



# Competition Commission of India



Case No. 94 of 2013

**In Re:**

**TATA Power Delhi Distribution Limited**

**Informant**

**And**

**M/s GAIL (India) Limited**

**Opposite Party**

**CORAM**

**Mr. Ashok Chawla**  
**Chairperson**

**Dr. Geeta Gouri**  
**Member**

**Mr. Anurag Goel**  
**Member**

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

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

**Appearances:** Shri Gopal Jain, Senior Advocate along with Advocate Shri Kaushil Laik; on behalf of the Informant. Ramji Srinivasan, Senior Advocate along with Advocate Shri Kapil Kher; on behalf of the Opposite Party.



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

1. The present information; filed under Section 19(1) (a) of the Competition Act, 2002 (**‘the Act’**) by M/s TATA Power Delhi Distribution Limited (**‘the Informant’**); relates to the alleged infringement of the provisions of Section 4 of the Act by M/s GAIL (India) Limited (**‘the Opposite Party’ or ‘GAIL’**) in transmission of natural gas to the power generating plant of the Informant.
2. Facts of the case, in brief, are as follow:
  - 2.1 The Informant, a company incorporated under the Companies Act, 1956, is engaged in the business of supplying electricity to consumers in North and North West circles of NCT of Delhi and owns a gas based power generating plant of 108 MW located at Rithala, New Delhi. The Opposite Party *i.e.*, GAIL is a Government of India undertaking and is, *inter alia*, engaged in the business of transmission of natural gas.
  - 2.2 As per the information, the Empowered Group of Ministers (**EGoM**) allocated 0.4 MMSCMD of natural gas per day to the Informant’s said power generating plant from KG-D6 Gas Fields. Accordingly, the Ministry of Petroleum & Natural Gas (**MoPNG**) directed M/s Reliance Industries Limited and M/s NIKO (NECO) Limited (**the Sellers**) to supply the allocated quantity of gas to the Informant.
  - 2.3 In pursuance to the said direction; the Informant, M/s Reliance Industries Limited (RIL) and M/s NIKO (NECO) Limited entered into a Gas Sales and Purchase Agreement on 03.08.2010. Also, the Informant entered into Gas Transportation Agreements (**GTA**) with M/s Reliance Gas Transportation Infrastructure Limited (**RGTIL**), the upstream transporter (from Kakinada in the state of Andhra Pradesh, through the states of Karnataka and Maharashtra, to Bharuch, Gujarat, referred to as the ‘East-West Pipeline’), on 03.08.2010 and with GAIL, the downstream transporter (from delivery point Ankot to redelivery point Rithala, Delhi), on 08.09.2008 which was further amended on 25.02.2010.



- 2.4 The Informant has been shipping the allocated quantity of natural gas made available by the sellers from time to time through the above stated upstream pipeline system of RGTIL and downstream pipeline system of GAIL. Because of decrease in the supplies of natural gas from the KG-D6 Gas Field, the EGoM took a decision regarding distribution of natural gas whereby the first priority was given to the fertilizer sector followed by LPG consumers followed by the power sector. As a result, the suppliers reduced the supplies of gas to the Informant and to other consumers in the power sector which have now been entirely discontinued leading to stranding of the generation plant of the Informant.
- 2.5 Because of reduction in supply of gas by the suppliers, the Informant was unable to ship the allotted quantity of gas through the gas pipelines of RGTIL and GAIL for which GTAs were entered into which *inter alia* provides for imposition of fortnightly ‘Ship-or-Pay’ payment equal to the difference multiplied by the transmission rates if, the aggregate of the allocated quantity at the redelivery point in a fortnight is less than 95% of fortnightly ‘Ship-or-Pay’ quantity.
- 2.6 Since, the Informant was not able to tender gas up to Maximum Daily Quantity (MDQ) for transmission it requested RGTIL and GAIL to give relief to it from the obligation under GTA to pay ‘Ship-or-Pay’ charges. In response RGTIL exempted the Informant from said charges on quarterly basis till 31.03.2012 which was further extended upto 30.06.2013.
- 2.7 It is the case of the Informant that despite of its repeated request to GAIL to relieve it from the obligation under the GTA to pay ‘Ship-or-Pay’ charges, it continued to levy such charges which is totally unjustified and in violation of the Act as the Informant has no other alternative but to use the transport facility offered by GAIL. It is submitted that, being the sole transporter and its dominant position in natural gas transmission services, GAIL is levying ‘Ship-or-Pay’ charges which are exempted by other transporters in different areas; in a scenario where suppliers reduced or stopped the supply of gas because of its inadequate availability or government regulation.
- 2.8 Accordingly, the Informant alleged that, being a dominant enterprise (having 92% market share in gas transmission and distribution market in India), by imposing ‘Ship-or-Pay’



charges in GTA, the Opposite Party has abused its dominant position which is in violation of the provisions of Section 4(2) (a) (i) of the Act.

3. Based on the above averments and allegations, the Informant has prayed to the Commission:

(a) to issue notice to inquire into the contraventions of the provisions of Section 4 of the Act by GAIL for abuse of dominant position;

(b) to direct the DG to conduct an investigation under Section 26(1) of the Act;

(c) to hold that 'Ship-or-Pay' Charges are unenforceable/void as it is in abuse of GAIL's dominant position;

(d) to direct GAIL to exclude 'Ship-or Pay' charges under the Gas Transmission Agreements;

(e) to impose a penalty on GAIL as the Commission deems fit and proper; and

(f) to pass any other order or direction as the Commission deems fit and appropriate.

4. Having perused the information and the documents filed therewith and heard the counsel appearing for the parties, it is observed that the crux of the gravamen of the Informant arises out of the alleged imposition of unfair and unilateral conditions by GAIL in the GTA by forcing the Informant to pay 'Ship-or-Pay' charges, irrespective of the quantity of gas actually shipped.

5. The allegations in the instant case relate to the services for transmission of natural gas through pipelines where the Informant is the receiver of the service and the Opposite Party is the service provider. Other modes of transportation of natural gas viz., through road, rail, ship etc., do not appear to be close substitutes of transmission through pipelines because of difference in cost of transportation, volume of transportation, time required for transportation etc. So, the market for the provisions of services of transmission of natural gas through pipelines is considered as the relevant product market in this case. The relevant geographic market is considered as the territory of India because the condition of provision of the said services is homogenous throughout India. Thus, the market for "the provision of services of transmission of natural gas through pipelines in India" is considered as the relevant market in this case.



6. In the said relevant market, GAIL owns and operates a network of about 10,700 KM of natural gas pipelines and it occupies a market share of 74%, as per its Annual Report 2011-12. The other players in the relevant market are Gujarat State Petronet Limited (GSPL), Reliance Gas Transportation Infrastructure Limited (RGTIL) and Assam Gas Company Limited (AGCL). These three players are relatively small and share the remaining 26% of the market among them. In view of the above, GAIL appears to be in a dominant position in the relevant market.
7. It is the case of the Informant that the EGoM took a decision whereby the first priority in gas supply was given to the fertilizer sector followed by LPG consumers. The power sector was third on the priority list. In view of the dwindling gas supplies and in compliance of the directions of MoPNG, the supplier reduced (entirely discontinued) the supplies to the Informant. Hence, it is averred that the Informant is unable to ship the allocated quantity to GAIL for transportation as the same is beyond its control.
8. *Per contra*, it has been vehemently contended by the counsel appearing for the Opposite Party that the information does not raise any competition law concern. The said GTA was voluntarily entered by the Informant with GAIL and the Informant acted upon the terms of the said GTA without any complaint for almost six years before filing this information. It was argued that the terms of the GTA provided that GAIL, as a transporter owning transport capacity on its transmission pipeline, would at the request of Informant, transport natural gas delivered by the Informant at the delivery point *i.e.* ANKOT to Rithala, Delhi.
9. It was further argued by the counsel appearing for the Opposite Party that clause 6.11 of GTA provides for transmission charges including 'Ship-or-Pay' charges. It was argued that the 'Ship-or-Pay' clause provided that if the total quantity of gas shipped in a calendar month by the Informant was less than 90% of the monthly 'Ship-or-Pay' quantity, the Informant will pay to GAIL an amount equal to such difference multiplied by transmission rates as fixed by PNGRB. Accordingly, if the Informant is not able to utilize the booked capacity of transportation of gas, then it becomes liable to make 'Ship-or-Pay' payment.



10. Elaborating further, it was argued that the concept of ‘Ship-or-Pay’ is that the shipper (the Informant) has booked a certain transmission capacity in GAIL pipeline on long term basis (usually beyond one year) and GAIL is then committed to make available that transmission capacity to the shipper during the tenure of the contract. Accordingly, that capacity stands reserved for the shipper. If the same is not used, then that capacity is lost forever, contends the counsel.
11. Further, it was submitted that there was no obligation on GAIL to refer to the source of any gas as the GTA does not refer to the source that the Informant intends to ship through the pipeline capacity of GAIL that has been blocked by it. Citing the letter of MoPNG dated 28.03.2011, it was argued that if one supplier reduced its supplies for whatever reason, it was always open to the shipper to obtain gas from other sources so as to continue to transport gas to the pipeline capacity blocked by it under the GTA.
12. The Commission has examined the rival contentions very carefully. It appears that the parties to the present proceedings entered into GTA on 08.09.2008 which was amended on 25.02.2010 in accordance with the Petroleum and Natural Gas Regulatory Board (Access Code for Common Carrier or Contract Carrier Natural Gas Pipelines) Regulations, 2008. On a careful perusal, it is observed that GTA contains *force majeure* clause (clause 11) whereby either party is not made accountable or held liable for acts which *inter alia* include any act/ action or in action of a Government instrumentally or compliance therewith. For felicity of reference, the same is noted below:

Clause 11- Force Majeure

*11.1 Definition*

*The term ‘Force Majeure’ means any event or circumstances or combination of events or circumstances that affects the performance by either party (such party, the ‘affected party’) of its obligations pursuant to the terms of this Agreement (including by preventing, hindering or delaying such performance), but only if and to the extent that such events and circumstances are not within the affected party’s reasonable control and the effects of which*



*the affected party could not have prevented by acting as a reasonable and prudent operator or, in the case of construction activities, by the exercise of reasonable skill and care.*

*11.2 Force Majeure Events:*

*Without prejudice to the generality of the foregoing definition in clause 11.1, Force Majeure included the following events or circumstances to the extent that they or their consequences satisfy the requirements of Clause 11.1*

(a) - (i) xxx

*(j) any act/action or inaction of a Government Instrumentality, or compliance with such acts, directly affecting the ability of shipper or transporter to perform its obligations under the Agreement.*

**13.** The Commission further notes that the PNGRB Guidelines (Development of Model GTA), 2012 spell out the specific exclusions of the impugned charges in certain situations. One specific exclusion relates to ‘quantities which have been reduced due to directions of Central/ State Government or any Government agency which is beyond the control of shipper and transporter’. Further, it was provided that all contracts/agreements were to be suitably modified to ensure consonance with these guidelines and the accompanying schedules.

**14.** In view of the above, the Commission is of opinion that the GTA makes suitable arrangements in respect of the eventuality faced by the Informant herein. Hence, the agreement *per se* does not appear to be abusive. Needless to add, the Informant would be at liberty to pursue its remedies before appropriate forum against the Opposite Party if the latter does not adhere to contractual obligations and the *extant* regulatory provisions including the guidelines.

**15.** Resultantly, the Commission is of opinion that no, *prima facie*, case of contravention of the provisions of the Act is made out against the Opposite Party and the information is ordered to be closed forthwith in terms of the provisions contained in section 26(2) of the Act.



**Competition Commission of India**



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

**Sd/-**  
**(Ashok Chawla)**  
**Chairperson**

**Sd/-**  
**(Geeta Gouri)**  
**Member**

**Sd/-**  
**(Anurag Goel)**  
**Member**

**Sd/-**  
**(M. L. Tayal)**  
**Member**

**Sd/-**  
**(S. L. Bunker)**  
**Member**

New Delhi  
Date: 11-03-2014