COMPETITION COMMISSION OF INDIA

Case No. 99 of 2015

In Re:

Paharpur-3P, Paharpur Cooling Towers 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 Informant	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 instant Information has been filed by Paharpur-3P, a division of Paharpur Cooling Towers Ltd. (hereinafter referred to as the **'Informant'**) 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' of 'GAIL'**) alleging *inter alia* contravention of provisions of Section 4 of the Act.

2. The Informant is primarily engaged in the business of manufacture and sale of flexible packaging. It is stated to be an intensive user of energy for its activities and keeping in view the non-polluting nature of natural gas and various advantages associated with its use, the Informant had signed a Gas Sale Agreement (hereinafter referred to as '**GSA**') with OP on 27th December 2008 to procure natural gas for power generation.

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 OP under GSA. It has been alleged that these stipulations imposed under GSA amount to abuse of dominant position by OP 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 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 been further 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. Whereas, 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 disruptions like non-availability of raw-materials clearly amounts to imposition of an unfair condition in GSA.

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. 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. In this regard, the Informant has filed subsequent submissions regarding the following conduct of OP:

(a) the letter of credit maintained by Informant as a security was encashed by OP against the take or pay liability of the Informant, even though GSA does not envisage 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. It was further alleged that, OP

need to deliver annual statement of settlement, within 60 days after the end of each contract year, before imposing the take or pay liability, however the same was not tendered to the Informant; 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. As per the facts available on record, it appears that the Informant, an industrial consumer, is primarily aggrieved by the alleged abuse of dominant position by OP in supply of natural gas by way of imposing unfair and discriminatory terms and conditions in GSA.

11. In this regard, it is pertinent to mention here that the Commission has dealt with similar issue in various 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, based on intended use and the price of natural gas. While industrial consumers use the purchased gas to meet the fuel and energy requirements of their plants, the end use of gas in case of domestic consumers is self-consumption/ domestic cooking purposes which is entirely different from industrial consumers. As such, the Commission is of the view that the same reasoning applies to the present case. As the Informant is a buyer of natural gas from the Opposite Party for commercial/ industrial use, the relevant product market in this case is the market for '*supply and distribution of natural gas to industrial consumers*'.

12. As far the relevant geographic market is concerned, the Commission notes that the 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 authorised by Petroleum & Natural Gas Regulatory Board (PNGRB) in every city/ state. While the city gas distribution network is confined to a particular city, a pipeline may pass through various States. In the instant case, the Informant is located at Sahibabad Industrial Area (Site IV) which falls with the geographic area of Ghaziabad District in the State Uttar Pradesh. The Informant cannot choose a supplier operating in a different area. Therefore, it appears that Ghaziabad, where the Informant's plants are located, constitutes a separate and distinct relevant geographic market.

13. In view of the relevant product market and the relevant geographic market defined above, the relevant market in the present case may be considered as the market for '*supply and distribution of natural* gas *to industrial consumers in Ghaziabad*'.

14. As per publically available information, OP owns four natural gas pipelines in the State of Uttar Pradesh which cover seventeen major districts of Uttar Pradesh. They are: HVJ-GREP-DVPL Natural Gas Pipeline, DVPL-GREP Capacity augmentation Trunk Pipeline, Dadri-Bawana-Nangal Natural Gas Pipeline and Karanpur-Moradabad-Kashipur-Rudrapur Natural Gas Pipeline. In addition to OP, IGL also appears to have entered into the relevant market. As per the Annual Report of IGL for the financial year 2008-09, IGL had planned capital investment of Rs. 2032 million for expansion in NCR towns of Noida, Greater Noida & Ghaziabad. Further, as per the Annual Report of IGL for the financial year 2010-11, it had extended its pipeline network to industrial area of Sahibabad as well. Thus, IGL also appears to be operating in the relevant market. The Informant has contended

that OP was the only supplier of natural gas in Sahibabad Industrial Area (Site IV) in 2008 when GSA was signed. Though IGL has a presence in the relevant market, its size, resource and expertise in the business are relatively limited when compared to OP. It is observed that OP is one of the promoters of IGL and holds around 22.5% of the shareholding in IGL. Further, the Informant did not have the option of choosing the services of IGL at the time of signing of GSA, the term of which lasts until April 2028. Considering these aspects, *prima facie* OP appears to enjoy a dominant position in the relevant market delineated above.

16. 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.

17. 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.

18. 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.

19. Coming to the additional submission dated 21st 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, as per Information, 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. It has also been alleged that OP did not render the annual statement of settlement for 2014 which is a prerequisite for raising take or pay liability under GSA. The Commission notes that OP *vide* its letter dated 28th February 2015 had raised a demand of only Rs. 2.33 crores as take or pay liability against the actual liability of Rs. 6.09 crores. This letter also mentions that the take or pay deficiency of the Informant for the contract year 2014 is 60890 MMBTU. It is observed that the Informant has not made any allegation nor provided any information regarding discrepancy in the calculation of the aforesaid liability or any deficiency in gas deliveries and billing thereto. It appears that the Informant is aware of the gas consumed by it during the impugned period from which one could reasonably ascertain the deficiency and take or pay liability and also verify the claims raised by OP in that regard. Further, in terms of GSA,

the Informant can also exercise the make-up gas facility for the shortfall in off take. Under these circumstances, the invocation of take or pay liability by OP does not appear to be abusive. Rather, the conduct of OP appears to be rational and not arbitrary in view of the fact that the amount demanded by OP was substantially lower than the actual liability. Safeguarding commercial interest or invoking contractual clauses which are not unfair *per se* cannot be termed as unfair just because they are invoked by one of the parties to the contract.

20. As regards the additional submission filed on 29th December 2015 by 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 for 2014. 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 29th December 2015, it is evident that OP *vide* letter dated 31st December 2013 had notified to the Informant the Annual Program containing the schedule of gas deliveries every month during the contract year 2014. 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 28th 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.

21. 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.

22. 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

Sd/-

(Justice G. P. Mittal)
Member

New Delhi
Date: 01/04/2016