COMPETITION COMMISSION OF INDIA

Case No. 88 of 2013

In Re:

M/s Sai Wardha Power Company Ltd.
(formerly known as M/s Wardha
Power Company Ltd.) **Informant**

And

1. M/s Western Coalfields Ltd. **Opposite Party No. 1**

2. M/s Coal India Ltd. **Opposite Party No. 2**

CORAM

Mr. Ashok Chawla
Chairperson

Mr. M. L. Tayal
Member

Mr. S. L. Bunker
Member

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U.C. Nahta
Member

Appearances: Shri Sanjay Sen, Senior Advocate with Shri Anand K Ganesan and Shri Pawan Sharma, Advocates for the informant.

Shri Srijan Sinha and Shri Himanshu Chaubey, Advocates for opposite party No. 1.

Shri Rajshekhar Rao, Shri Harman Singh Sandhu, Shri YamanVerma and Shri Toshit Shandiya, Advocates for the opposite party No. 2.

Order under Section 27 of the Competition Act, 2002

1. The present information under section 19(1)(a) of the Competition Act,2002 ('the Act') was filed by M/s Sai Wardha Power Company Ltd. ('the informant'/ SWPCL)(formerly known as M/s Wardha Power Company Ltd.) against M/s Western Coalfields Ltd. ('the opposite party No. 1'/WCL) and M/s Coal India Ltd. ('the opposite party No. 2'/CIL) [collectively, 'the opposite parties'/ OPs] alleging contravention of the provisions of section 4 of the Act.

Facts

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

3. The informant has set-up and operates a thermal power generation plant in the State of Maharashtra. The opposite parties are, directly and/or indirectly, stated to be engaged in the production and supply of coal across the country – which is the key raw material required for generation of power by the informant.

4. It is the case of the informant that in order to procure the supply of coal for its power plant, the informant after having gotten Linkage and Letter of Assurance ('LoA') on cost plus basis from the opposite parties, has entered into three Fuel Supply Agreements (FSA) for supply of coal from three different identified cost plus coal mines under the control of the opposite parties.

5. As per the information, the opposite parties enjoy virtual monopoly over production and supply of coal in India and abusing their dominant position, the opposite parties have *inter alia*:

(i) Significantly delayed the execution of the FSAs upto a point that the informant became desperate to execute the FSAs and the opposite parties then forced the informant to enter into one sided, anti-competitive FSA under which the informant had no bargaining power or power to negotiate whatsoever and in the absence of any alternative option for procurement of coal, the informant was compelled to accept the dictated terms and conditions stipulated by the opposite parties in the FSAs;

(ii) Initially, issued a LoA to the informant whereby the opposite parties had agreed to supply 2.28 MTs of Coal per annum to the informant on cost plus basis at the cost plus price or notified price, whichever is higher.

(iii) Thereafter, at the time of issue of notice of availability of mines on cost-plus basis by the opposite parties and inviting applications, it was agreed/represented by opposite parties that the coal will be supplied at the price of cost plus 12% Internal Rate of Return (IRR) (i.e. price per MT of coal which yields IRR

of 12% on the entire investment at 85% of capacity utilization covering the entire life of the mine or 20 years whichever is less). However, in the FSA the opposite parties unilaterally linked the contract price of coal to the notified price and also introduced the concept of fixed mark up on the notified price which then becomes the contract price whereby the contract price was substantially jacked up beyond cost plus 12% IRR which defeated the whole concept of cost plus method of coal supply/linkage;

(iv) Excessively increased the price of coal for supply to the informant from Rs. 1613 per MT to Rs. 2177 per MT (both exclusive of taxes), without there being any justification for the same;

(v) Unilaterally inserted in the FSA a provision to the effect that the informant is obliged to furnish additional Bank Guarantee(s) to the tune of Rs.183.53 Crores which is equivalent to amount of entire investment of opposite parties in the subject mines. When the opposite parties are getting their entire investment back with IRR of 12% in the form of price of coal there is no justification for guarantee of entire investment;

(vi) Refused to execute FSA(s) for supply of remaining 6,35,000 MTs of coal unless the informant furnished additional Financial Risk Bank Guarantee(s) to the tune of Rs. 233.36 Crores, which is also equivalent to the entire investment of opposite parties in the subject mines;

(vii) Resorted to discriminatory pricing between the informant and other purchasers, which is detrimental to the informant. The

opposite parties are even discriminating against the informant *vis-a-vis* other power generating companies, in as much as they are charging the informant nearly double of what is being charged to the other power generating companies *viz*. the opposite parties are charging the informant Rs. 2746 per MT inclusive of tax whereas they are charging the other power generating companies Rs. 1403 per MT inclusive of tax.

(viii) Delayed the execution of FSA by almost 5 years, during which period the informant had to purchase the coal from opposite parties themselves through auction which was at a very high price.

(ix) Unilaterally determined the price for coal under the FSA without sharing any details or methodology for determining the same with the informant.

(x) Unilaterally determined the amount of financial guarantees that was required to be provided under the FSA without sharing the details thereof with the informant.

(xi) Prepared the Project Report on the basis of which the price of coal and the amount of financial guarantee was fixed under the FSA without sharing the same with the informant.

(xii) Unilaterally increased substantial amount of capital expenditure on the mines which under the FSA was to be borne by the informant through coal price.

(xiii) Not given any right under the FSA to the informant to verify the necessity, value or actual installation/investment of the capital expenditure, which is required to be recovered entirely from the informant through coal price.

(xiv) Not provided any provision under the FSA whereby the income generated through sale of coal by auction from the mine is adjusted in the cash inflows of the mines while the entire cost of the mine is being recovered from the informant,

(xv) Not included any provision in the LoA, for providing any Financial Risk Guarantee by the informant. However, at the time of execution of the FSA, the provision of Financial Risk Guarantee was unilaterally incorporated by the opposite parties. The amount of Financial Risk Guarantee required to be given under FSA is the total amount of capital expenditure on the subject mine. There is no justification at all for this kind of guarantee, when admittedly the coal is a very scarce commodity having an inelastic demand. Even if such a guarantee can at all be justified the said guarantee cannot include the entire investment in the subject mine.

(xvi) Provided one sided Financial Risk Guarantee and the Commitment Guarantee format wherein the invocation and/or payment under the said guarantees are not dependent on the happening of any event. Therefore, the Opposite Parties can invoke the Bank Guarantees even if the pre-conditions for their invocation do not exist.

(xvii) Delayed the execution of FSA, due to which the informant could not generate the power to supply the same to its customer(s) and consequently, the customer(s) invoked the Bank Guarantee of huge amount against the informant for the default in supply of the power by the informant.

6. Based on the above averments and allegations, the informant has made following prayers to the Commission:

a) Initiate an investigation on the abuse of dominant position by WCL & CIL on the basis of the facts and grounds stated in this information;

b) Declare that WCL has abused its 'dominant position' as a producer and supplier of coal and as a result of such abuse has caused loss and injury to WPCL;

c) Impose penalty as may be appropriate keeping in view the wilful and deliberate abuse of dominant position by WCL;

d) Restate the Base Price mentioned in the Fuel Supply Agreement to the Base price mentioned in the Notice dated 16.10.2010 with effect from the execution date with a further direction that the Base Price may be reviewed and reset only if there is any change in the CapEx at the time of Project Completion.

e) Direct that the Contract price under the Fuel Supply Agreement shall stand modified to mean the higher of the

cost plus reasonable return yielding an IRR of 12% or the Notified Price as provided in the LoA dated 3.12.2009.

f) Direct that the Fuel Supply Agreement being Annexure 46 herewith be modified by deleting/modifying the anticompetitive/one-sided clauses therein and that the modification shall have effect from the date of execution;

g) Direct WCL not to take up any e-Auction of coal at the cost plus coal mines till the entire quantity of requirement of WPCL of the entire period is met and further direct that the income derived from e-Auction sale till date be reckoned in the determination of cost plus price;

h) Direct WCL to refund the excess price collected from WPCL under the Fuel Supply Agreement.

i) Direct WCL to undertake the modification of the agreement as above;

j) Give a finding on the losses / damages suffered by the informant due to the anticompetitive conduct of the opposite parties;

k) Direct WCL to return the Financial Risk Bank Guarantees for Risk of Rs. 183.53 crores furnished by WPCL further direct WCL to execute the Fuel Supply Agreement for the balance quantity of coal of 635,000 MTs without insisting on WPLC to furnish the additional Rs 233.63 Crores of such Financial Risk Bank Guarantees.

l) Direct the opposite parties to function in a manner as may be specified by the Commission in order to ensure freedom of trade carried on by the participants in the market and to protect the interest of the consumers;

m) Pass cease and desist order against the opposite parties stopping them from indulging in anticompetitive activities; and

n) Pass any other order as the Commission may deem fit in the interests of justice.

Directions to the DG

7. The Commission after considering the entire material available on record *vide* its order dated 22.01.2014 passed under section 26(1) of the Act directed the Director General (DG) to cause an investigation to be made into the matter and to submit a report.

8. The DG, after receiving the directions from the Commission, investigated the matter and filed the investigation report on 30.07.2014.

Investigation by the DG

9. The findings and conclusions of the DG are as under:

10. The relevant market was determined as 'production and supply of non-coking coal to thermal power producers in India'. It was further found that OPs are in a dominant position under section 4 read with section 19(4) of the Act.

11. It was found that the terms and conditions of LoA and FSA has been drafted by OPs unilaterally and there is no consultation process with the customers/other parties either at the time of drafting of FSA or at the time of modifications. The conduct of OPs in this regard has been found to be independent of the market forces and in the process it has been able to affect the consumers and market in its favour.

12. The dependency of consumers on OPs and their ability to act independent of market forces allowed OPs to decide the one sided terms and conditions of LoA and FSA without any obligations in the agreements. It was, therefore, found that the conditions imposed by OPs in LoA are found to be unfair in violation of the provisions of section 4(2)(a)(i) of the Act.

13. The investigation further revealed that OPs not only delayed the signing of FSA but also increased the price during the period of delay on estimate basis. This conduct of OP has resulted in profiteering and had adverse impact on the informant. It was, therefore, found that the conduct of OP in delaying the execution of FSA is exploitative in violation of provisions of section 4(2)(a)(i) of the Act.

14. The pricing formula in FSA for cost plus mines is not only erroneous but also found to be based on an unfair and non-transparent mechanism. The pricing formula adopted is one sided in favour of OPs only. It was, therefore, found that OPs have imposed unfair conditions relating to pricing in FSA in violation of the provisions of section 4(2)(a)(i) of the Act.

15. It was also found that the prices charged by OPs from cost plus FSA holders are excessive and unfair. The OPs due to excessive prices have

been able earn a very high profit during the first two years of operation. OPs have exploited the dependency of the consumers and charged unfair prices by adopting erroneous formula in FSA. It was found on the basis of actual data that the prices charged by OPs were significantly higher than the prices which yield IRR 12%. The DG concluded that OPs have imposed unfair price in the supply of coal to the informant in violation of the provisions of section 4(2)(a)(ii) of the Act.

16. It is also found that the condition of Financial Risk Bank Guarantees covering investments in the Immovable Assets is unfair in violation of the provisions of section 4(2)(a)(i) of the Act. Further, it is found that OP has imposed discriminatory provisions by providing different terms and conditions for refund of Security Deposit in the FSA for cost plus mines.

17. It is found that the provisions relating to performance incentive in FSA are unfair and OPs have violated the provisions of section 4(2)(a)(i) of the Act.

18. OPs have also imposed unfair condition by excluding the additional revenue in calculation of price of coal to the cost plus consumer. The conduct of OP is therefore violative of the provisions of section 4(2)(a)(i) of the Act.

19. In respect of third party sampling, it is found that there is differential treatment with cost plus mines FSA holder without any justified reason. OPs have therefore violated the provisions of section 4(2)(a)(i) of the Act.

20. The other conditions of FSA relating to quality issue in supply of non-coking coal to power producers have already been dealt in detail in Case

Nos. 03 of 2012,11 of 2012, 59 of 2012, 05 of 2013, 07 of 2013, 37 of 2013 & 44 of 2013. Since no new facts have emerged on this issue during the present investigation, the findings of the earlier cases on this issue were found to be equally applicable in the present case.

21. The investigation has, thus, concluded that OPs have violated the provisions of section 4(2)(a)(i) and 4(2)(a)(ii) of the Act, by imposing unfair and discriminatory provisions in the relevant market. The conduct of OPs has been found to be exploitative against the consumers.

Consideration of the DG report by the Commission

22. The Commission in its ordinary meeting held on 12.08.2014 considered the investigation report submitted by the DG and decided to forward copies thereof to the parties for filing their respective replies/ objections thereto. The Commission also directed the parties to appear for oral hearing, if so desired. Subsequently, arguments of the parties were heard on 23.09.2014.

Replies/ Objections/ Submissions of the parties

23. On being noticed, the parties filed their respective replies/ objections/ submissions to the report of the DG besides making oral submissions.

Replies/ objections/ submissions of the opposite party No. 1

24. At the outset, it was submitted by WCL that the nature of proceedings before the Commission is both inquisitorial and adversarial, meaning thereby that upon any submission made by any party, the Commission must question the veracity of any statement, declaration, action, document *etc*., which is produced before it. The report, which has been prepared under the inquisitorial jurisdiction of the DG, is a gross

misconstruction of both the facts and the law at several counts reflecting a complete lack of knowledge thereby warranting a re-investigation under regulation 20(6) of the Competition Commission of India (General) Regulations, 2009 of the issues which have been highlighted.

25. It was stated that the DG has heavily emphasized on the time gap between the issuance of the LoA and the execution of FSA, without taking due cognizance of the misrepresentation of facts as induced by the informant. WCL in the reply has highlighted in detail the chain of events pertaining to execution of FSA to demonstrate alleged bad faith on part of the informant.

26. It was argued that the DG has simply relied on the submissions made by the informant, with respect to the alleged delay on the part of WCL and has completely ignored the elaborate submissions made by WCL explaining the real reasons behind the same. It was submitted that the DG has chosen to ignore a vital fact while preparing the investigation report that linkage of the informant was converted from Tapering to Normal by Standing Linkage Committee (Long Term) (SLC(LT)), at the request of the informant on 29.01.2010 and that a new LoA was issued by WCL on 09.04.2010 for Normal Linkage on a Long Term basis. The fact that linkage of the informant was converted from Tapering to Normal has a huge bearing on the liability to be incurred by WCL with respect to the supply of coal to the informant and accordingly it also affects the exercise to be undertaken by WCL for fulfilling the obligation of supply of coal under the Normal Linkage. Further, it was argued that one of the main aspects of a Fuel Supply Agreement on a Cost-Plus Basis is arriving at a base price, which ultimately determines the Contract Price. It must be noted that the said Base Price is computed only through actual evaluation of various factors of production *i.e.*

through preparation of a detailed Project Report. This process usually takes around 7-8 months for completion and only thereafter WCL can enter into an FSA with a consumer. As per the facts at hand, CIL finalized the Generic Model FSA by May 2011, wherein it was mandated that the Base Price stated in the agreement, has to be arrived at the time of the execution of the FSA. Soon thereafter, Central Mine Planning and Design Institute Limited ('CMPDIL') initiated the process of preparation of Project Reports of the three cost plus mines. CMPDIL finally prepared the Project Reports in February 2012, subsequent to which a Letter of Allocation was issued on 15.03.2012 by WCL and it executed the FSAs on 03.04.2012.

27. It was also pointed out in the reply that it must be borne by the Commission that CIL and its subsidiaries are bodies created by a statute and are thereby bound by the four corners of the statute and bye-laws. Thus, to look at WCL's activities as a private player's activity in a free market shall be fundamentally wrong and would lead to a wrong assessment of the competition, thereby vitiating the very essence of these proceedings. It was urged that WCL has to adhere to the procedural formalities, which flow from its status provided to it under the Constitution of India. It was alleged that the DG completely ignored WCL's obligations to follow established norms.

28. It was further submitted that prior to the execution of the FSA, WCL met with every demand made by the informant and tried its level best to meet the requirements of the informant. In this connection, it was highlighted that the informant in its letter dated 07.06.2007 categorically stated that it had an agreement with Gujarat Mineral Development Corporation Limited (GMDCL) for supply of coal from its mines in Chhattisgarh. In furtherance of the said admission, the SLC (LT) granted Tapering

Linkage to the informant for short term and WCL issued a LoA for the same. Thereafter, an alteration to the demand was made by the informant, wherein procurement of coal from GMDCL was stated to be not viable for the informant. In light of the said development, WCL showed its willingness to convert the LoA on Tapering Linkage to Normal Linkage, *vide* its proposal before the SLC (LT). Pursuant to which, on thorough deliberation, which included scrutinizing 81applications *vis-à-vis* 3 applications made by the informant, 3 Long Term FSAs were executed by WCL in favor of the informant on cost-plus basis.

29. It was stressed that WCL only invests in a Cost-Plus Mine when a consumer is agreeable to procure coal from that mine, at the price which will yield 12% IRR at 85% Capacity utilization. Since the production in a Cost-Plus Mine commences only after the execution of the FSA, the base price arrived at the time of the execution has to be based on the estimated cost projections, since no data with respect to actual cost of production is available at the time of the execution of the FSA.

30. Controverting the allegations leveled by the informant that conditions stipulated in the LoA dated 09.04.2010 are unfair in nature, it was submitted by the informant that the DG arrived at this erroneous conclusion on the basis of two grounds. *Firstly*, the DG has stated in the report that even though WCL has imposed a condition of Commitment Guarantee over the informant so as to ensure that only serious consumers apply for an LoA, no liability has been imposed on WCL to ensure compliance on its part. It was submitted that the decision to impose the condition of Commitment Guarantee over the consumer was not taken by WCL, but was taken by the SLC (LT) in its meeting dated 12.11.2008, and the same was provided to the DG in the response dated

07.04.2014. It must be appreciated by the Commission that, by questioning the legality of the term of Commitment Guarantee the DG has in essence challenged the policy decision of MoC, and thereby investigated into an issue which is not subject to the present investigation. The proper forum to challenge any policy decision of MoC is not the present forum but is the Hon'ble High Court under Article 226 of the Constitution of India or the Hon'ble Supreme Court under Article 32 of the Constitution of India. *Secondly*, it was pointed out that the DG has stated in the report that even though the LoA stipulated certain milestones to be achieved by the informant within the prescribed time frame, no such time frame was provided under the LoA for execution of the FSA by WCL. In this regard, it was reiterated by WCL that the decision to impose the condition of achievement of milestones was not taken by WCL and was a decision of the SLC (LT), as taken in the meeting dated 12.11.2008.

31. Additionally, it was submitted that inclusion or omission of any term cannot be analyzed as per a strait-jacket formula of fairness and the same should be adjudged, keeping in mind the practical implication of such inclusion or omission. It must be appreciated by the Commission that WCL is bound to supply coal to each and every consumer which is directed towards it by SLC (LT). In most of the cases, such direction is given by SLC (LT) in light of a proposed development of a mine and not on the basis of the actual coal production by WCL. As a result, WCL has to cater to the needs of every new consumer simultaneously and needs to undertake the exercise of development of several new mines. It is because of this reason that a strict time frame cannot be provided under LoA, otherwise inclusion of such a clause will make WCL susceptible to unnecessary litigation.

32. Adverting to the issues relating to price mechanism, it was submitted that the DG in his report has come to various negative conclusions as regards the pricing mechanism and the prices themselves as charged from the informant. It was submitted that the pricing mechanism or formula as provided under FSA has pro-consumer benefits and has not been placed or adopted by WCL to make profits. It was submitted that WCL being a public sector undertaking does not work on a profiteering model, rather undertakes to provide coal at weighted average price, even at the risk of certain number of mines suffering losses. The finding of the DG that the newly adopted formula has no link with the actual cost of production and that the price being charged from the informant is much higher than the actual cost of production, was assailed as erroneous and inherently disjunct with the very nature of the cost plus mine. In order to explain the revision from the price escalation formula to a fixed mark-up formula, it was submitted that the same was carried out solely in the interest of the consumer and neither WCL nor CIL has been benefitted from the said formula.

33. Traversing the finding of the DG that the difference between the Base Price as published by WCL on its website on 13.12.2010 and on the date of final execution of three FSAs on 03.04.2012 amounts to unfair pricing, it was submitted that the Base Price is dependent upon various factors of production. Such factors may vary depending upon the requirements of a specific Cost-Plus Mine. In the initial notice issued in 2010, it was clearly provided that the Base Price as published in the Notice shall be subject to revision as per the price escalation formula, which at the time was in the process of review by CIL. The Generic Model FSA, which included the revised model for contract price through Fixed Mark Up and Base Price was made available in public domain in May 2011 for ready reference. Subsequently, as mandated by the

Generic Model Cost-Plus FSA, CMPDIL prepared Mine Specific Project Report for arriving at the Base Price for the three Mines. It was only the Base Price so arrived at under the Project Reports, which was stated in the FSAs entered into between WCL and the informant.

34. Thus, it was argued that the conclusion of the DG that the unfair revision of Base Price at the time of execution of the FSA stands unsubstantiated in light of the foregoing explanation.

35. On the allegations of the informant relating to bank guarantee, it was sought to be clarified that Security Deposit and Financial Guarantee against Risk have different roles to play in the FSA. While one looks at proper implementation of the terms of the contract, the other protects the project from financial unviability.

36. On the finding of the DG regarding discrimination by the opposite parties between a cost plus consumer and non-cost plus consumer as regards SD, it was submitted that the term Cost-Plus has been coined primarily on the basis of its inherent difference with a normal/notified/ Non-Cost-Plus Mine. The amendment which was carried out to the clause for Security Deposit was a feasible option in light of the fact that the seller has lesser investments to make in a Non-Cost- Plus Mine and the possibility of a loss due to default on the part of the buyer is much lesser. However, it was submitted that in case of a Cost-Plus mine the investments made by the seller *i.e.* WCL is substantially more than that in the Non- Cost-Plus Mine due to various reasons such as: (i) High Stripping Ratio of the Land; and (ii) Poor coal reserves in the Area *etc*.

37. It was pointed out that any default on the part of the Buyer in complying with the terms of FSA can result in heavy losses for WCL. Therefore, in

order to ensure compliance on the part of the buyer with the terms of the FSA and to negate any possibility of a loss it is imperative for WCL to impose the SD which can be forfeited or adjusted against any default committed by the buyer. Furthermore the conclusion arrived at by the DG is also against the principles of equality as enshrined under Article 14 of the Constitution of India. As per the said Article, equality can only be maintained amongst equals and not amongst un-equals. The informant being a consumer linked to a Cost-Plus Mine, cannot claim equal treatment with consumer linked to a Non-Cost-Plus Mine, because the guidelines and regulations governing the two and the investments made in the two are completely distinct and has no relation with each other.

38. It was argued that the term of financial guarantee against risk is in line with the provisions of the Act. The primary purpose of FGR is to ensure compliance on the part of WCL with the MoC guidelines dated 07.11.2001, which mandates that a coal company can only invest in a mine if it can ensure 12% IRR at 85% capacity utilization. It was submitted that in light of the MoC guidelines dated 07.11.2001, before WCL can enter into an FSA with respect to a Cost-Plus Mine, it has to ensure that the consumer is willing to procure coal at the price which will yield 12% IRR. The said price is calculated by CMPDIL under the project report prepared by it for a particular mine. It was reiterated that the primary reason behind imposition of FGR is not to recover the losses sustained by WCL, instead it is to act as a deterrent against willful default on the part of the buyer which can jeopardize the huge public investment made by WCL.

39. It was further urged that the terms of FSA provides for a reciprocal comfort. It was submitted that clause 4.4.2 of FSA categorically provides

that incase WCL is not able to supply coal to the informant from the allocated mine, then it will undertake to provide the coal to the informant from alternate sources in order to meet the ACQ of the informant. It was further submitted that the price of coal procured from the alternate sources will not be at the price as stated in the FSA, but at the price which is attributed to that particular alternate source. The clear implication which has not been recorded by the DG in his report is that in the event wherein the coal is being supplied from an alternate source, the price of such coal shall remain the same at which it is being provided to other consumers from that source. For instance, if the alternate source is a notified mine then the price of coal shall be the notified price for the same grade of coal. It was further pointed out that clause 9 of FSA clearly provides that the price of the coal charged from the informant will depend on the source from which he is being supplied the said coal. Hence, it was suggested that WCL upkeeps its ACQ commitments towards the buyers even if it has to incur a loss of revenue. It was argued that WCL has never defaulted in supply of ACQ to the informant and has on earlier occasions supplied the coal to the informant from alternate sources at a cheaper price. Thus, the finding of the DG that the agreement lacks reciprocity and the burden has solely been imposed on the informant stands negated.

40. It was further submitted that the figures of investments to be made in the mine are based on the market rates. It was argued that a major part of the investments is made on immovable assets *i.e.* the cost of land which is acquired and the said cost is decided and notified by the Government of Maharashtra. The other immovable assets constructed by WCL are roads and buildings around the mine, the cost whereof is also decided on the basis of prevalent market prices.

41. It was also stated that the terms of forfeiture of FGR have been clearly specified in the FSA in as much as clause 17.4 of FSA clearly states that the FGR shall be forfeited by the seller if FSA is terminated due to the reasons not attributable to the seller. Clause 17.2 of FSA further enunciates the grounds on which FSA can be terminated by either of the parties. It can, therefore, by no stretch of imagination be stated that the forfeiture of FGR is at the discretion of WCL, when FSA provides in unequivocal terms the eventuality in which FGR will be forfeited by WCL. It was denied that any benefit is being accrued by WCL from FGR.WCL has not procured any funds for making investments in the present projects and the same are being developed from the funds available with WCL.

42. It was further submitted the allocation of funds has already been made for the said projects and there will not be any necessity to procure any funds for making investments in the present projects. However, even on assuming, though not admitting that WCL can procure cheaper funds on the basis of FGR, the same cannot have any bearing on the cost incurred on the production of coal in the mine. Even if the funds procured through loan will be reflected by way of credit in the cost of coal, the same at the end of the day will remain a cost that has to be incurred by WCL for producing the coal, since the said credit has to be returned back to the lender along with the interest. It is therefore beyond the understanding of WCL that how has the DG stated that the cheaper funds procured on the basis of FGR should be reflected as a credit in the cost of production, the benefit of which should be conferred on the informant.

43. It was argued that non-payment of FGR has adversely affected the interest of WCL and the erstwhile land owners. In this connection, it was

argued that the DG has made an observation in the report with respect to the actual investment made by WCL *vis-à-vis* the FGR deposited by the informant. The DG has stated in the report that even though WCL has only made investment of 36 Crores in all the mines till 31.03.2014, the informant has already furnished risk guarantee of about 195 crores in March 2012. It was stated that WCL in its response dated 07.04.2014 made elaborate submission, enunciating the reasons for non-investment on its part.

44. It was highlighted that the two mines were earlier allocated in favour of both the informant and MAHAGENCO. The Base Price as stated in the project report was also arrived at keeping in mind the complete area of the mine. Since MAHAGENCO was not in a position to execute FSA and the informant was more than willing to procure coal from these mines, the balance area of the mine was allocated in favour of the informant so as to meet its whole requirement *i.e.* 2.26 Million Tonnes per Year. If the informant was not interested in procuring the balance quantity of coal from these mines, it could have rejected the allocation and in such a case WCL would have prepared the project report only on the basis of the area originally allocated in favour of the informant and the Base Price would also have been accordingly revised. However, the indecisiveness on the part of the informant has left WCL in a spot of bother, since the notification of acquisition for the said area has already been issued by the Government under section 4 of the Coal Bearing Area Act, 1957 and as such the farmers who owned the said land cannot conduct any activity on the land. However, due to the non-deposition of the complete FGR by the informant, WCL is not able to make payment of compensation to the land owners, due to the reasons explained. Furthermore, the said mine cannot be allocated in favour of any other consumer since a letter of allocation has already been issued in favour of

the informant. Therefore, the non-payment of FGR by the informant has not only affected the interests of WCL but has also affected the interest of erstwhile landowners, who now have no source of livelihood.

45. Lastly, it was submitted that the comparison of WCL with Singareni Colliery Company Limited (SCCL) by the DG was erroneous in nature. It was pointed out that SCCL has admitted in its response furnished before the DG (page 269, Annexure-4), that it has linked customer to only in one case *i.e.* Indaram-OC mine, FSA of which was signed in 2010. However what has not been enquired or enquired but not pointed out by the DG is that whether the said FSA is in existence or whether any coal is being supplied from the said Cost-Plus Mine. It was submitted that SCCL could not acquire the land for Indaram-OC Mine due to protests of villagers and political parties, as a result of which, it has terminated FSA with M/s Grasim Industries and has informed its customer to settle its accounts, *vide* its letter dated11.07.2013. In light of the aforesaid facts, it was submitted that the exercise undertaken by the DG, to compare the Cost Plus FSA drafted by CIL and SCCL, is a nullity since the said FSA, even if not terminated, is a mere piece of paper and has not been effectuated yet.

46. On the allegations pertaining to additional revenue being generated *via* e-Auction, it was submitted that WCL is not even earning the expected revenue from the mines, leave alone additional revenue. Therefore, the conclusion of the DG that the revenue being generated from e-Auction should be reflected in the costs of the mine is completely erroneous and further reflects lack of understanding of the functioning of the mines, on the part of the DG.

47. On the allegations relating to delay in application of third party sampling in case of the informant, it was submitted that steps have already been taken by WCL with respect to application of Third-Party Sampling in the case of the informant and the same will be brought into force as soon as approval will be granted by the Appropriate Authority. A delay, if any, was sought to be explained due to the procedural obligations on part of WCL and the same, it was argued, cannot be termed as a differential treatment with Cost-Plus Mines FSA. Hence, the conclusion of the DG that WCL has deliberately delayed the application of Third Party Sampling in case of the informant was denied being completely erroneous.

Replies/ objections/ submissions of the opposite party No. 2

48. It was submitted that the allegations in the information are baseless and the findings of the DG, in so far as they recommend that CIL is guilty of violating the provisions of the Act, ought to be rejected.

49. It was submitted that the DG's findings that the relevant market is supply of non-coking coal to thermal power plants in India is incorrect. Contrary to the findings of the DG, on the basis of recent import data, given the fact that significant quantities of coal are imported into India from other countries, the market for the supply of non-coking coal is global. The DG has failed to conduct an independent analysis of the conditions of demand and supply of non-coking coal in relation to the power sector in India and has simply relied on its finding in the previous cases against CIL. The lack of an independent analysis in complete disregard to the arguments and evidence presented by CIL shows non-application of mind and vitiates the findings of the DG.

50. On the issue of dominance, it was argued that the relevant market for supply of non-coking coal is global. In this market, there are a number of other significant active players and, therefore, CIL is not dominant. Without prejudice to this, assuming that the Commission arrives at the conclusion that the relevant market for supply of non-coking coal is as narrow as India, it was submitted that CIL is not dominant even in this relevant market. In this regard, it was argued that the domestic customers of coal are not dependent on the supply of coal from CIL. Over the years, the customers are increasingly relying on imports or production from captive coal blocks for sourcing their coal requirements. It was pointed out that in 2011-12, the imports grew by approximately 44%, in 2012-13, the import grew by 47% and in 2013-14 the import has risen by 25%. Further, CIL is faced with significant countervailing power exercised by some of its largest customers [such as the National Thermal Power Corporation (NTPC) *etc*.] both directly and through government bodies [such as the Ministry of Power (MoP), CEA (Central Electricity Authority), *etc*.].As a result of this countervailing buyer power, on a number of occasions, CIL has been forced to: a) amend the terms and conditions of the Fuel Supply Agreements (FSAs); b) increase the commitment levels of supplies of coal under the FSAs, either through discussions directly with stakeholders (i.e., NTPC and CEA) or through Presidential Directive; c) significantly change the penalty and incentive structure; d) withdraw the price change in January 2012 which was introduced as a result of the shift from Useful Heat Value (UHV) system to Gross Calorific Value (GCV) system; the prices were subsequently reduced with retrospective effect by an average of approximately 25%; and e) amend clauses relating to compensation payable for oversized coal and stones, *etc.*

51. It was also argued that the customers to whom coal is to be supplied under the FSAs are decided by the Standing Linkage Committee (Long-Term) (SLC (LT)). A binding obligation is imposed on it to meet the committed supplies to its customers, and a failure to comply with this requirement would lead to penalties. Such an arrangement clearly negates any kind of dominance and is contrary to free market principles. This is equally applicable in relation to supply of coal from mines on cost plus basis. It was further contended that the quantity of coal to be supplied to these customers is also decided by the SLC (LT) on the basis of the recommendations given by MoP/CEA in relation to thermal power plants. In relation to the supply of coal on cost plus basis, the linkages were granted by the MoP. CIL does not have freedom in deciding the quantity of coal to be supplied to the customers. Therefore, the issue of behaving independently of customers does not even arise. Further, the trigger levels for new and existing power plants have been decided by the Presidential Directives and the CEA respectively, and not by CIL.

52. It was also pointed out that CIL has to bear significant social costs and obligations in running its mines. CIL has been operating and continues to operate a number of loss-making mines, as shutting down these mines would result in *inter alia* loss of employment and reduction in production. Further, under the terms and conditions of the FSAs, coal is to be supplied on the basis of advance payment. However, CIL continues to supply to power utility companies, even where significant sums of money have not been paid to it by them. It was submitted that social costs and obligations borne by CIL are not its routine corporate social responsibility.CIL does not enjoy economic power as its behavior in the market is constrained by a number of factors. In addition to the countervailing buyer power exercised by purchasers of coal, pricing of coal by CIL is done keeping in mind the larger public interest, in

accordance with the directions of the Hon'ble Supreme Court. Further, the Presidential Directives imposed on CIL force it to commit to a higher level of coal supplies than are actually available with it.

53. It was submitted that the structure of the market for supply of coal in India has undergone and is currently undergoing significant changes. According to the figures submitted by the DG in its report, CIL's production share has dropped. Further, customers are increasingly relying on alternative sources for sourcing their requirements of coal. The DG has ignored the fact that the structure of the market is such that the supply of coal in India is not based on free market principles.

54. It was also canvassed that the mere fact that CIL has a large share of the market for the sale of coal in India does not necessarily mean that it is a dominant enterprise within the meaning of section 4 of the Act. Further, it was submitted that on the basis of recent data, it is clear that CIL's market share is on a decline.

55. Lastly, it was contended that CIL has contributed and continues to contribute immensely towards the growth and development of our nation. CIL is one of the largest revenue generating companies in India. Further, the GoI is CIL's majority shareholder, and dividends payable to the GoI are used by the GoI in developing the Indian economy. Further, given that coal is a vital commodity for a number of core sectors (such as steel, cement, power *etc*.), CIL has been engaged in relentless efforts to ensure that the nation's demand for coal is met. Further, even though the contractual arrangements between CIL and its customers provide that coal is to be sold on the basis of advance payments, CIL continues to supply coal to its customers despite significant outstanding dues, to

ensure that the ultimate consumers of the products of these core industries do not suffer.

56. On the basis of the facts presented it was submitted that CIL is not dominant in the market for supply of coal.

57. On the issue of abuse, it was submitted that CIL has conducted all its business activities in a fair and transparent manner, and in the best interests of its customers.

58. At the outset, it was submitted that the cost plus mines of CIL are those mines which are unviable for production at notified prices. Therefore, Ministry of Coal (MoC) has formulated a policy in relation to these mines whereby a mine is only opened when willing customer is ready to pay a price above the cost that will yield 12% IRR at 85% capacity utilization. Therefore, the availability and willingness of a buyer is a prerequisite for opening of a mine on cost plus basis.

59. It was submitted that the DG has placed wrong reliance on series of events to hold that CIL unnecessarily delayed the execution of the FSA in favour of the informant. The process of the issuance of the LoA was diligently initiated by WCL soon after the MoC directed WCL to issue the LoA to the informant. After the formulation of the guidelines on supply of coal on cost plus basis, the SLC (LT) introduced the requirement of furnishing a commitment guarantee before the issuance of the LoA. WCL requested the informant to furnish the commitment guarantee on 27/28 May 2009, however, a revised commitment guarantee was only furnished in November 2009 and thereafter, an initial LoA was issued to the informant on 2 - 3 December 2009.The DG has failed to show any willful delay on part of CIL in issuance of the LoA.

WCL could not have issued an LoA without the informant having fulfilled the requirement of furnishing the commitment guarantee which was cast upon by the SLC (LT).The DG has failed to note that, at the insistence of the informant, a revised LoA was issued in favour of the informant converting its linkage from a 'tapering linkage' to a 'normal linkage'. Accordingly, WCL issued a revised LoA in favour of the informant on 9 April 2010. Following this, WCL put up a notice inviting applications for allotment of cost plus mines.CIL was in the process of drafting a model FSA for supply of coal on a cost plus basis and after having formulated the FSA, CMPDIL started to prepare the project reports for the specified mines. As soon as the project report was complete and the scrutiny of the applications for allotment took place, WCL entered into the FSAs with the informant. Further, the LoA was valid for a period of 24 months and CIL prudently complied with the time stipulation.

60. Without prejudice to above, assuming there was a delay, the DG has not been able to establish that the informant suffered any harm because of the delay. The informant was getting regular supplies of coal from other sources as well as through a Memorandum of Understanding (MoU).

61. Further, the DG has erroneously held that had CIL entered into the FSA in December 2010, the mark up would have been lesser and would have caused huge price advantage to the informant. It is submitted that a reduction in the notified price in January 2012, was a one off instance in the history of CIL that was used to calculate the mark-up percentage. Nevertheless, the FSA itself provides that the base price is subject to revision on the basis of actual costs, if a 12% IRR is not achieved within the life span of the mine. Therefore, no great benefit would accrue to CIL.

62. The limited purpose of the LoA as acknowledged by the DG is to act as a bankable document for financial institutions to sanction the projects. The LoA merely contains the broad scope of the terms and conditions that would be contained in the FSAs, therefore there is no question of them being unfair or discriminatory.

63. The provisions in relation to the submission of commitment guarantee and achievements of the milestones are totally fair, as by opening of these mines, CIL was taking the risk of investing in what were otherwise financially unviable projects. Therefore, the purpose of the milestones in the LoA was to have a commitment from the dedicated buyer for its cost plus projects.

64. While drafting the FSAs on cost plus basis, CIL used the Model FSA for the old power plants of state utilities that was finalized in the year 2009. It is pertinent to note that this model FSA was developed after rounds of discussions with the power producers in the presence of CEA. Therefore, it is wrong to say that the clauses of the FSAs were unilaterally decided by CIL.

65. The only major difference in the FSAs for supply of coal on cost plus basis was the prices to be charged from the consumers and an additional financial security which was put into the FSA after detailed internal deliberations. All the other clauses including deemed delivery quantity, quality of coal *etc*., were to remain same as the other FSAs which have been subject matter of various investigations and the review of these clauses is currently pending before the Hon'ble Competition Appellate Tribunal in appeals.

66. It was argued that the pricing policy of CIL is motivated by the interest of the consumer which has been recognized by the Hon'ble Supreme Court in the case of *Ashoka Smokeless Coal* v. *Union of India and Ors*., (2007) 2 SCC 640.

67. It was argued that the base price in the FSA is based on the estimation of the costs that are projected to be incurred by WCL over the life of the project while the notified price takes into account the increased in the costs of production. The DG's data itself shows that with every increase in the notified price there is a corresponding and proportionate increase in the contract price for the FSAs. Without prejudice to the submission that the current system of pricing of coal in cost plus mines is fair, it was submitted that the mark up system is actually beneficial for the consumer, for the reasons given below:

a) Applying a fixed mark up on the notified prices simplifies the process and reduces the burden of calculation which was required at regular intervals under the previous system;

b) The mark up pricing on the basis of notified price provides is transparent method as it clearly provides the key benchmarks for the consumer to consider; and

c) The notified price, is calculated on the basis of the cost of all the mines of CIL, which is beneficial to the consumers in cost plus mines, because the cost of production in all the other mines is lesser than that in the cost plus mines which results in a lesser increase in the contract price.

d) The notified price of CIL is only increased when it cannot absorb the additional costs without adding efficiencies, therefore, the customer benefits from the cost absorbing capacity of CIL.

68. The DG has wrongly understood the profits earned by WCL in order to prove that the pricing of CIL is unfair. Further, the DG could not establish any unfairness in the pricing policy of CIL that could find foul of the provisions of section 4(2)(a)(ii) of the Act. The DG failed to note that the informant has failed to pay the revised financial guarantee against risk and therefore has not completed the condition precedent for WCL to incur investment costs for Bellora - Naigaon and Ukni Deep mines. Therefore, the mismatch between the projected investments and actual investments, as shown by the DG does not depict the clear picture as WCL is committed to incur costs as soon as it receives the revised financial guarantee.

69. It was submitted that WCL has incurred costs into the Urdhan project since the milestones were achieved by the informant. As a result, the DG's own calculation shows a 12.53% excess of the cost plus price over the investment, which is perfectly in line with the policy of supply of coal on cost plus basis, cost plus projects were supposed to yield 12% IRR over the costs.

70. It was also pointed out that the element of risk involved in the operation of the cost plus mines is higher than that in the operation of other mines. In case of the cost plus mines the production from the coal mine is supposed to be lifted by the customer and there are often no willing buyers to lift the overpriced coal from such mines. Therefore, there is no comparison of cost plus FSAs with the other regular FSAs. In the event that the buyer refuses to lift the coal extracted by CIL from mine, CIL

will face severe hardship in form of financial losses as there will be no buyers to lift the high priced coal.

71. On the issue of provisions relating to financial guarantee, it was argued that the sole purpose of the Financial Guarantee is to ensure guarantee that the investment of CIL is secure, in the event that the consumer fails to fulfil its contractual obligation and withdraws from the contract anytime during the tenure of the agreement. The amount of Financial Guarantee is tapered off in proportion to the quantity of coal lifted by the consumer in that year. Therefore, there is no unfairness in the provision of financial guarantee against risk. It was stressed that given that the cost of land constitutes major part of the capital investment of a mining project, it becomes essential for CIL (to ensure compliance with the policy directions of the GoI), to ensure that investments, which are made from public money, are made in relation to the cost plus projects are safeguarded.

72. It was further submitted that the performance incentive clause in the notified FSA had been included after detailed deliberations between CIL, the CEA and the NTPC, where this clause was agreed and found to be justified. The FSA quantities are determined based on norms provided by the MoP. Further, the SLC (LT), despite CIL protesting about the negative coal balance, has been handing out linkages to power plants and mandating that CIL promise to supply them quantities of coal that it does not have. As a result, the incentive clause is moved to a quantity that can more realistically be supplied by CIL.

73. The DG has wrongly analyzed the e- Auction quantity to arrive at a conclusion that CIL has earned additional revenues. It was submitted that, the DG has completely failed to recognize that the coal that is sold

in e-Auction from these mines is not additional coal produced, but coal that was to be sold to a cost plus consumer, but was not lifted.

74. In case of the Bellora - Naigaon and Ukni Deep mines, the quantity that was put up for e-Auction was actually supposed to be lifted by MAHAGENCO (under cost plus arrangement), which could not execute the FSA as it could not achieve the milestones. Further, the entire quantity put up for auction was not even sold. Therefore, there is no merit in the finding of the DG that benefits from e-Auction were not transferred to the cost plus customers.

75. Lastly, it was submitted that the findings of the DG in relation to the quality of coal are the replica of the finding of the DG in the previous cases and demonstrative of non- application of mind. The prejudice and the bias of the DG is reflected in its finding in relation to the clause relating to charging of transportation of coal for ungraded coal, which does not even exist in the FSA for cost plus consumers. Such an approach shows the pre conceived notions of the DG against CIL and are sufficient ground for the rejection of the DG's Report. The other clause of the FSA which have been found to be in violation by the DG are completely fair and reasonable as has been contested by CIL before the Commission in the previous cases and currently pending before the Hon'ble Competition Appellate Tribunal.

76. Therefore, in light of the facts presented above, it was argued that there is no merit in the findings of the DG in so far as the DG holds CIL in violation of the provisions of the Act.

Replies/ objections/ submissions of the informant

77. The informant, while agreeing with the finding of the DG, has filed its reply to the responses filed by the opposite parties and the same have been dealt with while examining the issues on merits.

Analysis

78. On a careful perusal of the information, the report of the DG and the replies/ objections/ submissions/ rejoinders filed by the parties and other material 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 the opposite parties are dominant in the said relevant market?

(iii) If finding on the issue No.(ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?

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

79. The DG determined and delineated the relevant market as production and supply of non-coking coal to thermal power producers in India.

80. It was, however, submitted by the opposite parties that the DG's findings that the relevant market is supply of non-coking coal to thermal power plants in India is incorrect. It was argued that contrary to the findings of

the DG, on the basis of recent import data, given the fact that significant quantities of coal are imported into India from other countries, the market for the supply of non-coking coal is global. The DG has failed to conduct an independent analysis of the conditions of demand and supply of non-coking coal in relation to the power sector in India and has simply relied on its finding in the previous cases against CIL. The lack of an independent analysis in complete disregard to the arguments and evidence presented by CIL shows non-application of mind and vitiates the findings of the DG.

81. The Commission notes that relevant product market has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use. Furthermore, to determine the 'relevant product market', the Commission is to have due regard to all or any of the following factors *viz*. physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products, in terms of the provisions contained in section 19(7) of the Act.

82. It is observed that the informant has set-up and operates a thermal power generation plant in the State of Maharashtra. In order to procure the supply of coal for its power plant, the informant has entered into Fuel Supply Agreements with the opposite parties for supply of coal from three different identified cost plus coal mines under the control of the opposite parties. In this connection, it is noted that cost plus supplies essentially relate to distinctly identified mines which are treated as financially unviable at Notified Price and required to be opened on cost

plus basis by the opposite parties. The prices in case of cost plus supplies are different than the prices of other categories of buyers. Though the prices of coal under cost plus mines are different, there is no difference in quality and usage of coal produced from such mines. Thus, the product in question is essentially the non-coking coal used by the thermal power producers.

83. The DG also examined the aspects relating to demand side substitutability and noted that demand side substitutability occurs when consumers switch to other products in response to the change in the relative prices of the product. Here, the product in question is non-coking coal which is used as raw material for the generation of power by the Thermal Power Plants, as in the case of the informant. This product has no demand side substitutability as no such other substitute product can be utilized as fuel for generation of electricity through thermal source for the thermal power plants. It was also found that imported coal is not a viable substitute or alternative for the Indian thermal power plants in view of the boilers used by them as well as on account of fact that the imported coal are very costly and the raw material *i.e*. coal alone amounts to 60%-70% of the total cost incurred by a thermal power plant.

84. In view of the above, the Commission is of opinion that there does not exist any substitute for non-coking coal which is made available to the thermal power producers and, as such, the Commission holds the relevant product market as 'production and supply o f non- coking coal to the thermal power producers'.

85. Further, the investigation revealed that the condition for supply of coal in the entire country is uniform and homogeneous as there are no barriers within the territory of India in terms of geographic location for the

consumers. Thus, the relevant geographic market was taken as the whole of India by the DG.

86. In this connection, it may be noted that 'relevant geographic market' has been defined in section 2(s) of the Act meaning as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the 'relevant geographic market', the Commission is to have due regard to all or any of the following factors *viz*. regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services.

87. The opposite parties, however, argued that the markets for supply of coal are global and accordingly objected to the DG concluding that the relevant geographic market for supply of non-coking coal cannot be expanded beyond India.

88. The Commission notes that the contention of the opposite parties to argue that the relevant market for the present purposes has to be global and cannot be confined to India as was done by the DG, is legally untenable. From a plain reading of the Explanation to section 4 of the Act, 'dominant position' means a position of strength, enjoyed by an enterprise, in the relevant market, *in India,* which enables it to operate independently of competitive forces prevailing in the relevant market or affect its competitors or consumers or the relevant market in its favour. Thus, the plea advanced by the opposite parties contending the relevant

market to be global is *ex facie* contrary to the express provisions of the Act and has to be rejected.

89. In view of the above, the Commission is of opinion that relevant market in the present case may be taken as 'production and supply of non-coking coal to the thermal power producers in India'.

Issue No. (ii): Whether the opposite parties are dominant in the said relevant market?

90. On the issue of dominance, the DG concluded that OPs are dominant in the said relevant market.

91. It was, however, submitted that CIL is not a dominant enterprise in the wider market (global) for supply of non-coking coal. It was submitted that CIL does not possess any economic power in the wider market. In this regard, it was pointed out, based on the statistics provided by World Coal Association in 2013, that India as a whole was expected to produce approximately 7.8% of the world's coal production (*i.e.* total estimated worldwide production of coal was 7823 million tonnes out of which India was estimated to produce 613 million tonnes, which represents a miniscule portion of the total global production). Therefore, it was argued that it cannot be said that CIL possesses any economic power leave alone enjoying a dominant position.

92. Further, it was argued that even if the market is narrowly construed and restricted to India, CIL is not dominant.

93. It was contended that CIL's current market position is because of the fact that coal mining in India was nationalized by the GoI in the early 1970's.

Therefore, CIL's market position is a creation of statute, and not as a result of its market practices. Further, as a result of being created by statute and majority owned and controlled by the GoI, it has social obligations that it is required to fulfil. These social obligations of CIL, must also be kept in mind when assessing CIL's dominance and should not be ignored as mere corporate social responsibility obligations as has been done in the past by the DG.

94. Further, in accordance with the provisions of the New Coal Distribution Policy (NCDP), linkages for supply of coal are decided by the Standing Linkage Committee (Long Term) [SLC (LT)], which consists of various stakeholders including Ministry of Power, CEA, Ministry of Coal, Ministry of Railways (being the largest logistics provider), Ministry of Surface, *etc*. Therefore, there is no question of CIL exerting any influence over the decision-making process in the supply of coal or refusing to negotiate at all.

95. At the outset, it may be noted that the Commission while determining the relevant market has already rejected the plea of the opposite parties whereby it was sought to be suggested that the market has to be global.

96. Further, it is also not in dispute that following the enactment of the Nationalization Acts, the coal industry was reorganized into two major public sector companies *viz*. CIL which owns and manages all the old Government-owned mines of National Coal Development Corporation (NCDC) and the nationalized private mines and SCCL which was in existence under the ownership and management of Andhra Pradesh State Government at the time of the nationalization.

97. Thus, it is evident that in view of the provisions of the Coal Mines (Nationalization) Act, 1973, production and distribution of coal is in the hands of the Central Government. As a result, CIL and its subsidiary companies have been vested with monopolistic power for production and distribution of coal in India. In view of the statutory and policy scheme, the coal companies have acquired a dominant position in relation to production and supply of coal. The dominant position of CIL is acquired as a result of the policy of Government of India by creating a public sector undertaking in the name of CIL and vesting the ownership of the private mines in it.

98. Thus, CIL and its subsidiaries face no competitive pressure in the market and there is no challenge at the horizontal level against the market power of the opposite parties.

99. The Commission has also considered in detail the various submissions relating to availability of imported coal, countervailing power exercised by customers and stakeholders, social costs and obligations, lack of freedom in deciding the quantity of coal to be supplied to the customers *etc*. advanced by CIL. The same were rejected after a thorough examination of the merits of the pleas in the previously decided cases involving the same relevant market. Hence, the submissions repeated by CIL need not be addressed separately again in this order.

100. In the present case, the Commission, on perusal of market share of CIL and its subsidiaries in the relevant market as recorded by the DG and after considering the market structure and size of market and in view of the analysis recorded above, is of opinion that the dominance of OPs in the relevant market is beyond any doubt. Further, since the passing of the earlier orders by the Commission in cases involving the same

relevant market, nothing has been brought on record or is otherwise discernible to suggest that any change has been effected in the *extant* regulatory and legal architecture affecting the market construct and structure in any manner.

101. In fact, the DG conducted an analysis of additional data covering the period since the passing of the previous order(s) upto the instant investigation and opined that there has not been any significant change in the market power and strength of the opposite parties in the relevant market.

102. In view of the above, it is held that CIL and its subsidiaries enjoy undisputed dominance in the relevant market, as defined above.

Issue No. (iii): If finding on the issue No. (ii) is in the affirmative, whether the opposite parties have abused their dominant position in the relevant market?

103. Before adverting to the issues projected in the present case, it would be appropriate to appreciate the mechanism of cost plus mines in supply of non-coking coal.

104. It may be observed that Ministry of Coal, Government of India through an executive order, has constituted a SLC for grant of Coal Linkages for supply of coal by CIL/ SCCL under the Chairmanship of Additional Secretary (Coal) having representatives of Ministry of Power, Central Electricity Authority, Ministry of Railways, Planning Commission, Ministry of Shipping and representatives of Coal India Limited, subsidiaries of Coal India Limited, CMPDIL, SCCL and NTPCL.

105. It may be noted that there are two separate categories of coal linkages, which are granted by the SLC (LT):

(i) Coal Linkages at Notified Price - In this category, coal is supplied from the pool of mines of CIL and therefore, the choice of mines from where the coal is supplied to the linkage holder is decided by CIL and its subsidiaries. Under this category, the coal is supplied at the Notified coal prices, which are decided by CIL from time to time. Major portion of supplies to thermal power producers is made under this category only.

(ii) Cost Plus Linkages - In this category, coal is to be supplied by CIL/ subsidiaries of CIL only from identified cost plus mines.

106. It may also be seen that cost plus mines are those mines which are financially unviable at Notified Price and required to be opened on cost plus basis. CIL offers to supply coal from these Mines at cost plus price yielding an 12% IRR at 85% capacity. In general, cost of coal from cost plus mines is at a premium to the notified price.

107. Ministry of Coal issued guidelines relating to supply of coal on cost plus basis *vide* its notification dated October 07, 2008. Under the cost plus guidelines, following procedures have been outlined for supply of coal from cost plus mines:

(i) Concerned coal company will identify blocks from where coal is to be allocated and inform CIL of the cost of such coal. Coal companies will put this information on their website so that existing LoA/ linkage holders can apply.

(ii) CIL/ SCCL would process the requests of linkage holders/ LoA holders/ FSA holders and decide on allocation of coal to these consumers, keeping in view the estimated production schedule and production pattern.

(iii) If the estimated production from such coal plus mines matches with the request for coal allocation from such mines, CIL/ SCCL, can take a view immediately.

(iv) If the request is less than the estimated production, then, the balance quantity can be offered by the concerned coal company on long term e-Auction and the reserve price for such auction can be fixed keeping in view the cost of production from such mines.

108. It has been stated by CIL before the DG that coal mining is done mainly by two methods - open cast mining and underground mining. Since the mines in operation have limited availability of coal reserves, the project is not a permanent industry, and gets exhausted in a span of time. Therefore, to maintain coal production in order to fulfil the demand for coal, new mines are required to be opened in phased manner. According to the guidelines of GoI only those projects which yield more than12% IRR at 85% capacity can be approved for production. Accordingly, financial IRR is calculated at the time of preparation of project reports by CIL's consultant CMPDIL before the start of operations in a particular mine. On the allegations of the informant relating to bank guarantee, it was sought to be clarified that Security Deposit and Financial Guarantee against Risk have different roles to play in the FSA. While one looks at proper implementation of the terms of the contract, the other protects the project from financial unviability. Therefore, a suitable price is derived which provides 12% IRR at 85% capacity in

order for them to make these mines operational. Investment in these projects can only be done once the customer is ready to pay such selling price.

109. It was noted by the DG that so far the supply through the cost plus mines is made only by one subsidiary of CIL *i.e.* WCL. In past, WCL had executed cost plus agreements with MAHAGENCO and Larsen & Toubro in 2000. It was stated by OP that currently 13 out of 16 ongoing projects which were earlier approved on notified price have been shifted to cost plus category. The informant was allotted coal supplies from three cost plus mines at Urdhan, Sellora Naigaon and Ukini out of these 13 ongoing projects.

110. In view of the aforesaid backdrop outlined by the DG, issues falling for consideration in the instant case may be examined.

111. The DG identified and examined the following alleged instances of abuse by the opposite parties:

(i) Delay in executing FSA

112. To examine the allegations on this score, it would be instructing to notice the chronology of events starting with the application of the informant made in June 2007 seeking coal linkage from cost plus mines of WCL to signing of FSA in April 2012:

(i) June 2007 – Application by the informant to WLC for Coal Linkage from its cost plus mines.

(ii) August 2007 - SLC (LT) granted coal linkage from cost plus Mines of WCL to the informant in its meeting dated 02.08.2007.

(iii) September 2007-Ministry of Coal, Government of India directed CIL to issue LoA to the informant for supply of coal on cost plus basis from WCL.

(iv) 07.10.2008, Ministry of Coal formulated and issued guidelines relating to supply of coal on cost plus basis by coal companies.

(v) By 31st March 2009, the informant had made substantial progress in setting up 540 MW Power plant at Warora and spent a sum of Rs1756.crores towards the project.

(vi) On13.5.2009, the informant entered into PPA with Maharashtra State Electricity Distribution company limited (MSEDCL) for supply of 300MW.

(vii) WCL *vide* Letter dated 27/28.05.2009 sought Commitment Bank Guarantee before issuing LoA.

(viii) On 18.06.2009, the informant submitted Commitment Guarantee of RS.36.27 crores.

(ix) In July 2009, in the website of WCL, information was displayed under the heading 'Financially unviable coal projects of WCL' offering for supply of coal to consumers on cost plus basis.

(x) On 07.11.2009 WCL informed the informant that the quantity in respect of the power plant has been revised to 2.26 million MTs and the existing

bank guarantee of Rs. 36.27 crores has to be enhanced to Rs. 39.18 crores for issuance of LoA. The informant complied in November 2009 itself.

(xi) On 03.12.2009, an initial LoA for supply of 2.26 million MTs of coal per annum was granted by WCL to the informant. LoA stipulated certain milestones to be achieved by the informant.

(xii) In July 2010 the informant commissioned its first unit of 135 MW. The informant communicated this to WCL but no action for coal supply is initiated by WCL. In November 2010 second unit of 135 MW was also commissioned by the informant.

(xiii) In October 2010 and December 2010 notices for cost plus mines were issued by WCL on its website to invite applications from eligible power producers including the informant.

(xiv) 2011-No progress on signing of FSA from WCL. By May 2011 all the 4 units were commissioned by the informant.

(xv) The informant requested to start supply of coal at 40% higher price and MoU is signed for this purpose in July 2011.

(xvi) In April 2012, the FSA is signed by WCL and the informant.

113. The DG conducted a detailed examination and analysis of the events in the investigation report and opined that the delay on the part of OPs in execution of LoA and FSA was result of its market power in the relevant market. It was noted by the DG that the ability to decide the terms and conditions in the relevant market allowed the opposite parties to act as

per their own convenience. The OPs in absence of any obligation on its part were able to act in an inefficient manner which resulted in one sided LoA, delay in supplies of coal and execution of FSA. The DG has also pointed out that the OPs not only delayed signing of FSA but also increased the price during the period of delay on estimate basis and thereby profiteered therefrom.

114. The opposite parties vehemently contended that there has been no delay on their part in executing the FSA. It was argued that from the first day when a request was made by the informant for conversion of its tapering linkage into a normal linkage, due to the failure of its arrangement with GMDCL, WCL has supported its request and the FSA was entered into within the shortest possible time-frame, keeping in mind all the procedural compliances that are to be undertaken by WCL while conferring a benefit on any private party. The opposite parties denied any delay in execution and sought to rationalize the time taken for FSA execution by ascribing the same to conversion of Tapering Linkage to Long Term Linkage on29.01.2010 necessitating WCL to plan for a long term commitment resulting in the whole exercise undertaken by WCL prior to 29.01.2010 as meaningless. The finding of the DG that the informant suffered great financial loss because of the alleged delay was also denied as misconceived.

115. The informant controverting the submission made by the opposite parties argued that these assertions of the opposite parties are not factually correct and contradict with the other assertions of the opposite parties. It was argued that it is an undeniable fact that the LoA for tapering linkage has been issued after more than full 24 months from the grant of linkage by the Government. There has been no cogent explanation as to why such inordinate delay occurred in issuance of LoA on tapering basis

itself. Infact, while the opposite parties are seeking to hide behind procedural formalities when the LoA expects the procurers to fulfill many substantial milestones including third party based clearances, land acquisition, financial closure *etc*. within a period of 24 months for its validity. In fact, it was pointed out that the DG Report at para 6.5.4 correctly states that the contention of the opposite parties on the issues of commitment guarantee is not tenable as records verification has evidenced a significant delay even after the guarantee was provided by the informant within 3 weeks from the demand by the opposite parties. The above facts *dehors* other facts on record would point to the undue delay on account of the opposite parties.

116. The Commission has carefully perused the material on record.

117. It appears that after the approval of SLC (LT) to the informant, who was ready to take supplies from cost plus mines, the opposite parties took more than 3 years to seek formal offer from the informant when the notice regarding cost plus mines was issued by the opposite parties in 2010. No satisfactory explanation has been offered by the opposite parties for such inordinate delay.

118. Further, it may be observed from the conclusions summarized by the DG in the report that the informant on several occasions requested to the opposite parties to issue LoA, sign the FSA and start the process of coal supply. However, these written communications were not acted upon by the opposite parties. The opposite parties apparently took advantage of onerous conditions imposed in LoA. The LoA issued by the opposite parties in 2009 did not contain any obligation on the part of seller to sign FSA or to start coal supplies, whereas the buyer was supposed to achieve the milestones within the stipulated time and failing which the

commitment guarantee of the buyer was liable to be forfeited. The LoA was drafted by the opposite parties having no provision of any commitment on their side. The informant was investing more than Rs. 2000 crores on the basis of LoA, whereas the investment by the opposite parties was of much less value. Due to monopolistic market conditions, the opposite parties prepared the terms and conditions in such a manner that the buyer had all kinds of obligations whereas the opposite parties had none. The informant after commissioning its plant had to buy coal from the open market to fulfill its commitment in the PPAs. The communications relating to commissioning of power plants were given to the opposite parties but the same were not acted upon. The power producers like informant are bound by its PPA to supply power but it cannot insure similar assurance and commitment from the other side *i.e.* by the opposite parties. The opposite parties while framing the agreement have not consulted the buyers. The opposite parties have incorporated the terms and conditions in agreement unilaterally without adopting a process of fair commercial arrangement between buyer and seller. The component of risk for the informant is not less than the risk taken by the opposite parties. Having terms and conditions in LoA which cast obligation on buyer only is onerous and unfair. Such exploitative conduct is only a result of dominance of the opposite parties.

119. The Commission notes that WCL has not elaborated what action were taken by it prior to 29.01.2010 *i.e.* when the linkage of the informant was converted from tapering to normal. In fact, from the minutes of the meeting of SLC (LT) held on 29.01.2010, placed on record by CIL itself at page 177 of its objections to the DG report, it appears that no objection was taken by WCL or any difficulty was expressed by it in the meeting due to such conversion. The same may be noticed:

CMD WCL informed the Committee that they have identified a cost plus mine for supply to this project with a life of more than 5 years and if it is decided to convert this LoA to normal as requested by the applicant, it may not have problems in supply of coal by WCL as they would be having a committed consumer throughout the life of the project. Having regard to the recommendation of MOP and WCL, the Committee agreed for conversion of tapering LoA to normal LoA on cost plus basis from WCL.

120. In view of the above discussion and conclusions drawn by the DG as noted above, which have not been controverted or otherwise satisfactorily explained by the opposite parties, the Commission is of opinion that the delay in executing FSA was attributable to the market power exercised by the opposite parties resulting in increase in the price during the period of delay on estimate basis.

121. In the result, the Commission agrees with the findings of the DG that the impugned conduct of the opposite parties adumbrated above was in contravention of the provisions of section 4(2)(a)(i) of the Act.

(ii) Imposing unfair terms and conditions in supply of non-coking coal

Conditions in LoA

122. The DG found the conditions imposed by the opposite parties in the LoA (clause 2.5/3.3) to be unfair in violation of the provisions of section 4(2)(a)(i) of the Act.

123. It may be noted that the process of supply of coal by the opposite parties to the power producers involve: (a) Grant of linkage by SLC(LT) to the power producer; (b) Signing of LoA issued by opposite parties; (c) Completion of milestones by power producer and commissioning of power plant; and (d) Signing of FSA issued by the opposite parties and beginning of coal supply.

124. As per clause 2.5 of LoA, the opposite parties imposed a condition of commitments guarantee before issue of LoA from the buyers. The reason for obtaining such commitment guarantee was stated to ensure the seriousness of the buyers. However, the opposite parties could not explain any rationale behind such clause which seeks to safeguard the risk taken by them when both the parties are taking risk for the commercial gains. Furthermore, in clause 3.3 of the LoA, the buyer was obligated to meet the milestones laid down therein. Failure to meet the milestones within stipulated time period required the buyer to furnish additional Commitment Guarantee equivalent to $1/10^{th}$ of the amount of the Commitment Guarantee for each incomplete milestone. From this, it was noticed by the DG that while the informant was obligated to complete the milestones in a time bound manner, no such commitment was given by the opposite parties for execution of FSA and commencement of coal supply. Lastly, it was noted that failure to achieve milestones within the stipulated time allowed the opposite parties to terminate LoA and encash the commitment guarantee. There was no such commitment for time bound supply of coal by the opposite parties.

125. The Commission has very carefully perused the conclusions of the DG and the submissions of the parties thereon.

126. It was contended by the opposite parties that the acceptance of the terms and conditions of the LoA by the informant without any evidence of protest and raising it after so many years before the Commission clearly reflects an afterthought on part of the informant. It was submitted that the DG has failed to note that LoA was simply an instrument of assurance (and is an interim document) given to the buyer to commence operations and did not contain any commercial terms and conditions within it. Therefore, the finding of the DG that the terms and conditions of the LoA were one sided is incorrect and should be set aside by the Commission.

127. It was contended that the decision to impose the condition of Commitment Guarantee over the consumer was not taken by WCL, but was taken by SLC(LT) in its meeting dated 12.11.2008, and the same was provided to the DG in the response dated 07.04.2014. It was pointed out that by questioning the legality of the term of Commitment Guarantee the DG has in essence challenged the policy decision of MoC, and hence thus investigated into an issue which is not subject to the present investigation. It was submitted that the proper forum to challenge any policy decision of MoC is not the present forum but is the Hon'ble High Court under Article 226 of the Constitution of India or the Hon'ble Supreme Court under Article 32 of the Constitution of India.

128. The Commission is of opinion that the contention raised by the opposite parties is misconceived. There is no challenge to the legality of any policy decision of MoC. The DG, in its report, did not question the legality of the terms of Commitment Guarantee. The entire submission of the opposite parties on the jurisdictional issue is therefore completely misplaced. The DG has pointed out that while SLC (LT) decided to levy

Commitment Guarantee, MoC did not restrict the opposite parties from granting reciprocal commitment to the consumers under such LoA. The DG has found on this count that the terms of LoA were one sided as the LoA neither cast any financial obligation on WCL, nor had any time-bound obligation on WCL to open the cost plus mine in time. Thus, as rightly contended by the informant that the very provision of Commitment Guarantee is not under challenge but the one side nature of the LoA with stipulation of Commitment Guarantee with no reciprocal obligations on the opposite parties which has been found to be anti-competitive.

129. In view of the above, the Commission is of opinion that the behavior of the opposite parties is found to be non-reciprocal in not having balancing provisions in the terms and conditions of LoA and accordingly, agreeing with the findings of the DG holds that the above conditions imposed by the opposite parties upon the buyers in the absence of mutuality and reciprocity of contractual obligations in LoA are unfair being in contravention of the provisions of section 4(2)(a)(i) of the Act.

Finalizing FSA without Bilateral Process

130. The DG also concluded that the opposite parties by virtue of their dominance and on account of lack of competitive process had never made effort to decide the terms and conditions of FSA by way of a bilateral process.

131. Though, no specific finding of contravention has been recorded by the DG on this count, the Commission notes that drafting of LoA and FSA was done by the opposite parties without engaging with the stakeholders. This is borne out from the DG report wherein it has been noticed that

various changes were made to the definition of the applicable price of coal for supplies over a period of years, which is the very essence of the commercial arrangement. It may also be noticed that the informant had limited choice except to sign FSA given the supplies under MoU were to expire in March 2012 and further due to the obligations to the power procurers under PPAs - failure in meeting the obligations would invite claim of damages from such power procurers.

132. In this connection, the Commission may observe that in the common order of the Commission in Case Nos. 03, 11 & 59 of 2012, it was held that CIL abusing its dominance did not try to evolve the terms and conditions of FSAs through a mutual bilateral process and the same were sought to be imposed upon the power utilities without seeking much less considering the inputs of the power producers.

(iii) Unfair Terms/ Conditions and Prices under FSA

133. It was concluded by the DG that the pricing formula in FSA for cost plus mines is not only erroneous but also based on an unfair and non-transparent mechanism. The pricing formula is one sided in favour of the opposite parties only. It was therefore held that the opposite parties have imposed unfair conditions relating to pricing in FSA in violation of the provisions of section 4(2)(a)(i) of the Act.

134. Further, the investigation also revealed that the prices charged by the opposite parties from cost plus FSA holders are excessive and unfair. The opposite parties due to excessive prices have been able earn a very high profit during the first two years of operation. The opposite parties have exploited the dependency of the consumers and charged unfair prices by adopting erroneous formula in FSA. The prices charged by the

opposite parties were significantly higher than the prices which yield IRR @12%.It was therefore concluded that the opposite parties have imposed unfair price in the supply of coal to the informant in violation of the provisions of section 4(2)(a)(ii) of the Act.

135. The Commission notes that the present information relates to FSA entered into by the informant with the opposite parties for supply of coal from three different identified cost plus coal mines. In this connection, it may be noted that there are two separate categories of coal linkages which are granted by SLC (LT).

136. In the first category, coal linkages at notified prices are granted. In this category, coal is supplied from the pool of mines of CIL and therefore, the choice of mines from where the coal is supplied to the linkage holder is decided by the CIL and its subsidiaries. Coal is supplied at the notified coal prices, which are decided by CIL from time to time. Major portion of supplies to thermal power producers is made under this category only.

137. In the second category, cost plus linkages are granted. In this category, coal is to be supplied by CIL and its subsidiaries only from identified cost plus mines. Cost plus mines are those mines which are financially unviable at notified price and require to be opened on cost plus basis. CIL offers to supply coal from these mines at cost plus price yielding an 12% IRR at 85% Capacity. In general, cost of coal from cost plus mines is at a premium to the notified price.

138. The DG has undertaken a detailed analysis of the pricing formula in the investigation report. On perusal of the analysis, the following points may be noted:

a) The pricing formula in FSA of cost plus mines is not based on the actual operating cost plus investment as envisaged in the offer letters and in LoA.

b) The notified price has no connection with the cost of operations of cost plus mines. Linking notified prices with the contract price of cost plus mines has no rationale.

c) The internal note for revision in notified price confirms that the changes in notified prices were not solely based on cost.

d) Charging fixed mark up on notified price is not logical as the notified prices have no connection with the operational cost of the cost plus mines. Further, instead of fixing the mark up % on actuals, it is fixed on estimate basis for entire project life. The mark up should be based on the actual cost and 12% IRR thereon.

e) The prices charged from the informant are found to be excessive as the margin between actual cost and contract price is much higher than the reasonable IRR @ 12%.

f) There is no provision for downward revision in case the prices charged by OPs are found to be excessive. On the other hand, if prices are found to be less than IRR @12%, the OPs are entitled for recovery.

g) The OPs do not provide actual data to the informant relating to operational cost and investments made in the cost plus mines.

h) The OPs have right to escalate the price during the period of agreement but the same has to be based on actual costs and not on estimated figures.

i) As per the formula for contract price when notified price increases the contract price increases exponentially due to fixed markup %. For example, if notified price is increased by Rs.100/-, the contract price will not increase by Rs. 100/- but is escalated to Rs. 239/- as there is a component of fixed mark up. Thus, when the cost is increased by Rs.100/- , the informant will not pay 100+12% *i.e.* Rs.112/- but Rs.239/- which is Rs.127/- more than the required amount, due to such erroneous contract price formula in FSA. There is no justification for charging such an extra charge which is disproportionate to the increase in cost.

j) Having a reasonable profit over the cost of sales is not unfair and does not violate the provisions of the Act. The data has shown that the profit of OP was much higher than the desired IRR of 12%.

k) In an agreement which provides long term business to OP and when there is no competition in the relevant market, the prices have to be based upon fair and transparent formula of cost plus principles.

l) FSAs do not provide any downward revision even if the cost of operation and the desired IRR is less than the Contract Price determined as per the formula.

m) The other player *viz*. SCCL in the relevant market has adopted the formula based upon actual cost and IRR.

n) The analysis of data for FYs 2012-13 and 2013-14 has revealed that WCL has made a high return from these cost plus mines due to erroneous pricing mechanism adopted in FSA.

139. It was argued by the informant that the contention of the opposite parties that the pricing mechanism under FSA has pro-consumer benefits is wrong in entirety. Referring to the reply of CIL at para288,it was pointed out that it has clearly admitted that it made a good faith judgment call to use a notified price based formula to calculate contract price, as this appeared to be the best way to avoid a cumbersome periodic calculation while still pricing coal based on cost of production.

140. It was strenuously argued by the informant that under the current arrangement not even a draft of the FSA was discussed with the informant by the opposite parties when the very genesis of the arrangement necessitated a clear requirement by SLC (LT) minutes of 2nd August 2007, the relevant portion as extracted below:

> *However, the specific commercial arrangements in this regard would be worked out between the consumer and CIL/ Linked Company for supply of coal on short term tapering basis, taking into consideration their requirement on normative basis and production/supply commencement schedule of their linked captive mines.*

141. The Commission notes that the opposite parties have earlier selectively taken the refuge of the mandate given by SLC (LT) in justifying their actions. However, at the same time, notwithstanding the clear

arrangement suggested by SLC (LT), no effort was made by them to even discuss draft of FSA with the informant.

142. Further, controverting the submissions made by WCL asserting that since the informant has not successfully even completed two years of the entire term of the FSA and the investments which were to be incurred by WCL have not been completed, the instant findings of the DG are also a pure estimation and there is no substantial proof which has been found by the DG to substantiate the otherwise invalid claims, it was argued by the informant that this is factually incorrect and attention of the Commission was drawn to para 6.10.32 in the DG report at page 68, which stated that it has used the operational data provided by WCL which has also been annexed at Annexure -7 to the DG report. The entire findings of the DG are therefore based on WCL's submissions and there are no estimations made by the DG in the report. Therefore, as it appears, the DG has provided an analysis of actual cost data provided by WCL. The opposite parties therefore should be prevented from resiling from their very own submissions made to the DG on actual data.

143. It was further contended by the informant that the opposite parties have accepted *vide* their submission that the Project Reports are an estimate of costs based on which a Base Price is arrived at for the particular cost-plus mine and that the estimation can vary in the due course of actual exploration of the mine, hence the FSA contains a provision, wherein they undertake revision of the Base price, if the same is not yielding 12% IRR. This is the precise ground wherein the intervention of the Commission has been sought as a party for supplies cannot be allowed to charge based on ad-hoc estimates, not share the basis of the same with the procurer, especially in a cost plus arrangement and thereafter equip itself with a provision under the contract for an upward revision alone.

Operating on the basis of estimates and absence of provision for downward revision itself, especially in a cost plus arrangement, indicates the motivations and the conduct of the opposite parties in this regard. Therefore, it was submitted by the informant that the DG Report has rightfully observed in its report at 6.10.37 at page 70 that WCL has profiteered by charging base prices & Contract Prices on estimation basis when actually compared with the operating data with respect to the three mines as furnished by the opposite parties themselves with respect to 2012-13 and 2013-14 years.

144. It was submitted by the informant that the opposite parties by their own admission are charging a price for the coal *dehors* the actual cost incurred and based on certain future investments that they seek to make. It was alleged that the same is not only *malafide* but seeks to justify the wrongs that are being committed by the opposite parties in charging an imaginary price *dehors* the actual cost being incurred and the resultant obligation under cost plus arrangement.

145. The informant has also controverted the contention of WCL that it did not incur the capital costs because the informant did not submit the BGs, as required. It was argued that the same is completely false as Bank Guarantees of Rs 183 Crore have been already furnished prior to signing the FSA and the opposite parties are fully aware of the same having received the same. Further, this stand by the WCL contradicts the position of CIL that has unequivocally at para 293, Table 12 of its reply states that the purpose of taking Commitment Guarantee was *to get an assurance from the buyer before opening up a project on cost plus basis*. This was later adjusted with the amount that was to be paid as Security Deposit. Therefore, the opposite parties cannot be allowed to take varying stands to suit their convenience and are duty bound to go ahead

and make investments in the development of the mines once commitment guarantees have been procured as stipulated under the LoA.

146. It was also contended by the informant that the opposite parties have conveniently averred to as to how the notified prices are arrived at by them considering various factors, which actually have no relevance to a cost plus mine. The informant questioned as to how the following factors which are considered by the opposite parties for fixing Notified Prices are relevant for cases of cost plus mines, as detailed below:

(i) Demand-Supply scenario - for a dedicated cost plus consumer, such overall demand-supply scenario experienced by CIL is irrelevant.

(ii) Capacity of company to absorb the increase in cost – the informant has already agreed to a cost plus arrangement to absorb all the costs related to the cost plus mine. It has no relevance to CIL's capacity to absorb the increase in costs.

(iii) Landed cost of imported coal - cost plus consumer sources his coal requirement from the identified cost plus mines. Landed cost of imported coal has no bearing on costs attached to a specific mine.

(iv) Requirement of additional resources mobilization for fresh Investments in new projects - has no bearing.

(v) Need for capital investment in new projects – already identified in case of cost plus mines.

147. In view of the above, it was urged by the informant that in instances of a cost plus mine, the actual costs (*viz*. Capital Costs and Operating Costs) relating to a mine are the only relevant factors and linking the Contract Price of the cost plus mines to the Notified Prices of Coal India's mines is a clear reliance on non-related factors and thereafter linking a mark-up on such prices is definitive abuse of dominant position of the opposite parties.

148. On a consideration of the rival submission, the Commission is of considered opinion that the pricing formula in the FSA for cost plus mines is not only erroneous but is also found to be based on an unfair and non-transparent mechanism.

149. Although, the OPs have contended that the linking contract price with notified price is beneficial for the consumers the Commission holds that the notified price has no connection with the cost of operations of cost plus mines. Linking notified prices with the contract price of cost plus mines has no justifiable rationale.

150. The Commission agrees with the conclusion of the DG to the extent that the opposite parties have imposed unfair conditions relating to pricing mechanism adopted by the opposite parties in contravention of the provisions of section 4(2)(a)(i) of the Act.

151. The DG has also returned a finding that OPs are charging excessive and unfair pricing which is higher than the prices which yield IRR@12%. On the other hand OPs have stated that they are not able to earn even mandatory 12% IRR as the contract price is less than the price that earns 12% IRR. OPs have also submitted that WCL has incurred costs into the Urdhan project and as a result, the DG's own calculation shows a

12.53% excess of the cost plus price over the investment, which is perfectly in line with the policy of supply of coal on cost plus basis, cost plus projects were supposed to yield 12% IRR over the costs. The Commission is of the opinion that once the unfairness embedded in the pricing formula is removed the issue of distortion in sale price would get addressed and therefore, the Commission does not deem it appropriate to hold the sale price excessive and unfair.

(iv) Provisions relating to Bank Guarantees

152. The informant alleged that FSA draft provided by WCL had a totally new stipulation of providing additional Financial Risk Bank Guarantees equivalent to immoveable assets of the mines. The informant pointed out that neither in WCL's Notice nor in LoA there was any provision envisaged with respect to Financial Risk Guarantee. Further, it was averred that under LoA the informant had submitted the Commitment Guarantee (CG) equivalent to 10% of the base price for LoA quantity, which was returned after execution of FSA, on furnishing the Security Deposit Bank Guarantee. It is alleged that WCL unilaterally inserted a provision to furnish Additional Bank Guarantee in FSA to the tune of 183 Crores (Financial Risk Bank Guarantee) for FSA quantity of 1.625 Million Tonnes out of 2.26 Million Tonnes. This was in addition to the Security Deposit Bank Guarantee submitted to WCL for this quantity.

153. The DG found the condition of Financial Risk Bank Guarantees covering investments in the Immovable Assets as unfair being in violation of the provisions of section 4(2)(a)(i)of the Act.

154. The OPs have argued that the only major difference in the FSAs for supply of coal on cost plus basis was the prices to be charged from the

consumers and an additional financial security which was put into the FSA after detailed internal deliberations. On the issue of provisions relating to financial guarantee, it was argued that the sole purpose of the Financial Guarantee is to ensure guarantee that the investment of CIL is secure, in the event that the consumer fails to fulfill its contractual obligation and withdraws from the contract anytime during the tenure of the agreement. The amount of Financial Guarantee is tapered off in proportion to the quantity of coal lifted by the consumer in that year. Therefore, there is no unfairness in the provision of financial guarantee against risk. It was stressed that given that the cost of land constitutes major part of the capital investment of a mining project, it becomes essential for CIL (to ensure compliance with the policy directions of the GoI), to ensure that investments, which are made from public money, are made in relation to the cost plus projects are safeguarded. It was also sought to be clarified that Security Deposit and Financial Guarantee against Risk have different roles to play in the FSA. While one looks at proper implementation of the terms of the contract, the other protects the project from financial unviability.

155. It may be noted that for securing the coal supply, the buyer has to furnish the following bank guarantees at different stages:

a) A Commitment Guarantee @10% of the value of Annual coal supplies before the issuance of LoA.

b) Security Deposit equivalent to 6% of annual sale value of coal as provided in FSA.

c) Financial Guarantee against Risk for an amount equivalent to the value of immovable asset mandatory as per FSA.

156. From the DG report, it appears that the Commitment Guarantee sought at the time of LoA is convertible to Security Deposit @6% at the time of signing of FSA. In December 2012, CIL modified the provisions relating to Security Deposit of 6% obtained at the time FSA. Prior to amendments, the SD was to be refunded only after the expiry of agreement. These provisions were amended for FSA holders as follows:

> *'The Security deposits shall be refundable to the purchaser at the end of 30 days from the First Delivery date'.*

157. The DG has stated that in case of cost plus buyers the similar amendments were not made and therefore the SD amount of FSA holder which is a non interest bearing deposit is locked in for the entire period of agreement. However, in view of the Commission the findings of DG that the opposite parties have imposed discriminatory provisions by having different conditions for refund of Security Deposit of FSA holders for cost plus mines is not acceptable because each and every term and condition applicable for supply of non coking coal to thermal power producer holding regular FSAs cannot be expected to be applied *ipso facto* to cost plus FSA holders.

158. As regards different kinds of bank guarantees, it may be observed that in the case of cost plus buyers, the Security Deposit Bank Guarantee of 6% which is non-refundable till the period of agreement is an umbrella cover available to the opposite parties which covers any defaults under FSA including failure to lift committed quantities. FSA also deals with consequences for failure of the informant to lift committed quantities and penalties applicable thereto. Further, it is also clear that the informant has already furnished Financial Risk Bank Guarantee to the tune of Rs

183.43 Crores at the time of signing the FSA. Thus, the investment risks of OPs have been sufficiently secured and demand of Additional Financial Risk BG to the tune of Rs 233.63 Crores has no valid justification.

159. The Commission also notes that even though a Bank Guarantee acts as a security mechanism and does not provide immediate cash flows to the OPs nonetheless, the Bank Guarantees procured by power producers do involve cost and also result in locking of their capital for an unproductive purpose.

160. Accordingly, the Commission agrees with the findings of the DG to the extent that the conduct of OP in demanding Additional Financial Risk Bank Guarantee for Rs 233.63 Crores in an arbitrary manner is a result of its market position and seeking the additional BG is not justifiable.

161. In the result, the Commission, is of opinion that the imposition of condition of Additional Financial Risk Bank Guarantee is unfair being in contravention of the provisions of section 4(2)(a)(i)of the Act.

(v) Performance incentive clauses

162. The DG found that the provisions relating to performance incentive in clause 4.14 of FSA as unfair being in contravention of the provisions of section 4(2)(a)(i) of the Act.

163. FSA for cost plus buyers contains a provision of performance incentive for coal supplied beyond 90% of Annual Contracted Quantity (ACQ) and buyer has to pay premium of 10% (for coal supplies of 90-95% of

ACQ), 20% (for coal supplies of 95-100%) and 40% (for coal supplies of 100% of ACQ) above the Base Price.

164. In this connection, it was noted by the DG that the concept of performance incentive was incorporated in FSAs meant for power producer to whom coal was supplied at the notified price. In view of gap between production and linkages, CIL sought an incentive for fulfilling the ACQ. However, in case of cost plus mines, where prices are based upon a working formula which yields at least 12% IRR , and where quantity is also to be supplied from the dedicated mines, the reason for incorporating similar provisions in FSA is not substantiated.

165. The Commission is of opinion that the issue of parity as claimed by OPs is not relevant so far as the performance incentive clauses are concerned since by very nature of cost plus arrangements, such incentive mechanism is found to be without any rationale.

166. In the result, the Commission agrees that the provisions relating to performance incentive in clause 4.14 of FSA are unfair and OPs have violated the provisions of section 4(2)(a)(i) of the Act.

(vi) Revenue from E-Auction of coal from cost plus mines

167. The DG also found OPs to have imposed unfair condition by excluding the additional revenue in calculation of price of coal to the cost plus consumers in contravention of the provisions of section 4(2)(a)(i) of the Act.

168. Firstly, from the data furnished by OPs and analyzed by the DG, it is evident that OPs have earned substantial revenue from coal sales through e-Auction in respect of the three cost mines in question.

169. As correctly appreciated by the DG that if the cost plus mines are operated on a principle that the power producer has to bear the cost of mining and pay a price which should give 12% IRR to OPs, the revenue generated from other mode like e-Auction are also required to be taken into consideration in calculation of prices.

170. Resultantly, the conduct of OPs on this count is also found to be in contravention of the provisions of section 4(2)(a)(i) of the Act.

(vii) Clauses relating to quality

171. The informant has also raised various issues relating to quality of coal arising out of impugned FSAs. It has been noted by the DG that the same stand covered by the order of the Commission passed in Case Nos. 03, 11 & 59 of 2012. The conduct of the OPs emanating from these clauses were examined and found to be abusive in violation of section 4 in the earlier decisions of the Commission. Accordingly, such clauses are violative of section 4(2)(a)(i) of the Act in the present matter also.

172. The only thing which merits notice on such aspects in the present case relates to issue of third party sampling which was stated to be introduced by CIL in August 2013 (yet the relevant provisions were not incorporated till the date of submission made by WCL on 20.05.2014).

173. Accordingly, the DG noted that there is a proposal mooted by OPs to incorporate provisions of third party sampling in FSA of cost plus mines,

the same was not found to be incorporated till the last submission made by OPs on 23.07.2014. Thus, it was concluded by the DG that there is differential treatment with cost plus mines FSA holder without any justified reason and OPs were found to have violated the provisions of section 4(2)(a)(i) of the Act.

174. From the reply furnished by OPs dated 20.05.2014 before the DG, the Commission notes that the third party sampling has already been proposed in respect of cost plus mines and the same is awaiting approval of appropriate authority.

175. In view of the above, the Commission is of opinion that no competition concern survives on this count.

Conclusion

176. In view of the above discussion, the Commission is of considered opinion that CIL through its subsidiaries operates independently of market forces and enjoys undisputed dominance in the relevant market of production and supply of non-coking coal to the thermal power producers in India. The Commission also holds the opposite parties to be in contravention of the provisions of section 4(2)(a)(i) of the Act, as detailed in the order.

ORDER

177. In view of the findings recorded by the Commission, it is ordered as under:

(i) The opposite parties are directed to cease and desist from indulging in the conduct which has been found to be in contravention of the provisions of the Act, as detailed in this order; and

(ii) The opposite parties are further ordered to make necessary modifications in its agreements in light of the observations and findings recorded in the present order within a period of 60 days from the receipt of this order and furnish an undertaking to this effect.

178. It is noted that the opposite parties have preferred an appeal before the Appellate Tribunal being Appeal No. 01 of 2014 wherein the Appellate Tribunal has ordered *status quo vide* its order dated 13.01.2014. In these circumstances, the directions at para 177 (ii) relatable to the clauses and conduct which were also subject matter of order passed by the Commission in earlier case would be subject to decision of the Appellate Tribunal.

179. In view of the directions contained in this order, no further or other orders are required to be passed in the application of the informant seeking interim relief and the same stands disposed of accordingly.

180. The Commission has already imposed a penalty of Rs. 1773.05 Crores upon the opposite parties in relation to the same relevant market which is involved in this case. While the present matter involves issues in relation to cost plus mines, the clauses and conduct broadly relate to the supply of non-coking coal to thermal power producers. Further, some of the conduct and clauses found to be in contravention of the provisions of section 4 are similar to the clauses and conduct examined and held to be in violation of the Act in the earlier orders, for which the opposite parties have already been penalized. In view of the totality and peculiarity of the

facts and circumstances of this case, the Commission does not deem it appropriate to impose any penalty on the opposite parties in this case.

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

(Ashok Chawla)
Chairperson

(M. L. Tayal)
Member

(S. L. Bunker)
Member

(Sudhir Mital)
Member

(Augustine Peter)
Member

(U.C. Nahta)
Member

New Delhi
Date: 27/10/2014