COMPETITION COMMISSION OF INDIA

Case No. 94 of 2015

In Re:

Gujarat State Fertilisers & Chemicals Ltd. **Informant**

And

Gail (India) Ltd. **Opposite Party**

CORAM

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Mr. M. S. Sahoo
Member

Justice G. P. Mittal
Member

Appearances:

For GSFCL	Mr. Sharad Gupta, Advocate Mr. Akshay Bhandari, Advocate
For GAIL	Mr. Ramji Srinivasan, Sr. Advocate Mr. Kapil Kher, Advocate

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

1. The Information in the instant case was filed by Gujarat State Fertilizers & Chemicals Ltd. (hereinafter referred to as the '**Informant'** or **'GSFCL'**) under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the **'Act'**) against Gail (India) Ltd. (hereinafter referred to as '**OP'** or **'GAIL'**), alleging, *inter-alia,* contravention of the provisions of Section 4 of the Act.

2. The Informant is stated to be a public limited company, based in Fertilizernagar, Vadodara, Gujarat. It is primarily engaged in the business of fertilizers and chemicals since 1962 and is claimed to be one of the largest manufacturers of fertilizers in India. It requires Re-gasified Liquefied Natural Gas (hereinafter referred to as '**RLNG**') as one of the primary inputs for its production activities. It is submitted that the Informant had entered into a Gas Sale Agreement (hereinafter referred to as '**GSA**') with OP on 26th December 2008 to procure RLNG.

3. OP is stated to be a Government company having its registered office in New Delhi. It is primarily engaged in the distribution and marketing of gas in India. It is also engaged in exploration, production, transmission, extraction and processing of natural gas and its related processes, products as well as services. It has been stated in the Information that as per the

Annual Report of OP for the financial year 2013-14, it had 67% market share in India's gas marketing. OP is also stated to own and operate about 11,000 kms. of natural gas high pressure trunk pipeline with a pan-India capacity of around 206 MMSCMD of natural gas.

4. The present Information concerns certain purported unfair and discriminatory conditions imposed by GAIL under GSA. It has been alleged that these stipulations imposed under GSA amount to abuse of dominant position by GAIL in contravention of the provisions of Section 4 of the Act. Brief details of the allegations levelled in the Information are as follows:

4.1. *Make Good Gas:* The quantum of gas that has not been taken pursuant to the Downward Flexibility Quantity mechanism envisaged under GSA could be requested by the buyer as Make Good Gas at a later point of time during the tenure of GSA. It has been submitted that, in terms of GSA, if a buyer does not take Make Good Gas till the end of duration of GSA, the buyer has to pay for that quantity even though the seller utilises that gas elsewhere for other purposes deemed fit by it and suffers no loss. On the other hand, if at buyer's request, OP is not able to supply the Make Good Gas for any reason till the end of the duration of GSA, OP is not liable to pay to the buyer any compensation for non-supply even though the buyer might have suffered heavy losses on account of such non-supply.

4.2. *Restoration Quantity:* If gas could not be supplied or taken owing to any *force majeure* event, the buyer could request the delivery of such deficiency (*Force Majeure Deficiency [FMD]*) at a later point of time. Such quantity requested is referred to as Restoration Quantity. The Informant has alleged that if the buyer does not take the FMD till the end of the duration of GSA, it shall be liable to pay for such quantity. However, allegedly GSA does not require OP to pay any compensation

if it fails to supply the FMD quantity. It has also been stated that GSA does not contain any provision to deal with a situation where the buyer is unable to take FMD due to the failure of OP to supply the same.

4.3. *Recovery Period Gas*: Recovery Period Gas denotes the total gas outstanding at the end of the basic term of GSA. It has been alleged that GSA does not envisage liability on OP for its failure to deliver the Recovery Period Gas despite the request made by the buyer. On the contrary, if seller tenders for delivery to buyer the Recovery Period Gas, the buyer must take it and pay for such gas or incur pay-for-if-not-taken liability. Such stipulation in GSA has been alleged as one sided and unduly tilted in favour of the seller.

4.4. *Quality*: In terms of GSA, OP is required to deliver gas of the specifications prescribed therein. However, allegedly GSA does not envisage any stipulation or methodology whereby OP is required to give quality certificate. It has been further alleged that no remedy is provided if the buyer/Informant tests the gas and finds it off-spec.

4.5. *Take or Pay Obligation and liability of OP to pay liquidated damages*: Under Art. 14 of GSA, the buyer is obliged to pay for the quantities of gas not taken but agreed to be taken. It has been alleged that the buyer is required to pay even for the quantities of gas which OP was unable to supply due to *force majeure*.

On the other hand, though OP is liable to pay liquidated damages if it is unable to deliver the agreed quantity of gas; however, such liability allegedly arises only in cases where the Informant procures '*alternate gas*'. It has been averred that the term 'alternate gas' has been narrowly defined and does not encompass all forms of

alternate fuel. Further, the procurement of gas/fuel of different specifications absolves the liability of OP.

It has also been alleged that the liability of OP to pay liquidated damages in a contract year is not to exceed the price of daily contracted quantity for twenty-one days. However, no such limitation is prescribed for the liability on the part of the buyer.

4.6. *Force Majeure*: The gist of the allegation in relation to *force majeure* clause of GSA is that while the provision identifies large number of events as *force majeure* events for OP, the number of *force majeure* events identified for the buyer is limited. Non-inclusion of '*acts of government agency*' in buyers' *force majeure* event; listing of larger number of events attributed to failure of 'LNG Tankers' as *force majeure* events for OP; and limiting buyer's *force majeure* relief to a specific period (while no such restrictions on sellers' *force majeure* relief), are also alleged as absolutely unfair to the buyer *vis-a-vis* OP.

4.7. *Suspension and Termination*: It has been alleged that OP can terminate GSA by giving 30 days prior notice if the Informant fails to take 50% or more of the contracted gas quantity during a period of 180 consecutive days. Similarly, the Informant can also terminate the GSA by giving 30 days prior notice if the seller fails to supply 50% or more of the contracted gas quantity for a period of 180 consecutive days. Though these provisions appear to be balanced, they allegedly operate adverse to the Informant if they are read together with the take or pay obligation. It has also been alleged that OP could terminate the GSA if the agreement between OP and its supplier gets terminated. However, allegedly no such right of termination is available to the buyer in instances such as production

constraints. It has been further submitted that the right of OP to terminate GSA without providing any reason and not giving any right to the buyer to terminate GSA even in the eventuality of it being compelled to cease its operations due to serious reasons like non-availability of raw-materials clearly amounts to imposition of an unfair condition in the sale of RLNG to the Informant.

5. The Commission heard the parties on 17th December 2015. During the hearing, the counsel appearing for OP raised objections regarding the applicability of the provisions of Section 4 of the Act to the terms and conditions of GSA as the same was entered into on 26th December 2008 at which point of time, Section 4 of the Act was not in force only. In response, the counsel for the Informant contended that the effect and consequences of GSA continue even after the enforcement of Section 4 of the Act and therefore, there is no bar to the application of the provisions of Section 4 of the Act to the unfair conditions imposed under GSA.

6. In light of the objections raised by OP, the Commission sought to know from the Informant whether any of the impugned conditions/conduct has taken place after the enforcement of Section 4 of the Act and if so, whether it has any material/evidence to prove the same. Consequently, the Informant has filed two additional submissions. These submissions seek to demonstrate that:

(a) the letter of credit maintained by Informant as security was encashed by OP against the take or pay liability of the Informant even though GSA does not provide for the same. It has also been stated that as per GSA, the letter of credit shall in a single instance at any given point of time, be drawable only upto an amount equal to 16 days supply of gas at applicable price; and

(b) Since 2014, OP has not nominated the monthly quantities and daily contract quantities as per Art. 8.2(c) of GSA which in-turn is crucial to determine the seller's shortfall and take or pay liability of the buyer. Despite that, OP had raised take or pay liability for the year 2014.

These conducts of OP have been claimed to be in pursuance of GSA without being contemplated therein.

7. The Commission has given a careful consideration to the Information, submissions of the parties and other materials on record. The Commission has also heard the parties.

8. Before going in to the allegations, it would be relevant to deal with the preliminary issues raised by the parties regarding the application of Section 4 of the Act to the impugned GSA. The Commission notes that the impugned GSA was entered/executed prior to the enforcement of Section 4 of the Act. The provisions of the Act being prospective in nature would not apply to any purported unfair stipulation imposed under an agreement that was entered into prior to the enforcement of Section 4 of the Act. Nevertheless, the unfair and discriminatory conduct of a dominant enterprise/group thereof, post the enforcement of Section 4 of the Act, is amenable to the jurisdiction of the Commission. Therefore, to bring out any abuse emanating from an agreement entered into prior to the enforcement of Section 4 of the Act, it would be relevant to look into the fact whether the dominant enterprise has pursued any unfair or discriminatory conduct post the enforcement of the said Section of the Act. In this backdrop, the allegations of the Informant in the instant case will be dealt with in the forthcoming paragraphs.

9. For the purposes of examining the allegations of the Informant under the provisions of Section 4 of the Act, it is necessary to determine the relevant market at the first instance. The purpose of delineating the market is to ascertain whether OP enjoys a position of strength required to operate independent of the market forces in the relevant market. Only when such a position is enjoyed by OP, it is imperative to examine whether the impugned conduct amount to abuse or not.

10. The Informant had earlier filed an Information bearing Case No. 56/2015 wherein also, it was, *inter alia,* alleged that OP has imposed unfair stipulations under the same GSA that is impugned herein. The Commission *vide* its order dated 8th September 2015 had closed the case in terms of Section 26(2) of the Act. Though the Commission observed that OP *prima facie* appears to be dominant in the relevant market of supply and distribution of natural gas (RLNG) to industrial consumers in Vadodara, it was concluded that the Commission was unable to construe abusive conduct on the part of OP. The relevant extracts of the order dated 8th September 2015 of the Commission regarding the relevant market and the dominance of OP in case No. 56/2015 are as follows:

> *"12. For the purposes of examining the allegations of the Informant 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 Informant 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 Informant have their respective plants, constitutes a separate and distinct relevant geographic market. It is so because the Informant 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. 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 Informant, 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 Informant 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'."

11. Although OP has furnished copies of certain agreements entered into by Gujarat State Petroleum Corporation Limited with Indian Oil Corporation Limited and Bharat Petroleum Corporation Limited to suggest the presence of other gas suppliers in Gujarat, nothing substantial has been brought on record by the parties to suggest anything contrary to the dynamics of the market and positon of OP therein, as captured in the earlier order dated 8th September 2015 of the Commission. The Commission notes that there has been no development since then which could materially affect the analysis.

13. Coming to the examination of alleged abuses, it is observed that most of them relate to asymmetric rights and obligations of the buyers and OP under GSA. The Informant has alleged that it has been deprived of certain rights and burdened with certain onerous obligations *vis-à-vis* OP. For instance, the allegations relating to Make Good Gas, Restoration Quantity and Recovery Period Gas are that while the buyer needs to pay if it fails to take delivery, OP is not liable to pay any damages if it defaults in its supply. It has also been highlighted that the buyer is liable to pay even in situations where OP might have sold the gas, not taken by the buyer, elsewhere and suffered no loss.

14. The other allegations regarding unfair nature of the clauses of GSA include (a) the *force majeure* events being wider for OP and limited for the buyer; (b) no liability on OP in case of *force majeure* but such benefit being available to buyer only for a limited period of 60 days and thereafter (*i.e.* from 61st day), take or pay liability applies even if the *force majeure* event continues; (c) liability of seller to pay liquidated damages not to exceed the value of daily contracted quantity for 21 days whereas take or pay liability

of buyer having no such limitation; (d) GSA not envisaging a mechanism whereby OP is required to certify the quality/specification of the gas supplied; and (e) while OP could terminate GSA if its arrangement with its supplier is terminated, no such right of termination is provided to the buyer to terminate GSA on account of production constraints.

15. The Commission notes that all the allegations raised in the information point to the possibilities of several conducts of OP that would be unfair but nothing has been brought through the information on record which could suggest that OP had in fact indulged in any conduct that is culpable under Section 4 of the Act. It is observed that mere possibilities under an agreement entered into prior to the enforcement of the Act cannot be a subject matter of examination under Section 4 of the Act.

16. Coming to the additional submission dated 23rd December 2015 of the Informant regarding the letter of credit being encashed against take or pay liability, the allegation is that GSA does not provide for the same. Further, in terms of GSA, the letter of credit, in a single instance, at a given point of time, shall be drawable only upto an amount equal to 16 days supply of gas at applicable price. In this regard, it is observed that in the earlier information bearing Case No. 56/2015 filed by the Informant, the Commission *vide* order dated 8th September 2015 had already taken cognizance of the fact that OP proposed to revise the contracted quantity of the Informant due to irregular consumption and the same was refused by the Informant *vide* letter dated 31st December 2013 stating that its plants are running at full capacity and there is no need for revision of existing RLNG contract. The Commission also noted that GSA appears to have been entered into after thorough negotiations and discussions. Further, pursuant to the request of the Informant to waive off the annual take or pay liability for the year 2014, OP expressed its inability to waive off the entire liability of Rs. 275.74 crores but reduced the same to Rs. 105.45 crores. It was also

clarified by OP that Informant can exercise the make-up gas facility for the shortfall in off take. Considering these aspects, the Commission had held that the invocation of 'Pay if not taken' liability under GSA does not appear to be abusive. The Commission had also held that the conduct of OP was rational and not arbitrary in view of the fact that take or pay liability of the Informant was substantially reduced by OP.

17. As regards the additional submission dated 30th December 2015 of the Informant regarding non-compliance of Art. 8.2(c) by OP, the claim of the Informant is that OP did not nominate monthly quantities and daily contract quantities as required under the said provision of GSA and as a consequence, it is impossible to calculate 'Sellers' Shortfall' which in-turn makes it impossible to compute 'Adjusted Quantity Taken' by the Informant and also the take or pay liability. It has been stated that take or pay liability has been computed and imposed on the Informant without the existence of daily contract quantity and properly nominated daily contract quantity which are the very basis of the obligation. Though this has been the claim of the Informant, from the materials supplied along with the additional submission dated 30th December 2015, it is evident that OP *vide* letter dated 1st January 2014 had notified to the Informant the Annual Program containing the schedule of gas deliveries for the contract year 2014. This notification clearly indicated the quantity of gas scheduled for delivery in every quarter and month during 2014 along with the details of daily contract quantities during each quarter and month. Further, nothing has been submitted or brought on record to suggest any shortfall on the part of OP in the supply of gas. Rather, the letter dated 27th February 2015 of OP addressed to the Informant is suggestive of the fact that the latter was not able to consume more than half of the contracted quantity during 2014 and as a result, take or pay liability was imposed. The Informant has alleged non-compliance of Art. 8.2(c) to suggest that take or pay liability has been imposed in a manner not contemplated under GSA. It is observed that mere technical non-

compliances of certain terms and conditions of GSA cannot be a subject matter under Section 4 of the Act if the conduct arising out of the same *i.e.* imposition of take or pay liability has already been held as not abusive.

18. In light of the above analysis, the Commission is of the view that no case of contravention of the provisions of Section 4 of the Act is made out against OP in the present case. Accordingly, the matter is ordered to be closed in terms of the provisions of Section 26(2) of the Act.

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

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

Sd/-
(M. S. Sahoo)
Member

New Delhi
Date: 01/04/2016

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