be unfair as GEECL retains the right to appoint a third party inspector in case of suspected tampering of the gas metering equipment. Further, DG also finds that the clause is discriminatory as the contract for one other customer provides that the third party inspector is to be appointed in consultation with the buyer. The Informant agrees with the conclusion of the DG and argued that this clause is discriminatory as another customer has been given more favourable terms under this clause. Furthermore, it has been argued that the clause is unfair as there is no methodology prescribed for calculating the penalty for tampering. Finally, it was pointed out that there is no provision for consequences for tampering by the seller *i.e*. GEECL.

63. The Commission, however, notes that in case of suspected tampering of the gas metering equipment, GEECL has to refer the metering equipment to the meter manufacturer who will get the meter calibrated by a third party inspector accredited by the National Accreditation Board for Testing and Calibration Laboratories ("NABL"). NABL accreditation is the accepted industry standard for testing and calibration laboratories. Furthermore, it may be noted that such clauses are a commonplace in commercial contracts. In this regard, reference is made to Clause 7 of GSPA which provides for annual calibration of the gas meter through a NABL accredited laboratory at GEECL's expense and thus, provides for a mechanism for the buyer to check the accuracy of the meter. It appears that SRMB has never requested for the calibration certificate of the meter. In any event, SRMB always had a recourse available under Clause 14 of GSPA which provides for an arbitration mechanism in case of any disputes in relation to GSPA. So far as the discriminatory nature of the terms is concerned, suffice to note that this may not hold as the terms are negotiated individually with each customer. Moreover, there is

no evidence to the effect that SRMB requested appointment of the third party inspector to be done jointly and GEECL refused it. No penalty has, in fact, been ever levied on SRMB and therefore, its concerns regarding methodology for calculation of penalty appears to be academic and theoretical. Moreover, in case of any dispute regarding the penalty amount, SRMB always has recourse to the arbitration clause under the contract. The likelihood of tampering by GEECL does not arise as the gas metering equipment is located in the premises of the buyer and the access to the same is also controlled by it. Thus, the contention of the Informant is more imaginary than real.

Quantity of Gas

64. The clause dealing with quantity of gas which *inter alia* deals with MGO liability of customers under GSPA and which is alleged to be abusive by the Informant is as under:

> *Clause 5.0 Quantity of Gas*
>
> *5.1 Subject always to the availability of GAS and SELLER's ability to supply the same to the BUYER, the SELLER agrees to sell the GAS on FIRM BASIS to the BUYER, to be used by the BUYER as Fuel solely for its own business purposes subject to the maximum of 35000 (Thirty Five Thousand Only) STANDARD CUBIC METERS per day (SCMD) and a total monthly of 910000 SCM (Nine lakh ten thousand only) STANDARD CUBIC METERS per month (considering 26 working days in a month) hereinafter called as Contracted Quantity. The supply of gas shall be at an even flow rate spread over a period of 24 hours and the BUYER agrees to use at the same rate. However, supply of GAS may be reduced due to technical, production, interruption or other reasons.*
>
> *In case the period of reduction in supply or stoppage in gas supply from the SELLER side lasts for continuous period of*

more than 3 (three) months, then either party (BUYER or SELLER) shall be free to terminate the contract by a written notice of (fifteen) days to the other party.

5.2 Subject to clause 8.3 & 9, in case the SELLER is ready and able to supply the Contracted Quantity of GAS but BUYER purchases GAS less than the k% of the Contracted Quantity or on account of stoppage of supply by the SELLER as prescribed under clause 4.2 results in purchase of GAS less than k%, then BUYER shall have to pay to the SELLER for his quarterly minimum quantity (hereinafter termed as 'Minimum Guaranteed Offtake i.e. MGO') of k% of contracted quantity. The MGO will be applicable after 45 days from the commencement of supply of CBM gas, will be known as 'Reading Period'. At the end of Reading period, buyer may amend the Contracted quantity, based on actual consumption of CBM gas during such period. In case of stoppage or interruption or reduction in gas supply from the SELLER's side as mentioned in clause 5.1, 8.0 and other clauses, the Minimum Guaranteed Offtake will be reduced on pro-rata basis, considering no. of days in a quarter when the supply to the BUYER was less than k% of the daily quantity mentioned in 5.1 due to reduction or stoppage of supply the SELLER. For eg. in a quarter if the quantity of gas supplied to the BUYER is less than k% of daily requirement mentioned in 5.1 for N days due to reduction or stoppage of supply by the SELLER, Minimum Guaranteed Offtake for the quarter will be as under:

MGO = Daily Contracted Quantity x (no. of days in a Quarter- N) x k
Where;
k = 80%
No. of days in a quarter is 75 days

The BUYER undertakes to pay for such Minimum Guaranteed Off take or for actual quantity used during the quarter, whichever is higher.

In the event of shortfall in supply of gas less than MGO level and due to this the BUYER has to use alternate fuel, the SELLER agrees to compensate the BUYER with the differential cost, which BUYER had to actually incur over and above the agreed gas price (with proof of purchase). The SELLER's liability in case of differential cost will be maximum to the agreed price of gas and the differential cost will be calculated on the basis of quarterly reconciliation. This will be settled through credit note by the SELLER to the BUYER in subsequent invoices.

65. The DG noted that MGO liability imposed on the customers by OP was both unfair and discriminatory. However, it was noted by DG that OP was required to compensate the buyer only to the extent of the difference in the price of alternate fuel used by it during the disruption in supply of CBM and, thus, there appeared to be no unfairness in the clause.

66. The DG Report finds that the MGO liability imposed under this clause appears to be unfair as unlike other gas suppliers where upstream suppliers impose MGO liability, GEECL is a producer itself and has no upstream obligations. Further, GEECL can regulate production as per demand. Also, Essar, the other CBM supplier in the area does not impose any such MGO liability. Further, the DG Report finds that many customers of GEECL do not have MGO liability in their contract and therefore, GEECL is discriminating between customers. The Informant agrees with the DG and argues that the gas flared up by GEECL is ascribed a zero value under its production sharing contract with the Government of India. Therefore, there is no financial loss to GEECL if SRMB consumes less than the MGO amount of gas. The imposition of

MGO liability would amount to excess profit earnings for GEECL. Further, Clause 5.1 is also unfair as in case of reduction or stoppage of gas supply for more than three months, either party may terminate the contract with a written notice of 15 days. This allows GEECL to stop supply of gas at its own whim. Further, the Informant highlights that there are two discriminatory conditions in Clause 5, namely, the provision for payment of differential cost is not present in the contracts of other suppliers and the clause relating to commencement of MGO liability has a different time period in the contracts of another customer.

67. On a careful consideration of the matter, it may be observed that production of CBM gas production is a continuous process that starts once a well is dug and stops only when the well goes dry. GEECL plans its production based on the contracted quantity agreed with its customers on a long term basis. Once the CBM is produced, it cannot be stored and if the customer fails to off-take the contracted quantity, GEECL has no option but to flare up the gas. There is no spot market for CBM gas where GEECL can sell the gas which is not consumed by a customer. MGO liability is a standard clause across most long term supply contracts of producers and is intended to cover the risk of the seller in committing to sell a fixed quantity on a long term basis and to assure the buyer of a firm supply of gas. Correspondingly, GEECL is liable for differential fuel cost under SRMB's agreement if its supply falls below the MGO level and therefore, the clause is equitable. The DG's reasoning suffers from a flaw as in the gas contracts of other gas suppliers, upstream suppliers who impose MGO liability are producers themselves. There is no question of discrimination if one considers that GEECL's contracts are negotiated with each individual customer and that SRMB did not raise the issue regarding the MGO liability at the time of signing GSPA. It was only after SRMB had signed an agreement with Essar, it requested for a waiver of the MGO liability. GEECL was willing to accept this but subject to a reasonable revision of price. The

Informant's argument regarding GEECL not incurring any financial liability for the gas which is flared, is flawed, as royalty payable to the government is only one component of the cost involved. There are other production costs incurred which cannot be recovered in case gas is flared up. Further, GEECL cannot divert gas which is not consumed by one customer to another customer as this would depend on the requirement of other customers. In case of stoppage of supply, both GEECL and SRMB can terminate the contract.

Quality of Gas

68. The Informant has also challenged the clause dealing with quality of gas on various grounds. For ready reference, the clause is reproduced below:

> *6.0 Quality of Gas*
>
> *6.1 The quality of Gas to be delivered to the BUYER will conform to the specification laid down in Annexure - I hereto which shall form part of this CONTRACT.*
>
> *6.2 If Gas delivered by the SELLER to the BUYER fails at any time to conform to the quality specifications provided in Annexure - I hereto, the BUYER shall notify the SELLER or its authorized representative of such deficiency in writing and the SELLER shall take steps to remedy such deficiency within a reasonable time as mutually agreed by the representatives of SELLER & BUYER.*

69. The DG Report finds this clause to be discriminatory as while GEECL has linked the price of gas to calorific value for its other customers, the same benefit has not been given to SRMB. The Informant agrees with the DG and argues that the clause is further unfair as the buyer is compelled to accept off-spec gas and pay for the same at the price agreed for standard specifications. In this situation, the buyer will have to consume more gas to meet its energy requirements and pay a higher amount to GEECL. Furthermore, there is no provision for any

compensation for supply of off-spec gas and no formula for adjusting the price according to the quality of the gas.

70. On a consideration of the matter, the Commission notes that the terms of GSPA are negotiated individually with customers. SRMB could have negotiated and asked for amendments in case it was concerned about this clause. Further, there is no unfairness as GSPA provides for a remedy to the buyer. Annexure-I of GSPA with SRMB provides the specification of the CBM which SRMB must adhere to. Clause 6 of the agreement allows the buyer to intimate GEECL in case it finds that the gas supplied is not adhering to the specification laid down in Annexure-I and provides that GEECL will take steps to remedy the deficiency within a reasonable time. It has been submitted by GEECL that it has never deviated from the specified quality of gas in Annexure-I and SRMB has never raised any complaint regarding the quality of gas. Further, GEECL has always provided the specifications of the gas supplied at any given time on the request of customers. Such clauses are not unusual and, thus, the Commission finds no infirmity in the impugned clause.

Shutdown and Stoppage of Supply

71. The Informant has alleged that clause 8.2 of GSPA forces the buyer to pay for committed gas in case of any defect in gas intake arrangement of the buyer leading to his inability to receive supply of gas. The same is noted below:

> *8.0 Shutdown and Stoppage of Supply*
>
> *8.2 The BUYER shall inform the SELLER immediately about any defects in the gas intake arrangement of the BUYER calling for the complete or partial stoppage of the supply of GAS. Provided that, in all such cases, the provisions relating to the payment of Minimum Guaranteed Off take by the BUYER in clause 5.2 shall apply.*

8.3 The SELLER shall likewise inform the BUYER immediately about accidents and/or defects in GAS installations and GAS pipeline of the SELLER calling for discontinuation or complete or partial stoppage of supply of GAS.

The SELLER shall not be liable for failure to perform or for delay in performing any provision(s) of the contract by the BUYER in such conditions and shall not be held responsible for any losses or damages to the BUYER due to partial or complete stoppage of gas supply. The provisions relating to the payment of Minimum Guaranteed Off take by the BUYER in clause 5.2 shall not apply.

72. The DG Report finds this clause to be unfair as it absolves GEECL of all liability in case of stoppage of gas supply. The clause does not provide for payment of compensation for use of alternative fuel as provided in Clause 5.2. The Informant agrees with the conclusions of the DG.

73. It may be noted that the DG's conclusion is based on an erroneous reading of Clause 8. When there is a stoppage of supply by GEECL, Clause 8 provides that the MGO liability will not apply which is to the benefit of the buyer. Instead, GEECL will continue to be liable for payment of differential cost for use of alternative fuel as provided in Clause 5.2 and Clause 8 states nothing to the contrary.

Force Majeure

74. The Informant has alleged that the *force majeure* clause considers action by labour as a *force majeure* for the seller but the same is not considered for the buyer. Hence, it is alleged to be unfair.

9.0 Force Majeure

9.2 The term FORCE MAJEURE in this CONTRACT means act of God, war, revolt, riot, fire, tempest, flood, earthquake,

lightening, direct or indirect consequences of war (declared/undeclared), sabotage, hostilities, national emergencies, civil disturbances, commotion, embargo or any law or promulgation, regulation or ordinance whether Central or State or Municipal, breakage, bursting or freezing of pipeline. Upon occurrence of such cause and on its termination, the parties rendered unable as aforesaid shall notify the other party in writing within twenty four (24) hours of the beginning and the ending, giving full particulars and reasonable evidence thereof. Any action of labor employed by the BUYER shall not be considered as FORCE MAJEURE.

75. The DG has termed the clause as unfair after noting some instances where OP refused to consider some events (including one of national grid failure) as falling within the purview of the clause and thereby not releasing the MGO liability for that period.

76. Specifically, the DG Report has found that the *force majeure* provision under this clause is unfair as it does not cover labour actions at the buyer's end as *force majeure* whereas labour actions at seller's end are covered as *force majeure*. The Informant agrees with the conclusion of the DG.

77. The Commission, however, notes that the DG's conclusion is based on an incomplete reading of the clause. The clause does not state that labour actions at the seller's end will be covered as *force majeure*. Contracts with other gas suppliers also qualify and limit the coverage of labour actions.

78. As such, the Commission is of opinion that the clause does not appear to be unfair. Moreover, no case of imposition of unfair term has been made out by the Informant.

Price of gas

79. The Informant has also challenged the pricing of gas by the seller. It has been argued that OP increased the price of gas despite cost of production going down.

> *10.0 Price of gas*
>
> *10.1 The floor price of CBM GAS, from the date of start of supply shall be Rs. 15.58 per SCM. This said price is excluding Sales Tax/VAT as per applicable rates, which at present is 4% which will be charged in addition to above price.*
>
> *10.2 The above price shall be valid till May 11, 2012 (i.e. one year only) from the date of start of supply as per clause 10.1 as above. After fixed price period i.e. increment in Floor Price shall be finalized at least forty five (45) days before expiry of the fixed price period. In case of disagreement beyond the above stipulated period either party may exit the contract.*

80. Though the Informant had alleged that OP increased the price of gas despite the fact that cost of production was going down, the Commission is in agreement with the DG that no unfairness can be found in the impugned clause.

81. As pointed out by the DG, pricing of CBM does not come under the administered price mechanism and the producer is free to sell the gas at market rates as per the Production Sharing Contract (PSC) of GEECL with the Government.

82. No case of unfair pricing is made out on the mere assertion of the Informant who is not even an aggrieved party on this count. OP, being a commercial enterprise, is not obliged to sell on cost-plus basis as desired

by the Informant.

Billing and Payment

83. The Informant has alleged the clause relating to billing and payment as abusive since under the said clause GEECL will only adjust the overcharged amount in the next invoice and pay no interest on the overcharged amount whereas if the buyer delays payment, it is obliged to pay 15% interest. For felicity of reference, the same is noted below:

> *11.0 Billing and Payment*
>
> *11.1 The SELLER shall issue and raise invoice to the BUYER considering the actual consumption of the BUYER as per (a), (b) & (c) given below along with supporting documents either by way of email, Fax, hand delivered or courier.*
>
> *a) SELLER to raise fortnightly invoice for gas supplied during first fortnight by 18th day of the same month and for gas supplied during second fortnight by 3rd day of immediately next/following month.*
>
> *b) The due date of the payment shall be:*
>
> - *Six days from the delivery made in 1st fortnight of particular month.*
> - *Six days from the delivery made during 2nd fortnight of month.*
>
> *c) Reconciliation of the meter reading:*
>
> *On a quarterly basis for reconciliation purpose a Joint Measurement Sheet will be signed by nominated representatives of the SELLER and BUYER.*
>
> *In addition to above, SELLER shall issue and raise quarterly invoice to the BUYER considering the actual consumption of the BUYER for that quarter or Minimum Guaranteed Offtake*

(MGO) as per clause no. 5.2, whichever is higher. The BUYER shall make the balance payment in full within 7 working days of receipt of such invoice.

In case there is any dispute regarding billing, the BUYER shall not withhold payment. After making full payment of such invoices, the BUYER shall lodge the claims to the seller giving full particulars within a period of fourteen (14) DAYS from the date of making the payment and such claims if found correct, the SELLER shall adjust the same against the next invoice of supply of GAS. The decision of the SELLER in this connection will be final and binding upon the BUYER.

11.2 The BUYER shall pay interest in all delayed payments @ 15%. Delayed payment means any payment not received within the stipulated due date of any invoice raised against the BUYER by the SELLER. The SELLER reserves the right to stop supply of CBM Gas on account of non-payment, till payment is received against the said invoice.

84. The DG Report has found this clause to be unfair as it provides for payment of interest by the buyer in case of delayed payments whereas no interest is payable by GEECL in case of any overcharged amount. The Informant agrees with the conclusion of the DG.

85. On a careful perusal of the DG finding and the material on record, Commission notes that SRMB did not raise such concerns during its negotiations with GEECL before signing GSPA. Moreover, it is observed that SRMB has never been overcharged nor has it ever complained of any overcharge.

86. Resultantly, the entire basis of the challenge to the clause is academic and imaginary.

Termination

87. The Informant has alleged that under clause 15 of GSPA, GEECL acquires the right to terminate the contract effective from the date of stoppage of gas supply to SRMB. It is stated that this termination can be done by GEECL immediately after suspending the gas supply to SRMB. It is alleged that such one-sided right to GEECL with no corresponding right to SRMB amounts to unfair condition in sale of CMB gas in violation of the provision of Section 4 of the Act.

> *15.0 Termination*
>
> *This contract shall stand terminated automatically on April 30, 2034. The SELLER has unrestricted right to deduct its all pending claims from the Bank Guarantee submitted by the BUYER. Notwithstanding anything contrary, contained herein, in the event GAS supply of the BUYER is suspended due to nonpayment of dues under this CONTRACT, the SELLER shall have the right to terminate this CONTRACT effective from date of suspension.*

88. The DG Report has found this clause to be unfair as it does not provide the buyer with a right to terminate the contract in case of failure of seller to supply the gas. The Informant agrees with the conclusion of the DG.

89. The Commission observes that SRMB had three exit options in relation to GSPA. First, at the time of negotiation itself, SRMB could have walked away in case it found the terms of the contract to be onerous. Second, in 2012, Clause 10.2 of GSPA provided that SRMB could exit the contract in case the revised price was not acceptable to it. Finally, in 2014, SRMB was offered a non-MGO contract which meant an effective exit right at will. SRMB never sought any amendments to this clause during negotiations. GEECL did not introduce this clause through amendments after GSPA was signed and therefore, there was no trap or

lock in for SRMB.

90. Hence, no unfairness can be attributed to the conduct of OP in this regard.

Indemnities

91. The Informant has alleged the clause 19 of GSPA indemnifies the seller, its employees, agents, successors etc. against various risks. But, no such indemnity is given to the buyer in respect of any similar claim arising out of any similar harm due to any mishap occurring before the point of delivery of CBM gas, where the gas is in the exclusive possession and control of the seller. The Informant had alleged that the clause is one-sided and is in favour of the seller and unfair against the buyer.

> *19.0 Indemnities*
>
> *The delivery of GAS being a continuous process, once GAS passes the point of delivery as herein provided, the BUYER shall be deemed to be in exclusive possession and control of the said GAS and fully liable and responsible for its arrangements, appurtenances and properties. Accordingly, the BUYER covenants and agrees to fully protect, indemnify and hold the SELLER, it's employees, agents and successors and assigns harmless against any & all claims, demands, actions, suits, proceedings and judgments and any and all liabilities cost, expenses, incidental to or in connection therewith which may be made or brought against the SELLER, whether by the BUYER, it's employees, agents or successors and assigns or by third parties on account of damages or injury to property or person or loss of life resulting from or arising out of the installation, presence, maintenance or operation of the intake arrangements, appurtenances and properties of the BUYER or others relating to the possession and handling of any GAS supplied*

and further defend the SELLER at BUYER's sole expense in any litigation involving the SELLER.

92. The claim of the Informant was noted by the DG as far-fetched. The DG notes that there seems to be no reason why OP is required to indemnify SRMB for any defect in its supply prior to the gas entering the premises of SRMB.

93. The Commission is of opinion that no infirmity can be found with such clause indemnifying the seller. As pointed out by DG, there appears to be no case for parity and to indemnify the buyer for any defect in the supply prior to the gas entering the buyer's premises. The Informant appears to be seeking an academic equivalence in contractual term without any regard to logic or commercial basis for such equilibrium.

94. Lastly, on the issue of discriminatory prices, DG did not note any contravention against OP. The Commission notes that a uniform pricing may not be applicable due to different types of customers, quantity procured by them and transportation costs depending upon distance *etc*. Pricing is essentially a commercial decision based upon a variety of factors and the agreements which are themselves outcomes of negotiations of varying degree. Hence, lack of uniformity in itself cannot be a ground to hold discrimination unless the same is demonstrably shown to be a result of abuse treating similar set of customers differently.

Conclusion

95. Based on the above discussion, the Commission is of the opinion that no case of contravention of the provisions of Section 4 of the Act is made

out against OP.

96. OP has filed confidential as well as non-confidential version of its response to the DG report. Alongwith the replies, a request was made on behalf of OP to seek confidentiality over the confidential version of the reply in terms of the provisions contained in Regulation 35 of the Competition Commission of India (General) Regulations, 2009 for a period of 3 years. On a careful perusal of the request, the Commission allows the prayer so made and it is ordered that the confidential version, which was kept separately during the pendency of proceedings before the Commission, shall continue to enjoy confidential treatment for a further period of 3 years only from the passing of this order.

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

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(U.C. Nahta)
Member

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

New Delhi
Date: 16/02/2017