COMPETITION COMMISSION OF INDIA
Case Nos. 16-20 & 45 of 2016, 02, 59, 62 & 63 of 2017

Case No. 16/2016

***In Re*:**
Rico Auto Industries Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

WITH

Case No. 17/2016

***In Re*:**
Omax Autos Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

WITH

Case No. 18/2016

***In Re*:**
Omax Autos Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

WITH

Case No. 19/2016

***In Re*:**
Rico Auto Industries Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

WITH

Case No. 20/2016

***In Re*:**
Rico Castings Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

Present in Case Nos 16-20/2016:
For Informant : Mr. Sharad Gupta, Mr. Vinayak Gupta, Advocates

Opposite Party: Mr. Sanjay Jain, Senior Advocate**,** Mr. Pranjal Prateek, Mr. Ebaad Nawaz Khan, Mr. Vidur Mohan, Mr. Arkaj Kumar, Ms Saniya, Mr Padmesh Mishra, Advocates, Mr. P.K. Solanki, GM, Mr Kamlesh Sharma, ZCGM, Mr. Girija Shankar, GM, Mr. Niraj Kumar, SM, Mr. V.N. Sharma, DGM and Mr. Joy Ji Das, CM Marketing, GAIL

WITH

Case No. 45/2016

***In Re*:**
Mohan Meakin Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

Present:
For Informant: None

Opposite Party: Mr. Sanjay Jain, Senior Advocate**,** Mr. Pranjal Prateek, Mr. Ebaad Nawaz Khan, Mr. Vidhur Mohan, Mr. Arkaj Kumar, Ms Saniya, Mr Padmesh Mishra, Advocates, Mr. P.K. Solanki, GM, Mr Kamlesh Sharma, ZCGM, Mr. Girija Shankar, GM, Mr. Niraj Kumar, SM, Mr. V.N. Sharma, DGM and Mr. Joy Ji Das, CM Marketing, GAIL

WITH

Case No. 2/2017

***In Re*:**
Shri Rathi Steel (Dakshin) Limited **Informant**
And
GAIL (India) Ltd. **Opposite Party**

Present:

For Informant: Mr. R. K. Rajwanshi, Advocate

Opposite Party: Mr. Sanjay Jain, Senior Advocate**,** Mr. Pranjal Prateek, Mr. Ebaad Nawaz Khan, Mr. Vidhur Mohan, Mr. Arkaj Kumar, Ms Saniya, Mr Padmesh Mishra, Advocates, Mr. P.K. Solanki, GM, Mr Kamlesh Sharma, ZCGM, Mr. Girija Shankar, GM, Mr. Niraj Kumar, SM, Mr. V.N. Sharma, DGM and Mr. Joy Ji Das, CM Marketing, GAIL

WITH

Case No. 59 of 2017

***In Re*:**
K L Rathi Steels Ltd. **Informant**
And
GAIL (India) Ltd. **Opposite Party**

WITH

Case No. 62 of 2017

***In Re*:**
Rathi Special Steels Ltd. **Informant**
And
GAIL (India) Ltd. **Opposite Party**

WITH

Case No. 63 of 2017

***In Re*:** **Informant**
Rathi Bars Ltd.
And **Opposite Party**
GAIL (India) Ltd.

Present in Case Nos 59,62,63/2017:
For Informant: Mr. Anand Shankar Jha, Advocate

Opposite Party: Mr. Sanjay Jain, Senior Advocate**,** Mr. Pranjal Prateek, Mr. Ebaad Nawaz Khan, Mr. Vidhur Mohan, Mr. Arkaj Kumar, Ms Saniya, Mr Padmesh Mishra, Advocates, Mr. P.K. Solanki, GM, Mr Kamlesh Sharma, ZCGM, Mr. Girija Shankar, GM, Mr. Niraj Kumar, SM, Mr. V.N. Sharma, DGM and Mr. Joy Ji Das, CM Marketing, GAIL

CORAM

Mr. Sudhir Mital
Chairperson

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Order

This common order shall dispose of ten informations filed in Case. Nos. 16-20 & 45 of 2016, 02, 59, 62 & 63 of 2017 as substantially similar issues are involved in these cases.

Facts

1. The information in Case No. 16 of 2016, is filed by Rico Auto Industries Limited (hereinafter referred to as '**Rico Auto**') under Section 19(1)(a) of the Competition Act, 2002 (hereinafter referred to as the **'Act'**) against GAIL (India) Ltd. (hereinafter referred to as the '**Opposite Party**' or **'OP'** or '**Seller**' or **'GAIL'**), *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. Rico Auto is stated to be primarily engaged in the business of automotive components manufacturing. It has been stated in the information that Rico Auto signed a Gas Sale Agreement (hereinafter referred to as **'GSA'**) with the Opposite Party on 31.03.2009, to procure Re-gasified Liquefied Natural Gas (hereinafter referred to as '**RLNG**') at the manufacturing unit of Rico Auto located at Gurgaon, Haryana. The Opposite Party is a Public Sector Undertaking (PSU) and is engaged *inter alia* in production, transmission and distribution of natural gas across India.

2. The information in Case No. 17 of 2016, is filed by Omax Autos Limited (hereinafter referred to as '**Omax Autos**') under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia,* alleging contravention of the provisions of Section 4 of the Act. Omax Autos is stated to be primarily engaged in the business of auto components manufacturing. It has been stated in the information that Omax Autos signed a GSA with the Opposite Party on 27.03.2009, to procure RLNG at the manufacturing unit of Omax Autos located at Manesar, District Gurgaon, Haryana.

3. The information in Case No. 18 of 2016, is filed by Omax Autos under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act.This information has been filed in relation to the GSA of Omax Autos with the Opposite Party entered into on 27.03.2009 for procurement of RLNG at the manufacturing unit of Omax Autos located at Dharuhera, District Rewari, Haryana. The Informant is primarily engaged in the business of auto components manufacturing.

4. The information in Case No. 19 of 2016, is again filed by Rico Auto under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. The Informant is primarily engaged in the business of auto components manufacturing. This information has been filed in relation to the GSA entered into between Rico Auto and the Opposite Party on 31.03.2009 for procurement of RLNG at the manufacturing unit of Rico Auto located at Dharuhera, District Rewari, Haryana.

5. The information in Case No. 20 of 2016, is filed by Rico Castings Limited (hereinafter referred to as '**Rico Castings**') under Section 19(1)(a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. Rico Castings is primarily engaged in the business of auto components manufacturing. It has been stated in the information that Rico Castings signed a GSA with the Opposite Party on 31.03.2009 to procure RLNG at the manufacturing unit of Rico Castings located at Manesar, District Gurgaon, Haryana.

6. This information in Case No. 45/2016, is filed by M/s Mohan Meakin Limited (hereinafter referred to as **'Mohan Meakin'**) under Section 19(1) (a) of the Act against the Opposite Party, *inter-alia*, alleging contravention of the provisions of Section 4 of the Act. The Informant is stated to be engaged in the business of manufacture and sale of alcoholic and non-alcoholic beverages. It has also been stated in the information that Mohan Meakin signed a GSA with the Opposite Party on 27.12.2008, to procure RLNG. The Informant is also stated to be engaged in the business of manufacture of glass bottles prior to December 2013, through its glass manufacturing unit at Mohan Nagar, Ghaziabad.

7. The information in Case No. 02/2017, is filed by M/s Rathi Steel (Dakshin) Limited (hereinafter referred to as **'Rathi Steel'**) under Section 19(1) (a) of the Act against the

Opposite Party**,** *inter-alia,* alleging contravention of the provisions of Section 4 of the Act. The allegations in this matter are also substantially similar to the above matters. It has been stated in the information that Rathi Steel (Dakshin) is primarily engaged in manufacturing and sale of TMT bars. It has also been stated that Rathi Steel signed a GSA with the Opposite Party on 31.03.2009, to procure RLNG for the purpose of its manufacturing unit located at Khushkhera, in the district of Alwar, Rajasthan.

8. The information in Case No. 59 of 2017 is filed by M/s K L Rathi Steel Ltd. (hereinafter referred to as **'KLRSL'**) under Section 19(1) (a) of the Act against the Opposite Party, *inter-alia,* alleging contravention of the provisions of Section 4 of the Act. It has been stated in the information that KLRSL signed GSA with the Opposite Party on 23.12.2008, to procure RLNG. The Informant engaged in manufacturing of TMT Bars and is located at industrial region of Gautam Budh Nagar, Ghaziabad, UP.

9. The information in Case No. 62 of 2017 is filed by M/s Rathi Special Steel Ltd**.** (hereinafter referred to as the '**RSSL**') under Section 19(1) (a) of the Act, against the Opposite Party, *inter-alia,* alleging contravention of the provisions of Section 4 of the Act. The Informant engaged in manufacturing of TMT Bars. It has been stated in the information that RSSL signed GSA with the Opposite Party on 31.08.2010, to procure RLNG for its industrial unit in the district of Alwar, Rajasthan.

10. The information in Case No. 63 of 2017 is filed by Rathi Bars Ltd. **(**hereinafter referred to as the '**RBL**') under Section 19(1) (a) of the Act, against the Opposite Party *inter-alia,* alleging contravention of the provisions of Section 4 of the Act. It has been stated in the information that RBL has signed GSA with the Opposite Party on 31.08.2010, to procure RLNG for its industrial unit of manufacturing TMT Bars in the district of Alwar, Rajasthan.

11. Hereinafter, Rico Auto, Omax Autos and Rico Castings, Rathi Steel, Mohan Meakin, KLRSL, RSSL and RBL shall be collectively referred to as the '**Informants**' or '**Buyers**'.

12. In the said cases, the Commission *vide* its common order dated 03.10.2016, considering the substantial similarity of allegations in information, clubbed Case Nos. 16/2016 (*In Re*: *Rico Auto Industries Limited.*), 17/2016 (*In Re*: *Omax Autos Limited.*), 18/2016 (*In*

Re: *Omax Autos Limited.*), 19/2016 (*In Re*: *Rico Auto Industries Limited.*) and 20/2016 (*In Re*: *Rico Castings Limited)*, and directed the Director General **(DG)** to complete the investigation and file a consolidated Investigation Report.

13. Subsequently, *vide* its separate order dated 14.07.2017 and 17.07.2017, the Commission clubbed the Case Nos. 16/2016, 17/2016, 18/2016, 19/2016 and 20/2016 with 45/2016 (*In Re*: *Mohan Meakin Limited)* and 2/2017 (*In Re*: *Shri Rathi Steel (Dakshin) Ltd.)* as the allegations in all these matters were substantially similar.

14. Further, considering the similarity of allegations leveled by the Informants in Case No. 59 of 2017 ((*In Re*: *KL Rathi Steel Ltd.)*, 62 of 2017 (*In Re*: *Rathi Special Steel Ltd.)* and 63 of 2017 (*In Re*: *Rathi Bars Ltd)*, the Commission *vide* its order dated 19.07.2018, clubbed these matters with Case Nos. 16/2016, 17/2016,18/2016, 19/2016, 20/2016, 45/2016 and 2/2017 in terms of Section 26 (1) of the Act, read with Regulation 27 (1) of the Competition Commission of India (General Regulations) 2009.

Table 1: List of Abbreviations and Connotations relevant in the matter

S.No	**Abbreviation**	**Full form**
1	RLNG	Regassified Liquefied Natural Gas
2	LTRLNG	Long-term Regassified Liquefied Natural Gas
3	MMBTU	Million British Thermal Units
4	GSA	Gas Sale Agreement
5	LPG	Liquefied Petroleum Gas
6	HSD	High Speed Diesel
7	PNGRB	Petroleum and Natural Gas Regulatory Board
8	LC	Letter of Credit
9	CBM	Coal Bed Methane
10	LDO	Lighter Diesel Oil
11	MBG	Abbreviation of MMBTU (Gross)
12	MBT	Abbreviation of MMBTU (Gross)
13	SCM	Standard Cubic Meters
14	BTU	British Thermal Units
15	UoM	Abbreviation of MMBTU
16	ACQ	Annual Contract Quantity (as defined in GSA)
17	AACQ	Adjusted Annual Contract Quantity (as defined in GSA)
18	DCQ	Daily Contract Quantity (as defined in GSA)
19	PNDCQ	As defined in GSA
20	MMBTU	One Million BTU
21	MMSCM	One Million SCM
22	Others	As defined in GSA

15. The information in all these cases broadly contained similar set of allegations which are classified under two heads as: (a) imposition of unfair terms and conditions, by the Opposite Party under the GSA entered by it with the Informants; and (b) alleged unfair conduct of the Opposite Party.

16. Alleged Unfair terms and Conditions in the GSA are summarized below:

(i) **Make Good Gas**: Article 6.2(b) of GSA stipulates if a buyer is unable to lift or avail of the Downward Flexibility Quantities, he is liable to make good the same later on during the tenure of the Agreement and even if the buyer does not take the short-lifted quantity of gas, he would have to make payment for the same. The Informants have contended that this condition vests untrammeled discretion in the seller not to fulfill such request of the buyer without incurring any liability on its part whatsoever.

(ii) **Restoration quantity:** Article 6.2(c)(i) of GSA provides that in the event of the buyer failing to take RLNG due to *force majeure* circumstances, it would make such request to the seller that all or part of such Force Majeure Deficiency be added to the Annual Contracted Quantity ("**ACQ**") for such Contract Year whereupon the Seller would add such deficient quantity to the ACQ for delivery. The Informants have contended that the agreement is vitiated by unreasonableness and arbitrariness as no liability is put upon the seller in case it fails to supply such deficient quantity.

(iii) **Recovery Period Gas***:* It denotes total gas outstanding at the end of the basic term of GSA. Article 6.5 of the GSA deals with Recovery Period Gas. According to the Informants, this clause does not envisage any liability upon the seller, if it fails to deliver the Recovery Period Gas, despite request made by the buyer. On the contrary, if the seller tenders for delivery of the Recovery Period Gas, the buyer must take it and pay for such gas or incur 'Take or Pay' (ToP) liability.

(iv) **Quality**: Article 10.3 of GSA states that even if the RLNG offered for delivery by seller is Off-Spec Gas, *i.e.* gas not upto the specification, the onus is on the buyer to give notice to the seller of such deficiency and thereafter the seller has not been made liable to pay any compensation. Furthermore, no procedure has been outlined in the Agreement as to the test which would certify the gas to be

specification compliant. This crucial aspect is totally left to the unilateral whims of seller. Moreover, the Informant is powerless to raise a challenge to the quality of the gas if it finds the same to be not meeting the specification standards on carrying out inspection at its own cost.

(v) **Buyer's 'Take or Pay' (ToP) Obligation:** Article 14.1 of GSA states that the buyer is obliged to pay for the quantities of gas not taken but agreed to be taken. According to the Informants, the said clause in the GSA relating to 'Take or Pay' liability is most abusive and unfair as the buyer has been made liable to 'Take or Pay' for a quantity of gas which is less than the Adjusted Annual Contract Quantity (**AACQ**). The exploitative contents of this Article are so sweepingly worded that even if the buyer terminates the GSA by exercising its right under Article 19, its liabilities would still continue. On the contrary, there is no such liability on the Opposite Party i.e. GAIL, if it withdraws from the GSA. Article 14.1 (c) yet again vests the dominant discretion in the Opposite Party to 'require the buyer to pay to the seller for all or part of the Buyer's Pay For If Not Taken Obligation.

(vi) **Force majeure:** Article 18 of GSA concerning force majeure operates pretty unevenly between the parties in as much as while the provision identifies a large number of events as force majeure events for the seller, the numbers of force majeure events identified for the buyer are limited. Non-inclusion of acts of government agency in buyer's force majeure events and listing of a large number of events attributed to failure of LNG Tankers as force majeure events for the seller are unfair and abusive.

(vii) **Suspension and Termination:** As per Article 19 of the GSA, seller can terminate the GSA by giving 30 days' prior notice if buyers fail to take 50 percent or more of the contracted gas quantity during a period of 180 consecutive days. Similarly, buyer can also terminate the GSA by giving 30 days prior notice if seller fails to supply 50 percent or more of the contracted gas quantity during a period of 180 consecutive days.

17. Allegations broadly contained in the informations, regarding unfair conduct of the Opposite Party that were not contemplated in GSA are summarized below:

(i) Suspension of gas supply, without notice, to the Informants in Case No. 17/2016 and Case No. 18/2016 on 31.03.2015;

(ii) Denial of dispute resolution mechanism envisaged under GSA to the Informants in Case No. 17/2016 and Case No. 18/2016;

(iii) Arbitrarily and unilaterally doing away with the requirement of seven banking days envisaged under the GSA, after buyer's due date, for issuance of notice for suspension of gas. Further that the invoices issued by the Opposite Party stated that gas supplies would be disconnected, if the amount due was not paid within three days of receipt;

(iv) The Opposite Party has arbitrarily and unilaterally substituted the term 'disconnection' for 'suspension' of gas supplies in its invoices raised on Informants thereby avoiding the compliance requirements for suspension of gas; and

(v) Informants have been forced to make payments against incomprehensible invoices, drawn up arbitrarily by the Opposite Party, without indicating the requisite details stipulated in the GSA.

(vi) Invocation of Letter of Credit by the Opposite Party in respect of amounts beyond time limits prescribed under the GSA.

(vii) Imposition of new condition of arbitrary 'pay for if not taken' obligation on the Opposite Party, computed on a basis not contemplated in the GSA.

(viii) Advancing buyers due date in the invoices.

(ix) Doing away with period of seven days for issuance of notice of suspension of gas.

18. It is observed from the information submitted by the Informants that all the allegations either pertain to unfair terms of GSA or that the seller *i.e.* the Opposite Party has not acted strictly in accordance with the clauses of the GSA, thereby preventing the buyer to further discharge its reciprocal obligations, and yet liability has been cast on the

Informants. Upon perusal of the information, it appears that the same has been filed with the Commission after the Opposite Party attempted to encash the Letter of Credit (LC) against the 'Take or Pay' liability of the Informants. In this context, it has also been alleged that the Opposite Party demands maintenance of LC in a manner not envisaged under GSA, invoked such LC for purposes not provided under GSA and for an amount beyond the value prescribed under GSA.

19. As regards allegation pertaining to suspension of supplies and denial of arbitration mechanism under GSA, the Informants in Case No. 17 & 18/2016 submitted that the Opposite Party had suspended gas supplies without any prior notice. In terms of Article 19 of GSA, if the buyer does not maintain LC, the Opposite Party could suspend deliveries by giving seven days' prior written notice. The said provision specifically provides that if the Opposite Party gives seven days' notice, the suspension shall commence from the seventh day following receipt of the notice by the buyer. It has been alleged that *vide* letter dated 28.02.2015, the Opposite Party raised a demand of Rs. 1.87 Crore against the 'Take or Pay' liability on the Informant (Omax Auto) in Case No. 17/2016. The Informant contested the said demand *vide* its letter dated 16.03.2015, *inter alia,* on the ground that the officials of the Opposite Party gave assurances to the Informant to consider its request to reduce the contracted quantity. However, the Opposite Party invoked the LC *vide* its letter dated 19.03.2015. This was again contested by the Informant *vide* its letter dated 24.03.2015, along with a request for amicable settlement of the dispute in accordance with Article 15.1 of GSA. The Informant wrote further letters to the Opposite Party on 28.03.2015 and 31.03.2015, seeking amicable settlement of the dispute in accordance with GSA. However, the Opposite Party allegedly did not respond to the request of the Informant but suspended gas supplies all of a sudden in the morning hours of 31.03.2015, without any prior notice. Thereafter, the Informant is stated to have written a letter dated 03.04.2015, to the Opposite Party seeking appointment to discuss their issue. After, regular follow-up, the Opposite Party invited the Informant to discuss the issues on 23.04.2015, but the meeting could not take place since none of the officials of the Opposite Party turned up for the same. The Informant *vide* its letter dated 28.04.2015 recorded the issues concerning the failure of the said meeting. After this communication, the Opposite Party finally *vide* its letter dated 01.05.2015, had informed the Informant that supplies were suspended to the Informant due to non-submission of renewed LC.

Preliminary conference with the parties

20. The Commission had a preliminary conference with the parties on 12.05.2016, and directed the parties to file information on the following:

> *"The Informant to file on affidavit: (a) the details of the day-wise, month-wise and annual quantity(ies) of gas delivered by OP during the calendar year 2014 and the daily contract quantity as an average of the annual contracted quantity for the same period; and (b) further information/data, if any, on the relevant market and the presence of other players in the relevant market. Similarly, the Opposite Party was directed to file on affidavit on the: (a) total quantity of gas committed to be taken by the Opposite Party from its suppliers and actual quantity taken during the calendar year 2014; (b) details of 'Take or Pay' liability imposed on the Opposite Party by its suppliers for the calendar year 2014; (c) the details of overall 'Take or Pay' deficiency of the customers of the Opposite Party during the calendar year 2014, the corresponding 'Take or Pay' liability in terms of quantity and value and the actual liability imposed by the Opposite Party on its customers; (d) the details of spot and contract price of natural gas supplied by the Opposite Party during the calendar year 2014; and (e) basis of reduction of the 'Take or Pay' liability of the customers of the Opposite Party for the calendar year 2014."*

21. In response to the Commission's direction, Informants in Case Nos 16-20/2016 filed details of the gas received by them in the year 2014. The Informants also made submissions regarding the relevant market and the dominance of the Opposite Party. The brief of the information regarding gas delivered by the Opposite Party are as under:

Table 2: Gas delivered by the Opposite Party during the calendar year 2014

In Standard Cubic Meters(SCM)

Case	**16/2016**	**17/2016**	**18/2016**	**19/2016**	**20/2016**
Informant	Rico Auto	Omax Autos	Omax Autos	Rico Auto	Rico Castings
January	206516	45390	215715	145952	123820
February	183991	41392	203142	144956	101244
March	203166	51290	205633	144564	134333
April	241089	43319	166342	141797	152404
May	238052	55628	200239	184283	149172
June	204238	46985	182786	186811	146679

July	240560	69409	181753	227155	172168
August	202214	43440	151351	214085	162392
September	187831	63420	186382	177735	173256
October	157808	82649	152666	158908	152726
November	174878	88516	159246	138105	180512
December	169070	87228	174336	155852	122012
Annual Total	2409413	718666	2179591	2020203	1770718
Daily average contracted	18000	10000	10000	10000	10000

22. As regards the reasons for 'Take or Pay' liability, the Opposite Party had submitted as under.

"For the calendar year 2014, about 1671.78 MMSCM (=65283009 MMBTU) of Long Term Regassified Liquefied Natural Gas (LTRLGN) volume was under-drawn vis-à-vis the contracted quantity of LTRLNG by the customers. It is further submitted that the Opposite Party, for the previous contract years and till September 2014, has been able to sell the under-drawn LTRLNG in the spot market, however, from September, 2014 onwards, the spot prices started to decline, thereby reversing the competitiveness of LTRLNG. In view of the same, about 350 MMSCM (=13667500 MMBTU) out of 1671.78 MMSCM (=65283009 MMBTU) of surplus LTRLNG could not be disposed off and was leftover in the Opposite Party's pipeline inventory by end of calendar year 2014 resulting in loss on account non off-take by customers, including the Informants. 'Take or Pay' liability, imposed on the Informants, was only to neutralize the losses borne by the Opposite Party due to under-drawal by the customers as per the respective GSAs, and was not to make any profits on account 'Take or Pay' deficiency".

23. As regards the allegations of declining settlement in Case No. 17/2016 and 18/2016, it had been submitted by the Opposite Party that its offer for one-time settlement with the Informants was declined. No written submission were made regarding disconnection of gas without prior notice although it was orally submitted by the Opposite Party during the preliminary conference that notice was given to Informants.

Directions to the DG

24. After considering the information, written submission of the parties and other materials placed on record, the Commission, *vide* its order dated 03.10.2016, passed under Section 26(1) of the Act, directed the DG to cause an investigation into the matters in Case Nos.16-20/2016. While passing such direction, the Commission, *inter alia*, observed as follows:

"20. The Commission notes that as per Art. 19.4 of the GSA, if a buyer does not maintain Letter of Credit, the Opposite Party could suspend deliveries by giving seven days' prior written notice. The said provision specifically provides that if the Opposite Party gives seven days' notice, the suspension shall commence from the seventh day following receipt of the notice by the buyer. The Informants in Case No. 17/2016 and 18/2016 had written letters dated 16th March, 2015 to the Opposite Party contesting the legality of the 'Take or Pay' liability imposed for the contract year 2014. In this letter, reference was made to their earlier e-mail and letter dated 4th June, 2014 wherein they had expressed their inability to consume the entire contracted quantity and therefore, requested the Opposite Party to reduce the contracted quantity. The said Informants have claimed that the officials of the Opposite Party assured them that the contracted quantity would be reduced and on the basis of such assurance, the Informants were paying the Opposite Party as per usage. These claims of the Informants regarding their request for reduction of contracted quantity and assurance given by the officials of the Opposite Party have neither been refuted during the preliminary conference nor in the written submission filed by the Opposite Party. Thus, there appears merit in the assertion of the Informants about the assurance given by the officials of the Opposite Party. It also transpired during the preliminary conference that 'Take or Pay' liabilities had been imposed by the Opposite Party only from 2015 and there was no such imposition earlier. Under these circumstances, the imposition of 'Take or Pay' liability on the said Informants as per the contracted quantity under the GSA and the encashment of letter of credit by the Opposite Party appear to be an unexpected business behaviour.

21. Further, the above referred correspondence show that the Informants in Cases No. 17/2016 and Case No. 18/2016 contested the 'Take or Pay' liability and sought for amicable settlement of the dispute as per the GSA but the Opposite Party declined their request vide letter dated 6th April, 2015 stating that the 'Take or Pay' liability was imposed in accordance with GSA and as such there is no

need for settlement. It is observed that Art. 15 of the GSA provide for amicable settlement of disputes and the term 'dispute' has been defined under Art. 2 of the GSA as 'Dispute includes, any failure to agree, controversy, difference or claim between the parties arising out of in relation to this Agreement'. The Commission notes that the issues raised by the Informants regarding the imposition of 'Take or Pay' liability is in the nature of dispute as defined under the GSA. However, the Opposite Party did not come forward for amicable settlement as provided in the GSA. Subsequently, the Opposite Party also went ahead and suspended gas supplies to the said Informants from 31st March, 2015 without giving any prior notice. The reason for suspension was communicated to them only after around a month and that too after much persuasion. It is observed that suspension of supplies for more than a month is also likely to have serious impact on the business of the Informants. Though the imposition of 'Take or Pay' liability, encashment of Letter of Credit and suspension of gas supplies as per contractual terms may not be per se abusive, the mysterious silence on the part of the Opposite Party in (a) not replying to the request of the Informants for reducing the contracted quantity; (b) not replying to the proposal of the Informant for amicable settlement of the alleged dispute; (c) doing away with the requirement of prior notice for suspension of gas; and (d) not divulging the reason for suspension of gas despite repeated attempts/requests of the Informant for amicable settlement of the alleged disputes appears to be prima facie unfair.

22. *It is further relevant to note that, in all the five matters, viz. Case Nos. 16/2016, 17/2016, 18/2016, 19/2016 and 20/2016, it has been contended that the compliance of the terms and conditions of GSA with respect to the contents of invoices and nominating daily contracted quantity are crucial for determining and imposing 'Take or Pay' liability. However, the Opposite Party did not comply with the said requirements. Nevertheless, in pursuance of the GSA, the Opposite Party imposed 'Take or Pay' liability and encashed the Letter of Credit furnished by the Informants. These acts of the Opposite Party, when seen in conjunction with other conducts such as suspension of gas supplies to the Informants in Case No. 17/2016 and Case No. 18/2016 without any prior notice, denial of dispute resolution when a buyer contests the legality of 'Take or Pay' liability, arbitrarily advancing buyers due date, etc. cannot be treated as mere non-compliance of contractual terms. Rather such high handed approach of the Opposite Party in dealing with its customers is indicative of abusive conduct. Hence, a holistic*

appreciation of the facts and circumstances discussed above suggests that the aforesaid conducts of the Opposite Party, prima facie, amount to contravention of the provision of Section 4(2)(a)(i) and 4(2)(b)(i) of the Act and thus, merit investigation." [Emphasis added]

25. The Opposite Party moved an application dated 17.11.2016, for review/recall of the order of the Commission dated 03.10.2016. The Commission *vide* its order dated 16.01.2017, was pleased to dismiss such application, stating that although new facts brought by the Opposite Party through such application are relevant to the allegations raised in the Information's being investigated by the DG, yet they do not negate the *prima facie* view formed by the Commission, regarding violation of provisions of Section 4 of the Act.

26. Subsequently, *vide* its order dated 14.07.2017, passed under Section 26(1) of the Act, the Commission clubbed Case No. 02/17 (*In Re*: *Shri Rathi Steel (Dakshin) Ltd.)* with Case Nos 16-20/2016, as the allegations in all the three matters were substantially similar and directed the DG, to file a consolidated Investigation Report in all these matters. In this order, the Commission additionally noted that:

'*11. In the instant matter, the Informant has alleged that the Opposite Party imposed ToP liability for the calendar years 2014 and 2015 notwithstanding the intimation of the Informant that procurement of RLNG has become economically unviable for it…….*

12. As per the GSA, the Informant is required to take 90% of the contracted quantity every year failing which it will be obliged to pay for the quantities not taken. Such liability is termed as ToP liability. With experience from the earlier cases [Cases No. 16 to 20 of 2016], the Commission notes that the GSAs of the Opposite Party largely envisage such liability upon all customers located across different regions. All these GSAs examined by the Commission are long term contracts with a term of 20 years. This would mean that: (a) potential buyers have to estimate their demand for gas for the next two decades to procure gas from the Opposite Party; (b) a contracted buyer has limited flexibility of 10% and it has to pay 'Take or Pay' charges if consumption of gas by it is less than 90% of the contracted quantity although the buyer could request for the unlifted quantity later as Make

Good Gas; and (c) a buyer who is locked into a contract with the Opposite Party cannot terminate the contract if the price of gas becomes economically unviable for it or it wants to shift to other cheaper alternatives as breach of obligation under the GSA would trigger ToP liability…..

14. The conduct of the Opposite Party in implementing such ToP liability from the year 2015 appears to be a modus to ensure ***de facto exclusivity*** *of the contractual arrangement. This, besides prohibiting the buyers from shifting to alternatives or terminating the GSA in the event of closure of their business, also appears to create entry barriers for alternative suppliers to enter the market or build up a viable customer base. It is observed that while imposition of ToP liability as per contractual terms cannot per se be regarded as abuse of dominant position, the same being imposed in an exploitative manner without justification or to ensure de facto exclusivity thereby hurdling potential entries or expansion of competitors warrants investigation under the provisions of the Act prohibiting abuse of dominant position. The Commission is, hence, convinced that the facts presented in the instant information prima facie suggest contravention of Section 4(2)(a) and Section 4(2)(c) of the Act."* (Emphasis added)**.**

27. Further, in Case No. 45/2016, the Commission observed that all the allegation in the said case were similar to and connected with the allegations leveled in Case Nos. 16-20/2016 and 2/2017. The Commission *vide* its order dated 17.07.2018, clubbed the said case with Case Nos. 16-20/2016 and Case No. 02/2017 and directed the DG to file a consolidated investigation report.

Investigation by the DG

28. The DG, after completing the investigation in Case Nos. 16/2016, 17/2016, 18/2016, 19/2016, 20/2016, 45/2016 and 2/2017, filed the public version of common investigation report dated 25.05.2018, to the Commission on 04.07.2018. Findings of the investigation by the DG are discussed below:

Relevant Market:

29. The relevant product market in respect of all the seven cases were broadly classified into two categories: (a) *natural gas used for domestic consumption* and (b) *natural gas used*

for industrial use. The Opposite Party was predominantly engaged in the business of supply and distribution of natural gas to industrial consumers and the Informants were industrial consumers of its natural gas.

30. Based on the submission of the Informants, the investigation underscored the following as some of important features of natural gas: (a) assured and uninterrupted supply through pipeline, at the point of usage, round the clock and consequent elimination of any inventory holding cost; (b) higher calorific value; (c) consistent rate of burning; and (d) clean fuel, particularly the absence of sulphur. Natural gas is relatively cheaper with certain inherent advantages, natural gas is a preferred fuel for industrial consumers and thus, non-substitutable with other fuels. The DG also noted that natural gas has a broad range of end uses in industry as a source of heat/power/input for producing plastics and chemicals.

31. Barring the consumers in Alwar, who were enquired in relation to Case No. 02/2017, all the consumers in Rewari and Gurgoan regions submitted before the DG that they would not shift their consumption from natural gas to any other fuel in case of an increase in price of natural gas by 5-10 %. In Case No. 02/2017, the Informant and certain third parties in Alwar indicated that they would shift to alternatives if price of natural gas increases by 10 %. However, given the cost of shifting to alternate fuel and the prices of other alternative fuels, the investigation concluded that re-liquefied natural gas (RLNG) is a preferred fuel for industrial consumption. Additionally, the DG considered the restriction imposed by the Hon'ble Supreme Court on the use of furnace oil and pet coke in National Capital Region (NCR) as a relevant factor in determining the relevant product market as "*supply and distribution of natural gas to industrial consumers"*.

32. Based on the factors like adequate distribution facilities, transport costs, consumer preference and need for secured and regular supplies, the DG found the relevant geographic markets to be confined to the respective districts of the Informants. Accordingly, the DG found the relevant market to be:

    (i) Case No. 16, 17 & 20/2016: market for "*supply and distribution of natural gas to industrial consumers in the district of Gurgaon*";

    (ii) Case No. 18 & 19/2016: market for "*supply and distribution of natural gas to industrial consumers in the district of Rewari*";

(iii) Case No. 45/2016: market for "*supply and distribution of natural gas to industrial consumers in the district of Ghaziabad*"; and

(iv) Case No. 02/2017: market for "*supply and distribution of natural gas to industrial consumers in the district of Alwar*".

Analysis of Dominant Position:

33. Based on several factors enlisted in Section 19(4) of the Act coupled with submissions of the Informants, the Opposite Party and third parties, the DG concluded that the Opposite Party was in a dominant position in all the relevant markets. A summary of the findings on market share of the Opposite Party in various geographical markets are as under:

Table 3: Market share of companies supplying RLNG in Gurgaon (in MMBTU)

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
GAIL	4308242	10810080	11384176	10776319	10752134	16667944	11602946
IOC	0	0	0	549	0	0	0
BPCL	0	0	0	0	0	0	0
GSPC	0	0	0	0	0	0	0
Total Gas Supply in the market	4308242	10810080	11384176	10776868	10752134	16667944	11602946
Percentage of market share of GAIL	**100%**	**100%**	**100%**	**99.99%**	**100%**	**100%**	**100%**

Table 4: Market share of companies supplying RLNG in Rewari (in MMBTU)

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
GAIL	140557	458441	597497	774694	1130702	485674	763697
IOC	0	0	0	0	10800	265300	353100
BPCL				11,160	78,100	403,357	387,620
GSPC	0	0	0	0	0	326260	282256

Total Gas Supply in the market	140557	458441	597497	785854	1219602	1480591	1786673
Percentage of market share of GAIL	**100%**	**100%**	**100%**	**98.57%**	**92.71%**	**32.80%**	**42.74%**

Table 5: Market share of companies supplying RLNG in Ghaziabad (in MMBTU)

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
GAIL	5021359	4388038	3463558	2939970	1629564	1212976	1507061
IOC	147590	87020	69042	41126	40090	218325	39176
BPCL	0	221205	854778	1167758	1118532	630780	183957
GSPC	0	0	0	0	0	0	0
Total Gas Supply in the market	5168949	4696263	4387378	4148854	2788186	2062081	1730194
Percentage of market share of GAIL	**97.14%**	**93.43%**	**78.94%**	**70.86%**	**58.44%**	**58.82%**	**87.10%**

Table 6: Market share of companies supplying RLNG in Alwar (in MMBTU)

	2010	**2011**	**2012**	**2013**	**2014**	**2015**	**2016**
GAIL	942341.4	1282674	2098097	1627894	2463344	1567311	2681501
IOC	0	0	0	0	0	0	0
BPCL						252452	101200
GSPC	0	0	0	0	0	0	0
Total Gas Supply in the market	**942341.4**	**1282674**	**2098097**	**1627894**	**2463344**	**1819763**	**2782701**
Percentage of market share of GAIL	**100%**	**100%**	**100%**	**100%**	**100%**	**86.12%**	**96.36%**

34. Analysis of above tables and other relevant information provided by parties to the DG indicate that:

i. The market share of the Opposite Party in supply of RLNG to industrial customers in all the relevant markets (*i.e.* Gurgaon, Alwar, Ghaziabad and Rewari) was significant and no other significant supplier was present in these markets.

ii. To portray the size and resources of the Opposite Party, the investigation highlighted the following factors: (a) turnover of more than Rs. 50,000 crores for three consecutive financial years between 2013-14 and 2015-16; (b) a large number of subsidiaries and joint ventures operating in energy sector; (c) overall market share of 72% in gas transportation in the country; (d) a market share of 70% in the overall natural gas transmission pipeline network in India (overall 15,800 kilometers as of 2016, out of which 11000 kilometers was of the Opposite Party); and (e) the Opposite Party's petrochemical plant at Pata (Uttar Pradesh) was the largest gas based plant.

iii. On the submissions of the parties and third parties, the investigation found that the competitors of the Opposite Party *viz.* Indian Oil Corporation Ltd (IOCL), Bharat Petroleum Corporation Limited (BPCL) and Gujarat State Petroleum Corporation Ltd (GSPCL) in Gurgaon and Rewari, had very limited supplies to challenge its position. Further, these competitors were very small in natural gas operations as compared to the Opposite Party.

iv. Being the gas supplier with the largest pipeline network and having presence in 22 states, the Opposite Party was found to have wide access to both industrial and domestic consumers. The investigation considered such access to confer a great degree of economic power including commercial advantages over other competitors.

v. The Opposite Party had entered into a long term GSA with Petronet LNG Limited (PLL) for procurement of RLNG, which is sourced from RasGas, Qatar. This upstream integration along with the downstream arrangements with customers and the midstream operations of running the country's largest pipeline network was taken into cognizance by the investigation to suggest vertical integration giving commercial advantage to the Opposite Party.

vi. Substantial dependence of consumers in the relevant markets and absence of countervailing buyer power was also considered by the investigation to suggest the dominance of the Opposite Party.

vii. The Opposite Party being a Maharatna public sector company in the oil and gas industry was also considered as one of the relevant factors contributing to the dominance of the Opposite Party. However, the investigation also opined that the contribution of the Opposite Party to the economic development of the nation could not be disregarded.

35. As per the information provided by the Opposite Party with regard to transmission charges for using its infrastructure facilities by IOC, BPCL and GSPCL, the Investigation Report states that:

i. Price of Domestic Natural Gas (APM and Non-APM) is governed by "New Domestic Natural Gas Pricing Guidelines-2014" and notified by Petroleum Planning & Analysis Cell of the Government.

ii. Price of Domestic Natural Gas (JV source) is governed by Agreement with the Government and notified by JV and Government.

iii. For the pricing of RLNG, Ministry of Petroleum & Natural Gas (MoP&NG) has issued directive dated 06.03.2007, that Gas prices being charged on supply of RLNG procured through long term contract should be on a non-discriminatory basis and uniform pooled prices should be charged from all customers.

iv. For charging various cost like Capital cost, IRR, Contingency fund cost, PLL and GAIL are acting according to the minutes dated 14.03.2003, of MOP&NG, wherein it is finalised that:

- IRR at 12% uniformaly for Regasification and Transportation.
- Interest cost at 8.5% for PLL and 8% for GAIL.
- Contingency to continue at 3% for PLL. For GAIL contingency and rupee inflation was clubbed and fixed at 7.5% of the revised capital cost and soft cost (cost of rebated/soft loan) was reduced at 8%.

v. Pipeline Tariff is fixed by MOP&NG through minutes dated 07.05.2003.

vi. Transportation tariff is regulated by PNGRB.

Hence, the DG concluded that the Opposite Party has no discretion to determine sale price of RLNG to be charged from industrial customers on supplies through Long term GSA.

36. As regards average unit price charged by the Opposite Party for supplying gas to the Industrial customers situated in relevant Geographical markets, the Opposite Party submitted the information regarding fortnightly average unit price of RLNG charged to its industrial customers during the period 2010 to 2016. The fortnightly average unit price charged by the Opposite Party during 2014-2016 is reproduced below:

Table 7: Average Gas Price in Contract Year 2014

S. No.	Month	F/N	Average Price of Gas		
			LT RLNG	MID term	SPOT gas
			Rs./MMBTU	Rs./MMBTU	Rs./MMBTU
1	January	1st Fortnight	1038.65	1190.63	1377.46
		2nd Fortnight	1049.53	1205.62	1393.42
2	February	1st Fortnight	1054.74	1201.60	1366.48
		2nd Fortnight	1051.52	1198.06	1365.47
3	March	1st Fortnight	1050.89	1186.22	1346.25
		2nd Fortnight	1030.26	1162.36	1317.67
4	April	1st Fortnight	1043.34	1162.77	1270.40
		2nd Fortnight	1044.38	1164.10	1271.11
5	May	1st Fortnight	1042.73	1147.69	1245.28
		2nd Fortnight	1033.63	1140.35	1175.54
6	June	1st Fortnight	1048.38	1149.73	1054.32
		2nd Fortnight	1059.95	1159.93	1069.77
7	July	1st Fortnight	1070.57	1166.53	1076.77
		2nd Fortnight	1071.34	1167.39	1077.62
8	August	1st Fortnight	1082.08	1172.72	1083.07
		2nd Fortnight	1073.55	1162.19	1074.29
9	September	1st Fortnight	1088.82	1161.44	1165.35
		2nd Fortnight	1097.42	1170.60	1173.90
10	October	1st Fortnight	1100.61	1147.54	1210.22
		2nd Fortnight	1101.39	1152.47	1208.77
11	November	1st Fortnight	1110.95	1125.97	1181.63
		2nd Fortnight	1115.69	1131.08	1156.21
12	December	1st Fortnight	1130.25	1103.08	944.66
		2nd Fortnight	1143.94	1113.49	883.04

Table 8: Average Gas Price in Contract Year 2015					
S. No.	**Month**	**F/N**	**Average Price of Gas**		
			LT RLNG	**MID term**	**SPOT term**
			Rs./MMBTU	**Rs./MMBTU**	**Rs./MMBTU**
1	January	1st Fortnight	1126.53	1049.83	795.86
		2nd Fortnight	1128.19	1049.83	795.50
2	February	1st Fortnight	1134.06	1006.59	752.36
		2nd Fortnight	1128.90	1001.61	748.65
3	March	1st Fortnight	1118.05	1011.18	772.77
		2nd Fortnight	1118.80	1010.06	773.46
4	April	1st Fortnight	1076.75	1002.12	747.14
		2nd Fortnight	1090.85	1018.43	759.32
5	May	1st Fortnight	1070.84	1018.43	759.60
		2nd Fortnight	1075.02	1020.92	801.46
6	June	1st Fortnight	1072.52	1023.70	716.66
		2nd Fortnight	1068.82	1021.68	715.37
7	July	1st Fortnight	1061.33	1016.57	711.33
		2nd Fortnight	1071.07	1025.27	738.18
8	August	1st Fortnight	1084.29	1040.61	947.42
		2nd Fortnight	1099.02	1057.06	958.64
9	September	1st Fortnight	1097.52	1058.85	744.24
		2nd Fortnight	1090.23	1049.18	740.00
10	October	1st Fortnight	1072.53	1036.47	718.69
		2nd Fortnight	1079.87	1042.00	663.04
11	November	1st Fortnight	1092.68	1054.98	689.68
		2nd Fortnight	1101.81	1064.24	714.62
12	December	1st Fortnight	1103.41	1067.42	706.01
		2nd Fortnight	1094.83	1057.60	737.55

Table 9: Average Gas Price in Contract Year 2016					
S. No.	**Month**	**F/N**	**Average Price of Gas**		
			LT RLNG	**MID term**	**SPOT term**
			Rs./MMBTU	**Rs./MMBTU**	**Rs./MMBTU**
1	January	1st Fortnight	675.92	615.87	697.19
		2nd Fortnight	683.52	631.31	688.26
2	February	1st Fortnight	642.90	569.39	587.06
		2nd Fortnight	647.38	608.70	602.70
3	March	1st Fortnight	592.20	575.21	591.82
		2nd Fortnight	586.19	566.32	585.02
4	April	1st Fortnight	537.78	591.09	584.00
		2nd Fortnight	535.79	589.93	584.62
5	May	1st Fortnight	554.54	633.18	587.69

		2nd Fortnight	559.00	583.04	594.16
6	June	1st Fortnight	601.65	605.61	591.50
		2nd Fortnight	601.86	607.01	592.36
7	July	1st Fortnight	633.21	615.75	647.59
		2nd Fortnight	633.73	615.06	644.88
8	August	1st Fortnight	651.86	633.92	682.36
		2nd Fortnight	653.72	634.87	684.36
9	September	1st Fortnight	652.73	607.40	662.35
		2nd Fortnight	651.95	607.05	649.89
10	October	1st Fortnight	649.03	610.68	692.18
		2nd Fortnight	648.39	610.63	645.06
11	November	1st Fortnight	665.91	618.17	663.26
		2nd Fortnight	672.61	623.68	670.98
12	December	1st Fortnight	728.78	643.21	646.74
		2nd Fortnight	730.22	633.57	645.71

37. Analysis **of** the above tables indicated that the Opposite Party was selling RLNG through Long term GSA, Mid- term GSA and through Spot market. It was also evident that the Opposite Party was charging different prices from Long term GSA industrial customers, Mid- term GSA industrial customers and SPOT market industrial customers. Further, it was also evident from the table that price of SPOT market industrial customers were higher compared to price of RLNG from Long term GSA industrial customers during the period prior to December, 2014 to April, 2016. However, as mentioned in investigation report, the Opposite Party charged less price of RLNG from Long term GSA industrial customers as compared to SPOT market industrial customers during the period 2009-2016 except for the period of December, 2014 to April, 2016, when SPOT market prices were lower.

38. As regards rationale behind committing 'Take or Pay' liability with upstream suppliers for a long period (20 years), the submissions of the Opposite Party as contained in the report is as under:

i. Production of gas, liquefaction of LNG, import of LNG, regasification of the same and transportation to the customer on 24 X 7 basis requires huge capital expenditure. Hence, globally, it is a common practice to enter into long term tie-ups for entire/maximum volumes of the installed capacity with the downstream customers before financial closure of the project. The entire value chain is integrated and merits

functioning on smooth & continuous basis. Disruption or default by any stakeholder will have cascading effect on the entire value chain.

ii. The Annual 'Take or Pay' ("**AToP**") is basically an advance payment against which the Buyer reserves its right for Make-Up Gas in line with the provisions of the GSA. i.e. the Buyer may schedule such make-up gas in the remaining contract period and amount paid as AToP shall be adjusted towards make-up gas supplied. This facilitates the uninterrupted functioning of the entire value chain.

iii. As mentioned in investigation report, the Opposite Party has stated that since India is energy deficient, hence LNG is imported from International suppliers based on prevailing international practices. LNG import contract between Petronet LNG Limited (PLL) and RasGas was the first of its kind contract entered to ensure the continuous RLNG supply to India to fulfil country's energy requirement. The same was entrusted to PLL, GAIL, IOCL & BPCL by the Govt. of India. Accordingly, RLNG GSPA was signed by PLL with the Opposite Party, IOCL and BPCL for the sale of RLNG, for further sale to the downstream customers. Further, long term agreement provides price stability of the RLNG, as compared to the spot prices/market prices which keeps fluctuating on the basis of market factors besides its uncertainty of availability compared to the RLNG. Further the Opposite Party has submitted that although terms and conditions are similar irrespective of the term of contract *viz.* 1 year, 3 years, 5 years, 10 years *etc.* yet the contract with a term more than 10 years have benefits over the short term contract. Customer with longer term contracts, *inter-alia*, have flexibility to increase or decrease the quantity off-take. Customer has sufficient time to mitigate the quantity not off taken in any contract years depending upon their requirement within the terms of contract. In short duration contracts, customers have very less time to avail such flexibility even though having the same terms and conditions in the contract.

iv. As submitted by the Opposite Party to the DG, the 'Take or Pay' liability, as imposed on the customers was only to neutralise the losses borne by the Opposite Party due to non-off take or under drawl by the customers as per the respective GSAs, and it was not making any profits on account of 'Take or Pay' deficiency.

v. Based on the information furnished by the Opposite Party, the investigation concluded that the Opposite Party is charging uniform 'Take or Pay' liability from all its industrial customers and demanding it solely to compensate the loss incurred due to not off-taking of RLNG by industrial customers. To this effect, the Board of Directors of the Opposite Party had also passed a resolution. In 2014, the Opposite Party had incurred losses due to not off-taking of RLNG by its industrial customers and therefore, it demanded a proportionate loss as 'Take or Pay' liability from its customers as one time settlement offer. In 2015, the Opposite Party had availed downward flexibility option from PLL in respect of gas not off-taken and the same option was provided to the industrial customers of the Opposite Party. As no loss was incurred by the Opposite Party in 2016, the Opposite Party did not recover any amount as 'Take or Pay' liability for the calendar year 2016. It is also mentioned that the Opposite Party did not pay any 'Take or Pay' liability to its upstream supplier i.e. PLL, during the contract years 2014, 2015 and 2016.

vi. Spot sales market had been found to be the only risk management measure available for the Opposite Party to mitigate the losses suffered due to fluctuation in the prices of long term RLNG. In this regard, the Opposite Party has submitted to DG, the data regarding volume of procurement and sale of RLNG during 2010 to 2016 which is reproduced as below:

Table 10: Long Term RLNG (GSPA-2003) Receipt/Out in 2010-2016

Year	Volume of RLNG Obtained from PLL	Volume of RLNG disbursed to Industrial customers		Volume of undisbursed RLNG sold in spot market		Remarks
	In MMBTU	In MMBTU	%	in MMBTU	%	
2010	225,198,153	190,850,304	84.7	(-)10,265	(-) 0.005	Balance quantity, if any, is adjusted in Internal Consumption and line pack
2011	227,013,519	212,730,830	93.7	832,577	0.4	
2012	225,703,035	208,713,852	92.5	8,199,594	3.6	
2013	225,989,225	167,087,587	73.9	27,684,009	12.3	
2014	225,788,059	133,502,489	59.1	38,718,546	17.1	
2015	122,904,979	106,477,822	86.6	(-)881,858	(-) 0.7	
2016	229,736,773	192,962,654	84.0	12,777,121	5.6	

39. As per above table it is evident that most of the volume of RLNG procured through long term GSPA from PLL by the Opposite Party was supplied to its industrial customers

through long term GSA and Spot market. Sale through Spot market by the Opposite Party was not significant except for the year 2014.

Investigation of alleged anticompetitive conducts of the Opposite Party:

40. The DG framed various issues for investigation in the instant matters, based on the nature of allegation levelled in the information and the respective order of the Commission passed under Section 26(1) of the Act. The findings in respect of the information in Cases No. 16 to 20/ 2016, are as under:

41. **Forcing the Informants to make payments against incomprehensible invoices, drawn up arbitrarily by the Opposite Party without indicating the requisite necessary details stipulated in the GSA**:

i. Investigation found that the provision of GSA mandated that all the information as discussed in GSA was to be provided in Joint Tickets and in the invoices for each fortnight. However, as submitted by the Informants, the Opposite Party unilaterally imposed a completely arbitrary condition to the effect that the invoices provided by it to the Informant shall not show the requisite details, thereby making them incomprehensible and yet the Informant was coerced to make the payment demanded in the invoice under threat of disconnection if the invoices were not paid within 3 days.

ii. Upon a detailed examination of the invoices issued by the Opposite Party, joint tickets signed on a fortnightly basis by the Opposite Party and the Informants, replies of the parties and the requirement of GSAs in relation to contents of invoices, the DG observed that all the information on PNDCQ, DCQ, Allocated Quantity of Gas, Net Heating Value, *etc.* was either provided in the Joint Ticket or in the invoices and as such both were to be read simultaneously. Joint Tickets were signed by both the parties, *i.e.*, buyer and seller, and based on Joint Tickets, invoices were generated. The Opposite Party in its reply enclosed copy of invoices and joint tickets for references.

iii. On the basis of the above allegation of the Informants and the invoice provided by the Opposite Party, in the investigation report it was concluded that information required to be mentioned in terms of Article 12.1 (A)(i) of the GSA was either

provided in the Joint Tickets or in the invoices. The joint tickets were signed by both the parties, buyer and seller, and based on joint tickets, invoices were generated. The investigation attempted to ascertain whether item (a) to (i) of Article 12.1 (A) of the GSA had been captured on the invoices and corresponding joint ticket or not, if so, to what extent. In this regard, investigation concluded that invoice did not contain any of the particulars about each day covered in the fortnight, the particulars were either cumulative or the average for the fortnight, as the case may be. Investigation report also mentioned that to cover particulars of such nature for each day in the invoice would make invoice bulky upon a repetition of the data captured in the Joint Ticket, which was duly signed by both the parties.

iv. Further, the DG concluded on the allegation of incomprehensible invoices issued by the Opposite Party as under:

> " It *can at best be said to be an outcome of literal application of GSA by IPs without establishing any harm caused to them i.e., case of non-compliance to the 'form' rather than 'substance' by the OP and accordingly, in the facts and circumstances of the matter, cannot be said to be a competition issue at all. Nothing can be said to be 'unfair condition' which can be considered to have been practiced by the OP. In view of it, the Investigation is of the opinion that the allegations of contravention of the provisions of Section 4(2)(a) of the Act on this account are not established. However, to avoid any sort of grievance, the Commission may direct the OP to make appropriate change in the Invoice to clarify the matter in the context of GSA*".

42. **Computation of 'Take or Pay' liability in such a manner not contemplated in GSA:**

The DG looked into the requirements of concerned GSAs, the conduct of the Opposite Party and the Informants and concluded the following:

i. Nomination or determination of the various quantities envisaged under the GSAs were dependent upon the actions of both the Opposite Party and Informants, being the seller and buyers respectively. In terms of Article 8.1 of GSA, the Opposite Party's responsibility was to provide Annual Programme of gas delivery which would show the Annual Contract Quantity (ACQ), Adjusted Annual Contracted Quantity (AACQ), Monthly Quantities, Daily Contracted Quantity (DCQ) and

Properly Nominated Daily Contracted Quantity (PNDCQ). In response to Annual Program by seller (the Opposite Party), the buyers *i.e.* the Informant's responsibilities were to nominate Quarterly Contracted Quantities (QCQ), Upward Flexibility Quantity (UFQ), Downward Flexibility Quantity (DFQ), Restoration Quantities, Make Up Gas and Make Good Gas. Time schedule of making these nominations were also mentioned in the GSA.

ii. DG investigated the compliance of the Opposite Party and Informants in terms of GSA. DG found on such investigation that both the parties failed to furnish any evidence regarding the compliance of nominations of various quantities mentioned above, during the contract year 2014. Further, there was no contract year in which the AACQ was shown to be different from the ACQ. The Opposite Party stated that there were no adjustments made throughout all the years and hence ACQ and AACQ in all the years was same and there was no dispute regarding determination of ACQ and AACQ.

iii. Investigation report mentioned that the Opposite Party had communicated Annual Program to Informants in the month of December each year. These communications contained the AACQ in MMBTU and Monthly Quantities in MMBTU. Though, the quarterly quantity was not separately mentioned, but it may be easily calculated by adding the Monthly Quantity of three months of calendar year. With regard to indicative DCQ, the report mentioned the Opposite Party's submission that indicative DCQ in MMBTU units could be calculated easily by dividing the Monthly Quantity by number of days of the said month. Accordingly, DG concluded that the Opposite Party had provided Annual Program to the Informants broadly in accordance with Article 8.1 of GSA.

iv. As regards nomination of QCQ, the finding in the Investigation report was that the Informants did not nominate QCQ as per the GSA. The report mentions that eeven if it was presumed that the Opposite Party's communications to the Informants during December was not the Annual Program, nothing precluded the Informants to either protest about the same with the Opposite Party or to furnish nominations for each quarter in terms of information already provided by the Opposite Party to them, which could have been even 'under protest'. However, the Informants failed to

perform what was expected from them. Therefore, the DG concluded that there was inaction on part of both the parties, *i.e.,* Informants and the Opposite Party.

v. As regards monthly nominations as per GSA, Investigation report found that the Opposite Party failed to make these nominations. The Informants alleged and highlighted all procedural inactions of the Opposite Party as soon as it raised financial claims regarding 'Take or Pay' liability. However, not even a whisper of discontentment was aired by the Informants so long as it was not inconvenient to the Informants. When financial claim was made by the Opposite Party in 2015, the Informants alleged all procedural inactions on the part of the Opposite Party. Accordingly, DG took a view that there was inaction on part of both the parties. Similar view was taken by DG in the investigation report with regard to daily nomination.

vi. As regards daily nomination elucidated in Article 8.2 (d) of the GSA, Investigation found that Informants did not intimate daily nominations to the Opposite Party. As per the GSA, the Informants were required to nominate, not later than 10.00 hrs on Wednesday immediately preceding each week, the quantity required by them on each day commencing 06:00 hrs of Monday of next week which should in range of 95 %- 105 % of the DCQ. Upon receiving the same, the Opposite Party was required to confirm the same by 22:00 hrs of Friday and it shall be called PNDCQ. Since, no such daily nominations before commencement of week were received by the Opposite Party, the DCQ was arrived by the Opposite Party as per the quantities mentioned in Annual Program and offered for delivery, as it did not possess any enabling figure with respect to the quantity of gas required by the buyer for each day and consequently, the determination of PNDCQ was not possible. Further, both the parties did not strictly follow the procedures for nomination of QCQ, PNQCQ, Monthly Quantity, DCQ and PNDCQ as per GSA. The investigation found that these were only procedural lapses and did not have any material effect/bearing on final outcome.

vii. Further, the investigation found that the Opposite Party had intimated the quantity of DCQ, as per calculation derived from Annual Program, through emails to Informants. DCQ had been accepted by Informants as well as by the Opposite Party as they both signed on the joint tickets. Thus, there was a mutual acceptance of the

DCQ, by signing the Joint Ticket. Hence, in this case DCQ and PNDCQ were same and the allegation of Informants that DCQ and PNDCQ did not exist was factually incorrect.

viii. Investigation analysed calculation of 'Take or Pay' liability demanded by the Opposite Party and found that 'Take or Pay' liability was significantly lesser than the liability that was computed as per the formula envisaged under GSA. The Opposite Party made the necessary calculations to compute the Seller's Daily Shortfall to the extent possible based upon the data available in the joint tickets duly signed by the parties concerned. the Opposite Party had submitted to DG the calculation of 'Take or Pay' liability for the year 2014 which is reproduced below:

Table 11: Calculation of ToP by the Opposite Party for the year 2014

Customer Name	**AACQ (MMBTU)**	**ToP %**	**Actual Drawl (MMBTU)**	**Seller's Shortfall (if any, MMBTU)**	**Force Majeure quantity (if any, MMBTU)**	**Make-up quantity (if any, MMBTU)**	**Annual 'Take or Pay' Deficiency for CY-2014 (MMBTU)**	**Weighted Average Contract Price for CY-2014 as per GSA (Rs./MMBTU)**	**Pay For if Not Taken Liability Amount**	**Annual 'Take or Pay' Deficiency demanded in line with GAILs letter dated 28.02.2015 (MMBTU)**	**Pay For if Not Take Liability demanded vide GAILs letter dated 28.02.2015 (Rs.)**
	(1)	**(2)**	**(3)**	**(4)**	**(5)**	**(6)**	**(7)**	**(8)**	**(9)**	**(10)**	**(11)**
Rico Auto Gurgaon	211714	90%	87224	1486	0	0	101833	994.680	101,290,850.57	38,932	38,724,897.67
Rico Auto Dharuhera	117600	90%	72198	825	0	0	32817	1001 920	32,880,008.64	12,546	12,570,156.04
Rico Castings	117620	90%	64103	826	0	0	40929	1003 380	41,067,340.02	15,643	15,696,252.65,
Omax Auto Dharuhera	143103	90%	78905	1004	0	0	48884	999.610	48,864,635.36	18,701	18,694,188.43
Omax Auto Manesar	134870	90%	26177	947	0	0	94259	1010 560	95,254,375.04	36,070	36,450,842.94

ix. As per the Investigation Report, the above table indicates that calculation of 'Take or Pay' liability for Informants was possible. Accordingly, DG concluded that it was difficult to hold the allegations of Informants that it was nothing but an abuse of dominant position by the Opposite Party under provisions of Section 4 of Act. Investigation also concluded that 'Take or Pay' liability clause was a necessary pre-requisite and could not be said to be unfair just because it was putting financial burden upon the informants.

x. In view of foregoing, the investigation came to the conclusion that invocation of the contractual clause of the 'Take or Pay' liability by the Opposite Party and the computation of the liability to the extent it was possible in the state of part

compliance of the GSA by either side could not be said to be a case of contravention of the provisions of Section 4 of the Act.

43. **Invocation of Letter of Credit (LC) for purpose not contemplated in the GSA**:

The Informants had alleged that the purposes for which this LC could be invoked by the Opposite Party were specifically stipulated in Article 12.7 (b) of the GSA. These stipulated purposes were the realization of amounts under any Invoice, Provisional Invoice, Final Invoice, Correctional Invoice, Miscellaneous Invoice or Debit Advice/Debit Note. The stipulated purposes did not include the realization of 'Take or Pay' Liability. Upon examining the relevant provisions of the GSA, especially Article 12.7 (a) and the terms of LC, the DG came to the conclusion that it covered the risk of payment of 'Take or Pay' liability through the irrevocable LC. Further accepting the reply of the Opposite Party, as also relying upon decisions of Hon'ble High Courts and the Hon'ble Supreme Court in the case of *Federal bank v. V.M Jog Engineering Ltd.* (2001) I SCC 663, the DG opined that the contract of bank guarantee or LC was independent of the main contract between the seller and buyer, which was the GSA in the instant matters. The DG stated that the Informants were wrong in suggesting that Article 12.7(b) did not use the term 'debit note' and therefore, the Opposite Party could not invoke LC for the purpose of its dues against debit notes issued against 'Take or Pay' liability. The DG found that the Informant failed to make payment of debit notes raised by the Opposite Party for the amount arising under '*Annual Statement of Settlement*', which included 'Take or Pay' liability claim. Under these circumstances, the DG in the investigation report concluded that invocation of LC for recovering 'Take or Pay' liability by the Opposite Party could not be said to be an instance of imposition of unfair condition in sale of goods/services, in contravention of Section 4(2)(a)(i) of the Act.

44. **Forcing the Informants to maintain the LC in a format which enables GAIL to secure payments, which are not envisaged in the GSA***:*

The allegation of Informants was that the Opposite Party was forcing them to maintain LC to cover the amount of Minimum Guarantee Offtake (**MGO**) and 'Take or Pay' liability. In this regard the Opposite Party submitted before the DG that it maintained a standardized format of LC that is provided to the customers. The Opposite Party

submitted to DG that it was present in various gas markets for instance, APM gas and Non APM gas, Panna Mukta Tapi Gas, Ravva Gas, *etc.*, as well as it imported RLNG. Further, the DG report mentions that the term MGO and 'Take or Pay' are synonymous terms. The term 'MGO' was used in case of supply of Domestic Gas contracts whereas the term 'Take or Pay' was used in imported gas contracts. Upon considering the provisions of GSA and the terms of LC, the DG reached a conclusion that the concepts of MGO and 'Take or Pay' liability were used synonymously and the standard LC terms of the Informants mentioned only 'MGO'. The DG found that the Opposite Party, being in a dominant position in the relevant market, had a higher responsibility and should have restricted the application of the LC only to those items which emanate from GSA. Accordingly, investigation concluded such a lapse as a contravention of Section 4(2)(i)(a) of the Act, by the Opposite Party, but yet may be regarded as a minor mistake on its part.

45. **Unauthorised invocation of LC beyond the limits prescribed under the GSA:**

The DG found that as per GSA, LC could be drawn at one point of time, up to an amount equal to sixteen days of supply of gas at applicable price. The value of LC was, however, a value of Gas for a period of three fortnights. The Informants alleged that the Opposite Party attempted to encash LC for 'Take or Pay' liabilities of the Informants, the values of which were higher than the said limit contemplated under the GSA. The Investigation Report mentioned the details of invocation of LC of the Informants in March 2015 which is as under:

Table 12: Invocation of LC of the Informants by the Opposite Party in March 2015

Name of IP	Amount of LC (Rs)	ToP Liability (Rs)	Invocation date	Invocation amount (Rs)	Approx. value of gas for a period of 16 days (Rs)
M/S Rico Auto-Gurgaon	1.93 Crores	3.87 Crores	19.03.2015	1.93 Crores	67 Lakhs
M/S Rico Auto-Rewari	1.6 Crores	3.29 Crores	19.03.2015	1.26 Crores	55 lakhs
M/S Omax Autos– Gurgaon	1.61 Crores	3.64 Crores	19.03.2015	1.61 Crores	57 lakhs
M/s Rico Casting Ltd.	78.86 Lakhs	1.57 Crores	16.03.2015	78.86 Lakhs	26 lakhs
M/S Omax Autos – Rewari	1.63 Crores	3.64 Crores	19.03.2015	1.63 Crores	40 lakhs

46. According to the DG, the conduct of the Opposite Party was clearly reflected in above table as the Opposite Party invoked the LCs beyond what was prescribed under the GSA contractual commitment. The DG thus concluded that the Opposite Party's act of invoking LC beyond 16 days could be termed as a one sided unilateral conduct, which was not contemplated in the GSA. The DG further held that the Opposite Party was expected to have been circumspect in making financial claims, which otherwise would impinge upon the key contractual provisions of GSA and the reputation of the party on the other side. Therefore, DG found the Opposite Party to be in contravention of Section 4(2)(i)(a) of the Act.

47. **Arbitrarily advance the 'Buyers Due Date' to the detriment of the buyers in violation of the GSA**:

The Informants alleged that GSAs allowed payments within four banking days from the receipt of invoice but the invoices issued by the Opposite Party reduced the time period to three days. The DG found that in terms of Art. 12.3(a) of the GSA, a buyer could make payment within 4 days of receipt of invoice. However, the invoice issued by the Opposite Party required payment within three days. The Opposite Party contended that its invoices followed a standard format formulated long ago when the payments were to be made within 3 days of receipt of the invoice. Further, in case of delayed payments, the Opposite Party had computed interest only after giving a grace period of four days from the actual due date stipulated in the GSA. Investigation also found that the Opposite Party did not levy interest for delayed payments on many occasions.

48. However, the investigation report concluded that as a dominant enterprise the Opposite Party was required to represent true facts and values to its clients/ stakeholders and representation of a wrong fact in one of the legal documents could not be considered lightly particularly when it could lead to significant commercial and financial implications on either party. In the investigation report, it was stated by the DG that this conduct of the Opposite Party could be taken as an instance of abuse of dominant position by the Opposite Party in contravention of Section 4(2)(a)(i) of the Act. Nevertheless, it was noted that the Opposite Party's contention that its invoice format was old and had not led to computation of interest in wrongful manner, *etc.* could be taken as a mitigating factor at the stage of passing order under Section 27 of the Act.

49. **Arbitrarily and unilaterally doing away with the period of 7 banking days after buyer's due date, before notice of suspension could be issued**:

The Informants alleged that the Opposite Party, through the invoices issued, was threatening them of disconnection of the supply of gas without any further notice if the amount of invoice was not paid within three days of its receipt. The invoices issued by the Opposite Party stated that

> "*In case the invoice is not paid within 3 days (4 days for e-banking) of receipt of invoice, the supply of gas shall be disconnected without any further notice and without prejudice to other rights under the contract. The sale is subject to the terms & stipulations in the agreement.*"

The Informants contended that such stipulation by the Opposite Party was contrary to the terms of GSA, which allowed the Opposite Party to suspend gas supplies if a buyer failed to make payment for a period of seven banking days after the buyer's due date. Such suspension presupposed issuance of a notice from the Opposite Party to the buyer not later than three days from the expiry of the said seven days. Article 19.2 (a) of GSA clearly prescribed that after buyer's failure to make payment within Buyer's Due Date, 7 additional Banking Days would be allowed to the buyer, to make the payment and on Buyer's failure to make such payment even in these 7 Banking days, seller could issue a 3 days written notice to the Buyer for suspending deliveries of gas to it. Further, in terms of Clause 19.2(c) of the GSA, the Opposite Party could terminate the GSA if a buyer failed to make payment within 15 banking days from the Buyer's Due Date.

50. In this regard the Opposite Party submitted before DG as under:

> "*The invoice mentioned that the sale was subject to the terms and conditions stipulated in the Agreement. Therefore, irrespective of the statements made under the invoice, ultimately, it would be the terms of the GSA which would govern the stipulations mentioned in the invoice. That being said, it is also submitted that at no point of time did GAIL ever suspend, let alone disconnect the supply of gas to the Informant on account of non-payment or delayed payment of invoices. However, with respect to delayed payment of invoices, interest had*

been levied on the payment as per the terms of GSA. M/s Omax Autos Limited had made these payments to GAIL.

It is further submitted by Informants that the gas supply to M/s Omax Autos Limited Dharuhera and Maneshar was suspended on 31.03.2015. However, this was not on account of nonpayment of invoices by M/s Omax Autos Limited but on account of non-renewal of the LC. Further, in terms of Article 19.4 of the GSA, GAIL had provided adequate notice to Omax Autos Limited before suspending the supply of Gas."

51. The Investigation concluded that the Article 19 of GSA provided a detailed procedural mechanism for suspension or termination of gas supplies in cases of failure to make payment against invoices. However, the stipulation in invoice that gas supplies would be disconnected, if payment was not made within 3 days, modified the contents of GSA and overruled the conditions agreed upon between the two sides. Such stipulation in invoice, in disregard of the terms of GSA, was one-sided, unilateral and arbitrary. Thus a finding was given in the Investigation Report that the above act of the Opposite Party fell foul of Section 4(2)(a)(i) of the Act.

52. **Arbitrarily and unilaterally substituting disconnection for suspension of gas supplies:**

The Informants alleged that the Opposite Party, through the invoices issued, was threatening them of disconnection of the supply of gas without any further notice if the amount of invoice was not paid within three days of its receipt. As mentioned in DG report, the use of the term 'disconnected' in the invoice, was found not to be covered within the scope of GSA. Therefore, the investigation stated that it was difficult to ascertain the intent of the Opposite Party in use of the term 'disconnected'. Similar to the earlier finding, the DG concluded that such conduct of GAIL was in contravention of Section 4(2)(a)(i) of the Act.

53. **Suspension of gas supply without notice**:

The Informants in Cases No. 17 and 18/2016, alleged that the Opposite Party had suspended gas supply on 31.03.2015, without any notice and the same amounted to abuse

of dominant position. It was only on 01.05.2015, after around one month that the Opposite Party informed the Informants that supplies were suspended due to non-submission of renewed LC. These Informants further contended that the Opposite Party also denied them dispute resolution envisaged under the GSA.

54. In response to above mentioned allegation, the Opposite Party submitted that the gas supply to Omax was suspended by the Opposite Party on account of non-renewal of the LC by Omax. Further, this suspension was preceded by multiple notices to Omax by the Opposite Party. Further, the Opposite Party submitted that emails dated 06.02.2015, 19.03.2015 and 30.03.2015 were sent to Omax wherein Omax was reminded to renew its LC by the end of 30.03.2015. The investigation report relied on the email dated 19.03.2015, which was taken from the dump of email of officers of the Opposite Party. Thus, the Opposite Party submitted that the statement of Omax that it was made aware of the reason for suspension of gas only on 01.05.2015 was false. However, the Informants took the stand that they never received such email.

55. Further, the Opposite Party submitted that, in 2014, under similar circumstances, the same Informants requested for additional time beyond the stipulated deadline for submission of LC *i.e.* by 31.03.2014. The same was allowed by the Opposite Party and the LC was furnished only by 02.04.2014. However, in 2015, these Informants neither provided LC on time nor sought additional time to furnish the same, which is a requirement of GSA. Therefore, the Opposite Party went ahead and suspended gas supplies in accordance with the GSA. In these circumstances, the Investigation concluded that the allegation was found incorrect, the conduct of the Opposite Party was not found abusive as submission of LC was a requirement of GSA.

56. **Denial of dispute resolution as per GSA: GAIL acting as a judge in its own cause:**

Informants alleged that the Opposite Party rejected their request for amicable settlement of disputes. Upon examination of the correspondence with the Informants in Case No. 17 & 18 of 2016, the investigation found that the Opposite Party rejected their request for partial surrender of contracted quantity of gas because such request was beyond the scope of GSA. Further, the Opposite Party has stated that 'Take or Pay' liabilities for contract year 2014 were raised according to the provisions of GSA and hence rejected the request for amicable settlement made with regard to imposition of 'Take or Pay'

liability. To assess whether the Opposite Party acted in any unfair manner in dealing with the request of the Informants for amicable settlement of disputes, the Investigation examined the following four allegations: (a) 'Take or Pay' liability demanded without any basis; (b) gas supplies were disconnected without notice; (c) LC was attempted to be invoked beyond the provisions of GSA; and (d) the Opposite Party refused to reduce the contracted quantity. The Investigation concluded that there was no unfair conduct on the part of the Opposite Party as these allegations were largely incorrect and some of them had basis in GSA.

57. The Investigation further noted that at the time of entering into the GSA, the Informants had the option to either go for Spot or Long Term GSA and also the short term. They chose to go for Long Term GSA which made them receive continuous supply of gas at a significantly lower price. The investigation report mentions that the Informants knew that the Opposite Party had back to back contractual commitment with PLL, being the upstream supplier to the Opposite Party, and it was making supplies to the Informants nearly on the same terms and conditions under which PLL was making supplies to the Opposite Party. In fact, in some of the aspects, the GSAs with the Informants were much favorable than the arrangement between the Opposite Party and PLL. Hence, for reducing ACQ of the Informants, it was logical that the Opposite Party had to further negotiate with its upstream suppliers of RLNG *i.e.* PLL for corresponding reduction of contractual quantity, which may not be possible in the entire value-chain. Further, the price set for RLNG was set in accordance with the formula agreed with RasGas and the directions of MoPNG and PNGRB. Accordingly, the refusal to the proposal of the Informants to reduce the contracted quantity in 2014 and 2015 by the Opposite Party could not be said to be in violation of Section 4 of the Act.

58. **Discrepancy in Annual Statement of Settlement issued to M/s Omax Autos**

The Informants in Cases No. 17 and 18/2016 contended that the Opposite Party did not provide Annual Statement of Settlement, without which the Informants could not be made liable for payment of 'Take or Pay' liability. However, the Opposite Party invoked the LC against 'Take or Pay' liability. Investigation found that the Opposite Party had sent a communication dated 28.02.2015 and an email dated 05.03.2015 with various details such as ACQ and different outstanding of the Informants – carry forward aggregate, *force majeure* deficiency and Annual 'Take or Pay' deficiency; Amount of

earlier Make Up Gas, Restoration Quantities. The Investigation compared the relevant Article/Clauses with the said communication issued by the Opposite Party to Omax Autos. The positions, as tabulated by the DG, is as under:

Table 13: Information provided by the Opposite Party to Omax Autos

Particulars	**Provision of Article 12.2 (a)**	**Information provided by GAIL/ the Opposite Party**
ACQ	Amount of ACQ and AACQ should be provided.	GAIL failed to provide the amount of ACQ/AACQ.
Outstanding Carry Forward Aggregate, outstanding Force Majeure Deficiency and outstanding Annual 'Take or Pay' Deficiency.	The amount of Outstanding Carry Forward Aggregate, outstanding Force Majeure Deficiency and outstanding Annual 'Take or Pay' Deficiency should be provided.	Since the amount of Outstanding Carry Forward Aggregate, outstanding Force Majeure Deficiency and outstanding Annual 'Take or Pay' Deficiency is zero hence it has not been provided by GAIL.
Amount of Earlier Make Up Gas, Restoration quantities or Make Up Gas and Carry Forward Aggregate.	The amount of Earlier Make Up Gas, Restoration quantities or Make Up Gas and Carry Forward Aggregate should be provided.	Since the amount of Earlier Make Up Gas, Restoration quantities or Make Up Gas and Carry Forward Aggregate is zero hence it has not been provided by GAIL.
The calculation of total quantity of any Annual 'Take or Pay' Deficiency, the Weighted Average Contract Price and total amount due and payable in respect of Pay For If Not Taken obligations in rupees.	The calculation of total quantity of any Annual 'Take or Pay' Deficiency, the Weighted Average Contract Price and total amount due and payable in respect of Pay For If Not Taken obligations in rupees should be provided.	GAIL has provided calculation of total quantity of any Annual 'Take or Pay' Deficiency, the Weighted Average Contract Price and total amount due and payable in respect of Pay For If Not Taken obligations in rupees through email dated 05.03.2015.

59. The DG has given a finding in the Investigation Report that from the above table, it was evident that the Opposite Party had provided "Annual Statement of Settlement" to Omax Autos. Though, certain deficiencies were noted but these could not be considered as material or substantive in nature particularly when these did not have any bearing upon the quantum of liability raised on Omax. Thus, in substance, the said communications

dated 28.02.2015 and 5.03.2015 were found to contain the details of annual statement of settlement and were sufficient to ascertain the ToP liability of the Informants. Accordingly, Investigation found that the claim of the Informants in this regard was not tenable.

60. **Coercing the informant of Rico group to pay an amount towards payment against the pay for it if not taken obligation and forcing the Informant to forfeit its right to receive make up gas against such payment*:***

Upon examination of the ToP issues, the investigation noted that the demand raised by the Opposite Party in 2014 on Informant was lesser than the actual ToP liability in terms of GSA. The Opposite Party also offered one time settlement to these Informants whereby they could absolve their ToP liability by paying a lump sum, which was further lesser than the demand, provided the buyers forego the right to corresponding quantum of Makeup Gas. The Opposite Party contended that it had suffered loss by selling RLNG gas off-taken from upstream suppliers by it during contract year 2014, but not off-taken by its contracted customers. Therefore, it had to demand ToP from customers on proportionate basis and not as per GSA. The Opposite Party came out with a one-time settlement scheme in which customers were required to pay the loss suffered by the Opposite Party on proportionate basis. The Opposite Party submitted that it demanded only about 38 percent of the amount which the Informants were contractually liable and subsequently One Time Settlement amount, which was calculated for individual customers based on actual loss suffered by the Opposite Party, was only approximately 6.4 percent of the Actual 'Take or Pay' liability of the Informants:

Table 14: ToP demanded by the Opposite Party in Year 2014

Name of Customer	ToP amount 2014 (Rs in Cr)	Demanded by OP (Rs in Cr)	One Time Settlement(OTS) Amount (Rs)	Remarks
Omax Auto (Dharuhera)	4.89	1.87	31,38,361/-	Settlement Indenture not signed
Omax Auto (Manesar)	9.53	3.64	60,51,481/-	
Rico Auto (Gurgaon)	10.13	3.87	65,37,711/-	Settlement Indenture signed
Rico Auto (Dharuhera)	3.29	1.26	21,06,870/-	
Rico Casting	4.11	1.57	26,27,665/-	

It further stated that the Opposite Party recovered only loss suffered due to the default of Informants to off-take the committed quantity in CY 2014. Considering these, the Investigation concluded that the allegation of the Informants in Cases 16, 19 & 20/2016 were not justified.

61. **Whether the manner of demand of Buyer's ToP obligation by GAIL may be considered as abuse of dominant position by GAIL or not?**

M/s Omax Autos Ltd and M/s Rico Autos Industries Ltd furnished the details of ToP liability demanded by the Opposite Party for years 2014, 2015 and 2016 as under:

Table 15: ToP Liability Demanded by the Opposite Party from M/s Omax Autos Ltd

S.No.	Calendar Year	ToP Liability Demanded (in Rs Cr)		
		For Maneshar Plant	For Dharuhera Plant	Total
1	2014	3.640	1.870	5.510
2	2015	13.336	13.020	26.356
3	2016	7.242	7.684	14.926
Total		24.218	22.574	46.472

Table 16: ToP Liability Demanded by the Opposite Party from M/s Rico Autos Industries Ltd

S.No.	Calendar Year	ToP Liability Demanded (in Rs Cr)		
		For Gurgaon Plant	For Dharuhera Plant	Total
1	2014	10.13	3.29	13.42
2	2015	18.61	4.89	23.50
3	2016	9.417	1.295	10.712
Total		38.157	9.475	47.632

The investigation found that the Opposite Party had demanded only a proportion of the actual ToP liability to compensate its loss incurred in contract year 2014 due to under drawl of gas by its industrial customers. Uniform approach was adopted across customers. The Opposite Party also provided one-time settlement options to the defaulting customers provided they relinquished their right to make up gas. In 2015, the Opposite Party exercised Downward Flexibility Quantity (DFQ) with its upstream

supplier and the same benefit was passed on to the customers who did not meet their minimum off-take obligation. The Investigation opined that it was an exaggeration to state that the Opposite Party did not have the right to raise ToP claims in instances where there was a request for reduction in the contracted quantity. Neither GSA provided for reduction of contracted quantity nor did the Opposite Party at any point of time waive its rights to raise ToP claim. Keeping all these into account, the investigation did not find any fault with the manner in which the Opposite Party imposed ToP liability on its contracted customers. Hence, DG concluded that the manner of demand of ToP liability and the demand of ToP by the Opposite Party for contract year 2014 and 2015 could not be said as abuse of dominant position by the Opposite Party.

62. In Case No. 45/2016 and Case No. 2/2017, the Investigation looked into similar allegations *i.e.* invocation of LC, imposition of ToP liability, one-time settlement, reduction of contract quantity, etc. and found no contravention by the Opposite Party. Additionally, the allegation regarding exclusionary effects of long term contract was also assessed. After considering the beneficial effects of long term contracts; entry of Indian Oil Corporation Limited (IOCL) and Bharat Petroleum Corporation Limited (BPCL); and placing reliance upon the Commission's decision in SAIL case (Case No. 11/2009) and *Standard Oil Co. of California v. United States* [337 US 293 (1949)], it was concluded in the Investigation Report that the allegations concerning foreclosure of competition, due to longevity of GSA, was not sustainable.

63. The investigation, however, found following violations of the provisions of Section 4 of the Act by the Opposite Party on following aspects:

(i) **Forcing the Informants to maintain the LC in a format which are not envisaged in the GSA**: The DG concluded that the Opposite Party, being in a dominant position in the relevant market, had a higher responsibility and should have restricted the application of the LC only to those items which emanate from GSA. However, the investigation also mentioned that this act may be regarded as a minor mistake on part of the Opposite Party.

(ii) **Unauthorised invocation of LC beyond the limits prescribed under the GSA**: The DG noted that as per GSA, LC could be drawn at one point of time, up to an amount equal to 16 days of supply of gas at applicable price. However, the Opposite Party invoked the LC for an amount more than the value of 16 days supply of gas.

Investigation found this lapse of the Opposite Party as contravention of provisions of Section 4(2)(i)(a) of the Act.

(iii) **Arbitrarily advance the 'Buyers' Due Date' to the detriment of the buyers in violation of the GSA**: The investigation found that there were instruction on the invoice to make payment within 3 days as against permitted period of 4 banking days in the GSA. This act was found to be contravention of Section 4(2)(i)(a) of the Act. However, the report also mentioned that, in case of delayed payments, the Opposite Party had computed interest only after giving a grace period of four days from the actual due date stipulated in the GSA.

64. The Commission considered the Investigation Report filed by the DG on 19.07.2018 and decided to forward electronic copies of the public version of Investigation Report to all the parties for filing their suggestions/objections thereto. The Opposite Party was directed to file its written suggestions/objections to the Investigation Report latest by 17.08.2018 with an advance copy to all the Informants. The Opposite Party was also directed to file suggestions/objections to the Information in Case Nos. 59/2017, 62/2017 and 63/2017 with an advance copy to all the Informants. The Informants were directed to file their written submissions, if any, latest by 31.08.2018, with an advance copy to the Opposite Party. The final hearing on investigation report was held on 05.09.2018. 18.09.2018 and 05.10.2018. The written suggestion/objection on the investigation report of the parties and the gist of the arguments made by the respective parties during the hearings are as under.

Replies/ objections/ submissions of the Parties

Replies/ objections/ submissions of Informants in Case No 16-20 of 2016

65. Counsel for the Informants, in aforesaid cases, has supported the delineation of the relevant market, made by the DG, in the investigation report as also the finding that the Opposite Party was in a dominant position, in each of such market, during the relevant period. However, the Counsel, has strenuously argued that a very elaborate Gas Sale Agreement ("GSA") was signed between the Informants and the Opposite Party, in terms of which natural gas was to be supplied to each of such Informants and each and every relevant term, in such GSA, was defined and nothing was left to any kind of presumption. The Counsel to buttress his arguments submitted that if a gas supplier has

committed to supply 365 units' gas in a calendar year, such supplier has not undertaken, by implication, to supply 1-unit gas on each day of the year. It is only the supplier, for reasons exclusively known to it, could decide on supply of varying amounts of gas on different days in the year, which could include the receipt of LNG from its upstream, the planned repairs and maintenance of the equipment and the pipelines by the supplier and commitments made by the suppliers to its other customers etc. Thus only the supplier could provide the indicative quantities of gas which it expected to supply on each day of the year, during each month of the year and during each quarter of the calendar year. The provisions of Article 8.1(c) of the GSA requires the Opposite Party to provide to the Informant the Annual Program, showing therein, inter alia, the ACQ, the quarterly quantities, monthly quantities and the indicative DCQs in MMSCM and MMBTU for each Contract Year.

66. Thus, it is only the Opposite Party, which could have shown the quarterly quantities, monthly quantities and the indicative DCQs in the Annual Program and further all quantities shown in the Annual Program, other than the ACQ, were tentative and flexible in nature, which could be fixed by the Opposite Party, only close to the commencement of the relevant period. Therefore, the monthly quantity shown by the Opposite Party for a particular month could not be divided by the number of days in such month, to arrive at the indicative DCQ for each day of the month, as done by the DG in the investigation report. Since the calculation of DCQ, in such manner was not logical, therefore it was not logical to add up the monthly quantities of three months to arrive at the quarterly quantities. The Opposite Party could not be heard say that it has shown the monthly quantities in the so called Annual Program and the Informant should add up the quantities for three months to compute the quarterly quantities and should divide each monthly quantity to arrive at the indicative DCQ for the month. Further if the submissions of the Opposite Party were to be accepted, then there was no necessity for it to even show the monthly quantities in the Annual Program. The ACQ is fixed in the GSA known to both the Opposite Party and the Informants and Informants would simply have been expected to divide the ACQ itself by four to get the quarterly quantities, by twelve, to arrive at the monthly quantities and then divide these monthly quantities by the number of days in the months to arrive at the indicative DCQs.

67. The Informants have assailed the finding of the DG on accepting this calculation done by the Opposite Party, whereas according to them the quantities should have been

calculated exactly in accordance with GSA. The Informants also submitted that all the quantities mandated to be shown in the Annual Program, were required to be shown in two units, *viz.*, MMSCM and MMBTU, whereas the Opposite Party had indicated the monthly quantities only in MMBTU, which has also been accepted by DG. Further the DG has not taken into account the heat content of gas while accepting such calculation. The DG while being unsure in his report of whether an Annual Program was given by OP in terms of Article 8.1(c) of the GSA, still accepted the same stating that it was broadly in accordance with such clause. This finding of DG in the investigation report deserved to be dismissed.

68. The Learned Counsel for the Informants also contended that DG in his investigation report has observed that it was incumbent upon the buyer / Informants to confirm the quarterly quantities and though DG had required the Informants to submit details of nomination of QCQ, by them, the same was not submitted. This according to him is factually incorrect, as Informants had supplied their reply affidavit to DG on 19.05.2017 and 31.05.2017, wherein it was informed to DG that QCQ can be nominated by the Buyer (Informants), only and only when the "Annual Program QCQ", i.e., the quarterly quantities set forth in the Annual Program exist [this is the requirement prescribed in Article 8.2(b)(i) of the GSA] and, the quarterly quantities were not shown in the "Annual Program", and, accordingly, no steps on Informants part were possible for nomination of QCQ. Thus the conclusion arrived at by the DG in the report, to the effect that the Opposite Party could not nominate/determine PNQCQ for the succeeding calendar quarters due to the absence of nomination of QCQ by Informants, is wrong and devoid of any basis. It was also contradictory to the Opposite Party's own admission that the amount mentioned in the Annual Program shall prevail.

69. The Informants next contended that the Opposite Party in terms of Article 8.2(c) failed to nominate in writing to the Buyer (Informants) the aggregate quantity of gas deliveries which the Opposite Party expected to achieve during the next succeeding calendar month, being the monthly quantities, as also the quantities of gas, which the Opposite Party expected to deliver on each day during such month (DCQ) and this communication/nomination had to be sent by the Opposite Party to the Informants on the tenth (10) Day prior to the expiry of each calendar month. However DG, in its Investigation Report, without adverting to requirement of sub- clause (b) and (c) of Article 8.2(c) of the GSA, simply stated that since Informants did not have comments

on QCQ, hence monthly quantity as mentioned in the Annual program could be considered applicable. This finding arrived at by the DG was clearly wrong.

70. Next it was contended that in the absence of any DCQ, nominated by the Opposite Party, it was impossible for the Informants to make any daily nominations in accordance with Article 8.2(d), which was a prerequisite for the determination of the PNDCQ. The Informants also impugned the finding of the DG that neither the Informants nor the Opposite Party strictly followed the procedures for nomination of QCQ, PNQCQ, Monthly Quantity, DCQ and PNQCQ. According to Learned Counsel, the correct position was that the Opposite Party failed to make the requisite nominations and in the absence of such nominations, it was impossible for the Informants to make any nominations required on its part.

71. The Informants assailed the finding of the DG, in the investigation report that the DCQ (as communicated by the Opposite Party in December, 2013 and in Joint Ticket) and PNQCQ were same and the allegation of the Informants that DCQ and PNQCQ do not exist, is factually incorrect. In this regard, it was contended that DG had stated that the DCQ was communicated by the Opposite Party in December, 2013 and in Joint Ticket. According to the Informants, DCQ was to be given by the Opposite Party in the Monthly Nominations to be made by it on the tenth day prior to the commencement of each calendar month of 2014, in accordance with Article 8.2(c) of the GSA. Thus a quantity mentioned in a Joint Ticket, made after the expiry of a period, could not be the basis to communicate the DCQ on the Tenth day prior to the commencement of that period. In such a case, the Informants could not make Daily Nominations for the determination of PNQCQs.

72. As per Article 9 of the GSA, the aggregate of Seller's Daily Shortfall could not be calculated due to absence of DCQ, as it has necessarily to be calculated with reference to the lower of PNDCQ or DCQ, as the case may be, and that Informants have demonstrated that none of these quantities existed due to the failure of the Opposite Party to make the Monthly Nominations for each month on the Tenth day prior to the commencement of the month. Yet, Seller's Daily Shortfall had been calculated by using the methodology explained by the DG, as follows:

i. "The average DCQ as per the Annual Plan" arrived at by dividing the quantity given in Article 6.1 of the GSA by 12 to compute the monthly quantities and thereafter dividing the figure so arrived with the number of days of the month.

ii. The DCQ as per the actual nomination in the Joint Ticket duly signed by both the parties.

73. According to the Learned Counsel for the Informants, after narrating the above methodology and quantities, the DG declared in the relevant para of the Investigation Report that "the allegations of the Informant that aggregate of Seller's Daily Shortfall cannot be calculated due to absence of DCQ seems to be factually incorrect". The Informants are aggrieved that the DG had not bothered to examine whether the quantities narrated and methodology adopted above even found any place in the GSA or were the arbitrary creation of the Opposite Party. Further it was contended that though DG embarked on accepting this arbitrary calculation of the Opposite Party, yet it was stated in the Investigation Report that the Opposite Party had calculated the seller's shortfall to the extent possible. The Informants strongly contended that in the absence of the DCQ and the PNDCQ, the computation of the aggregate of Seller's Daily Shortfall was not possible.

74. The Learned Counsel for the Informants, stated that the formula of 'Take or Pay' liability as per GSA is as follows:

'Take or Pay' liability = 0.9 AACQ – Quantity of gas taken by Buyer – Aggregate of Seller's Daily Shortfall.

According to Counsel, for calculation of 'Take or Pay' liability 'aggregate of Seller's Daily Shortfall" was a necessary component of calculation. Without there being any nominations, the sellers shortfall could not have been calculated, but DG had concluded in the report that the calculation of this quantity is possible "only to the extent possible" based upon the data available in the Joint tickets.

75. The Counsel for the Informants on the strength of the above submissions made by him contended that in the absence of the DCQs and the PNDCQs due to the failure of the Opposite Party to make Monthly Nominations in accordance with Article 8.2(c) of the GSA, the calculation of the aggregate of Seller's Daily Shortfall and consequently, the calculation of the 'Take or Pay' liability, could not have been made by the Opposite

Party. The Opposite Party had made some calculations of the liability by dividing the ACQ stated in Article 6.1 of GSA by 365 and by dividing the Monthly Quantities stated in its communication dated 31.12.2013, by the number of days in the respective months, which was wholly extraneous to the GSA. The DG termed such untenable calculations, first as calculation "to the extent possible", then as "calculations with the review of GSA" and finally, as "computation to the extent it was possible".

76. Thus it was argued on behalf of the Informants that in these circumstances, the Commission may, pronounce that the computation of the 'Take or Pay' liability by the Opposite Party, utilizing the quantities and methodology not provided for in the GSA, cannot be held to be in consonance of the GSA and, accordingly, it is in abuse of its dominant position.

77. It was then contended that the investigation report of the DG revealed that with regard to allegation of forcing Informants to make payments against incomprehensible invoices, on account [of failure to show all material facts as per Article 12.1 (A)/(i) of GSA] can at best be said to be an outcome of literal application of GSA without establishing any harm caused to Informants. It was a case of non-compliance to the 'form' rather than 'substance' by the Opposite Party and accordingly, in the facts and circumstances of the matter, could not be said to be a competition issue at all. Nothing can be said to be 'unfair condition' which can be considered to have been practiced by the Opposite Party and the allegations of contravention of the provisions of Section 4(2)(a) of the Act on this account were not established. However, to avoid any sort of grievance, the Commission may direct the Opposite Party to make appropriate change in the Invoice to clarify the matter in the context of GSA.

78. According to the Learned Counsel for Informants, this finding of the DG was self-contradictory and untenable as the DG had, on the one hand, accepted that the invoices sent by the Opposite Party did not comply with the 'form' prescribed in the GSA and yet non-adherence to the format was not an 'unfair condition', since the Informant had not established any harm caused to it thereby. However, the DG still recommended that Commission should give a direction to the Opposite Party to make appropriate changes in the Invoice in the context of the GSA. It was further contended in this regard that the Opposite Party had submitted during the course of investigation by DG that the information mentioned in Article 12.1(A)(i) was either provided in the Joint Ticket or in

the Invoices and as such both were to be read simultaneously. The finding of the DG has been assailed by the Informants, on the ground that DG in the Investigation Report has placed reliance on a table submitted by the Opposite Party (at page 231 of the Investigation Report) wherein the PNDCQ for each day has been expressed in MMSCM and MMBTU and which is shown at page 2 of the Joint Ticket, whereas Page 2 of the Joint Ticket (contained at page 235 of the Investigation Report) does not show any PNDCQ, written in MMSCM and MMBTU. Similar was the case with 'confirmed quantity' on each Day (denominated in both MMSCM and MMBTU) being shown at page 2 of the Joint Ticket. Further the Opposite Party has drawn boxes to announce that the individual entries in the columns titled 'Nom./Schd Qty in Contractual UoM' and 'Corrected Nom./Schd Qty in SCM' should be presumed to be the DCQ in MMBTU and the DCQ in MMSCM respectively. Although no reason for making this presumption had been provided by the Opposite Party, yet the DG proceeded on this presumption throughout the investigation. It was contended that on the basis of this incomprehensible invoice and Joint Tickets, the DG found favour in the calculation of DCQ by the Opposite Party, contrary to the provisions of the GSA.

79. In the above background, it was contended by the Informants that it had no option but to surrender to such unfair and abusive conduct of the Opposite Party in the light of the threat communicated in each invoice that if the invoice was not paid within three days, the supply of gas would be disconnected without any further notice. Thus, Informants were coerced into paying the Opposite Party, amounts of money shown in the Invoices, without even comprehending the basis and the correctness thereof. The Informants prayed for rejection of finding of DG and that a finding be instead given that Informants were forced to make payments of incomprehensible invoices, drawn up arbitrarily by the Opposite Party, without indicating the requisite necessary details in the GSA.

80. Next the Learned Counsel for the Informants, contended that Informants were forced to maintain the LC in a format which enabled the Opposite Party to secure payments, which were not envisaged in the GSA. The DG concluded that the conduct of the Opposite Party was in contravention of Section 4(2)(a)(i) of the Act. The Informants agreed with the conclusion. However, the DG made some erroneous remarks in its investigation *viz.* that there is no evidence that the Opposite Party had forced the Informants to include the terms 'MGO' in the terms and conditions of LC and that Informants had not raised the said issue before the Opposite Party at any point of time before filing the information in

the Commission. As per DG, both the Opposite Party and Informants were negligent in drafting and finalizing the terms and condition to be included in the terms and conditions of LC. This lapse on the part of the Opposite Party may be called minor lapse on the part of the Opposite Party. The Informants assailed this finding of the DG as being biased towards the Opposite Party and failing to take into account, that Informants protest were not considered, which it had explained *vide* its affidavit dated 05.07.2017, wherein it was informed to the DG that three specific unfair and one-sided conditions were got included in the LC by the Opposite Party, although each one of them was extraneous to the GSA. In this context it was submitted that Clause 4 of the Standard Format of LC covered 'MGO' and 'Take or Pay' amount' although, MGO is a term, which was not defined anywhere in the GSA and was completely extraneous to the GSA and the GSA vested no authority in Seller to draw upon the LC for the realization of any amount allegedly due as the Pay For If Not Taken Liability of the Buyer arising under an Annual Statement of Settlement.

81. Next it was contended by the Informants that though the Informant (Omax Auto) did default in renewing the LC within the stipulated date and in that situation, Article 19.4 of the GSA did empower the Opposite Party to suspend deliveries of gas to the said Informant, but the Opposite Party was obliged to give not less than 7 (seven) days prior written notice to the Informant. The Informant submitted that no prior proper notice in terms of GSA, was ever given by the Opposite Party, as was mandatorily required to be given, without which the suspension of gas supply by the Opposite Party on 31.03.2015, had caused serious prejudice and production losses to the Informant. The said conduct is thus abuse of dominant position. The findings of the DG that the Opposite Party had sent a mail dated 19.03.2015, was seriously disputed by the Informant, saying that no such mail was received. Further even after suspension of gas, the Opposite Party for the first time *vide* its communication dated 01.05.2015, gave reasons for suspension of gas supplies.

82. According to the said Informant, the DG failed to investigate the matter properly, and gave a finding that an email dated 19.03.2015, was sent by Mr. Kashif Hassan, Dy. Manager, OP to Omax, with copy to Mr. Giriraj Shankar, Dy. GM and Mr. VN Verma, Marketing Manager of the Opposite Party. The DG had demanded from the Opposite Party the email dump (Inbox and Outbox) of all the three officers of the Opposite Party for various dates, but significantly, not for 19.03.2015, which is the crucial date in

question for investigation. Most notably, the DG received from the Opposite Party the email dump of Mr. Girija Shankar, Dy. GM and of Mr. VN Sharma, Marketing Manager, of the Opposite Party, but did not receive the email dump of Mr. Kashif Hassan, Dy. Manager, who was purportedly the sender of the mail. Equally significantly, the DG did not ask for the email dump of Informant/Omax for 19.03.2015, to find out if the purported email dated 19.03.2015, was actually received by said Informant or not. Thus, without looking into the email dump of either the purported sender (Mr. Kashif Hassan) or the purported receiver (the Informant), the DG concluded that the claim of the Informant that the Opposite Party did not sent the email dated 19.03.2015, was factually incorrect.

83. According to the Informant, the DG had been swayed by the fact that Informant had made default in renewing the LC before the date of expiry of LC, as provided in the GSA and Informant had also failed to communicate any intention for renewal of LC and only thereafter, the Opposite Party had suspended the supply of RLNG. Further, the Informant had never renewed the LC after 31.03.2015, even after the suspension of supply of RLNG and despite several requests being made by the Opposite Party for renewal of LC. The DG has also observed that Informant (Omax) had not completely stopped the production in its plant on or after the suspension of supply of RLNG and did not renewed the LC within 1 or 2 days after the suspension of supply of RLNG by the Opposite Party. On this basis, DG had concluded that the conduct of the Informant showed that the suspension of supply of RLNG was not a major incident affecting the manufacturing operations of the Informant and thus Informant had also defaulted in compliance of the GSA. The Learned Counsel strongly contended as to whether, the Opposite Party's communication dated 01.05.2015, informing the Informant about the reason of suspension of gas supplies, which was done by the Opposite Party on 31.03.2015, could be taken as fulfilment of the contractual requirement under Article 19.4 of the GSA, of not less than seven days prior written notice by the seller to the buyer, before suspending deliveries of gas to the buyer for its failure to maintain the LC. This was especially as Informant had raised issue of suspension with the Opposite Party, immediately on 01.04.2015. Thus according to him, the Opposite Party, failed to give Informant not less than seven days prior written notice for suspension and its conduct was abusive under Section 4(2)(a)(i) of the Act.

84. Further, the Learned Counsel for the Informants contended that the Opposite Party failed to provide the Annual Statement of Settlement, for the contract year 2014, strictly in terms of Article 12.2 of the GSA. According to the counsel, the data that is required in this annual statement included the calculation and total quantity of any Annual 'Take or Pay' deficiency for such year as calculated pursuant to Article 14.1(b)(i), the Weighted Average Contract Price for such year and the total amount due and payable in respect of Pay For If Not Taken obligation in Rupees for such Annual 'Take or Pay' Deficiency pursuant to Article 14.1(b)(i). The DG in the Investigation Report had stated that the Opposite Party had provided calculation of total quantity of any Annual 'Take or Pay' Deficiency, the Weighted average Contract Price and total amount due and payable in respect of Pay For If Not Taken obligations in Rupees through its email dated 05.03.2015 and has on that basis concluded that the Opposite Party, has provided all the necessary items which deserved to be included in the Annual Statement of settlement and, therefore, it could be said that the communication dated 28.02.2015, read with email dated 05.03.2015 could be treated as the Annual Statement.

85. According to the Informants, firstly, the "Annual 'Take or Pay' Deficiency for contract year 2014" had only been announced in the email dated 05.03.2015. Secondly no calculation leading to this quantity had been shown, as mandated in Article 12.2(a) of the GSA. This was in clear violation of the contractual mandate by the Opposite Party and deprived the Informant of any opportunity of pointing out any mistakes in the quantity announced to the "Annual 'Take or Pay' Deficiency for contract year 2014. Further the Opposite Party had not shown any proper "Annual 'Take or Pay' Deficiency" in the Annual Statement vide its communications dated 28.02.2015 and 05.03.2015. Thus it was contended that the Commission, ought to reject the finding of the DG that the Informants had received the "Annual Statement of Settlement for contract year 2014" vide the Opposite Party's letter dated 28.02.2015 and email dated 05.03.2015 and may pronounce that the "Annual Statement of Settlement for contract year 2014" was not provided by the Opposite Party to the Informants to make them liable to the 'Take or Pay' Liability for contract.

86. Lastly it was submitted that DG had specified the persons who were responsible to the company (the Opposite Party) for the conduct of the business at the time when the contravention was committed by the Opposite Party. Informants agreed with the conclusion arrived at by the DG and Commission may proceed in due course to punish

the individuals found guilty of the contravention. It has been thus prayed that the relevant market in the instant cases may be determined as "Market for supply and distribution of natural gas to industrial consumers in Gurgaon district and in Rewari district. That the Opposite Party enjoyed a position of dominance in the supply of natural gas in the relevant market of Gurgaon and Rewari districts, which enabled it to affect its consumers in its favour. The Opposite Party did impose on the Informants 'Take or Pay' liability, which was computed in a manner not contemplated in the GSA and thereby abused its dominant position as per section 4(2)(a)(i) of the Act, by imposing an unfair condition in the sale of natural gas. That the Opposite Party forced the Informants to make payments against incomprehensible invoices, drawn up arbitrarily by the Opposite Party, without indicating the requisite necessary details stipulated in the GSA and thereby abused its dominant position as per section 4(2)(i) of the Act by imposing an unfair condition on the Informants. The Opposite Party forced the Informants to maintain the LC incorporating therein numerous conditions, which were wholly extraneous to Article 12.7 of the GSA and thereby abused its dominant position as per section 4(2)(a)(i) of the Act by imposing an unfair condition on the Informants. That the Opposite Party invoked the LCs beyond the limits prescribed under the GSA as a contractual commitment and thereby abused its dominant position as per section 4(2)(a)(i) of the Act, by imposing an unfair condition on the Informants. The Opposite Party arbitrarily advanced the "Buyer's Due Date" to the detriment of the Informants in violation of the GSA and thereby abused its dominant position as per Section 4(2)(a)(i) of the Act, by imposing an unfair condition on the Informants. The Opposite Party arbitrarily and unilaterally did away with the period of seven banking days after Buyer's Due Date, before notice of suspension could be issued and thereby abused its dominant position as per section 4(2)(a)(i) of the Act, by imposing an unfair condition on the Informants. The Opposite Party arbitrarily and unilaterally substituted "disconnection" for "suspension" of gas supplies, in the invoice and thereby abused its dominant position as per section 4(2)(a)(i) of the Act, by imposing an unfair condition on the Informants. The Opposite Party suspended the gas supply to the Informants on 31.03.2015, for not providing the requisite LCs, without fulfilling the contractual mandate to give to the Informants not less than seven days prior written notice for suspension and thereby abused its dominant position as per section 4(2)(a)(i) of the Act, by imposing an unfair condition on the Informants. That the Opposite Party did not provide to the Informants the "Annual Statement of Settlement for contract year 2014" to make the Informants liable to the 'Take or Pay' liability for contract year 2014 and yet imposed the liability on them and thereby abused its dominant position as per

Section 4(2)(a)(i) of the Act, by imposing an unfair condition on the Informants. The Informants have sought a direction from the Commission that the Opposite Party should discontinue such abuse of its dominant position forthwith and maximum penalty as envisaged under the Act, be imposed on the Opposite Party in view of the large number of infringements of the provisions of the Act committed by it.

Replies/ objections/ submissions of Informant in Case No 02/2017

87. Informant in Case No.02/2017, submitted that it supports the finding of the DG that the Opposite Party has a dominant position in the supply of natural gas in the relevant market of Alwar. However the findings of the DG, except on the aspect that inclusion of MGO amounts to violation of section 4(2)(a)(i) of the Act, is not correct.

88. The Learned Senior Counsel for the Informant, assailed the conclusion of the DG that the Opposite Party had not entered into agreement with its industrial customers that they will buy all their requirements of gas only from the Opposite Party and that the industrial customers were free to procure gas from the rival source such as IOCL or BPCL, *etc*, or even free to procure their own gas procured from any source elsewhere and utilize the gas pipeline network of the Opposite Party for its transportation to the point of use by them by paying the transmission charges as determined by PNGRB. The Learned Counsel impugned the finding of the DG that long term GSA has not lead to foreclosure of the market for the rival suppliers or created any sort of entry barriers in the market or created inefficiencies in the market of gas supply in India. According to the Learned counsel, these conclusions of the DG about sufficient rival sources available in the market and liberty to procure Gas from others suppliers are not borne out of records of the case as there was no alternate supplier in Alwar District (Relevant Geographic Market) till the year 2014 and there was only one option available with the Informant to procure its complete requirement of RNLG i.e. from the Opposite Party, which enjoyed monopoly till the year 2014 in the relevant geographic market. Further in the year 2009, no such option of a shorter period was ever made available to the Informant, nor did the DG ever seek a clarification on this aspect, from the Opposite Party.

89. It was next contended that the conclusion reached by the DG of option being available from other suppliers and utilizing the Gas Pipeline Network of the Opposite Party is based on conjectures. Also a long tenure of 20 years is a *prime facie* indication of market

foreclosure. Further the Opposite Party deliberately concealed the fact that as a matter of practice it insists on inserting a clause regarding "Right of First Refusal" whenever it permits a settlement, surrender of quantity or termination.

90. Though the DG had found that there appeared to be no supply restraint on the competitors of the Opposite Party and inspite of long term GSA, the competition had flourished in the market. According to Informants, the Oil and Gas Sector is strictly regulated at the central level by Ministry of Petroleum and Natural Gas and other regulators including PNGRB. PNGRB is the concerned regulator for the downstream market. At best, the market in its present form can be referred to as an oligopoly.

91. Next it was pointed that the DG had concluded that the Opposite Party had only demanded the loss incurred by it during contract year 2014 because of less off taking of supply of RNLG by the Informant and other industrial customers. Moreover, the Opposite Party had finally not demanded any 'Take or Pay' liability for the contract year 2015 as it had provided the facility of downward Flexibility Quantity to all its industrial customers. Further the Opposite Party had not incurred any loss due to less off taking of supply of RLNG by the industrial customers in 2016. According to the policy framed by the Opposite Party, it could not demand 'Take or Pay' liability for contract year 2016. Hence, the DG concluded that the Opposite Party had only demanded an amount equivalent to 60% of total 'Take or Pay' liability for contract year 2014 to compensate its loss as 'Take or Pay' liability under the provisions of GSA. This according to DG could not be said to be in violation of provisions of Section 4 of the Act. According to the Informant, this position was factually incorrect in as much as the Opposite Party had not incurred any liability to its upstream suppliers, nor had paid any 'Take or Pay' liability to its upstream supplier of RLNG. Further the conduct of the Opposite Party had to be viewed in light of resolution dated 24.07.2013, passed by its Board wherein it was resolved as follows:

> "*Whenever OP does not incur TOP under the GSPA with RLNG/LNG supplier (including PIL), OP shall not raise invoice for TOP on gas price to consumers) who have drawn less than the respective TOP quantity. 'Take or Pay' debit notes shall be raised to the extent of TOP obligation incurred by OP, if any, with RLNG-LNG Suppliers. This provision will cover all the current/future RLNG/LNG supplies under the GSPA/SPA."*

92. Thus it was contended that the Opposite Party having accepted the fact that it has not incurred any liability to 'Take or Pay' charges was equally bound by its own resolution. However, in violation of its own Board decision, the Opposite Party continued to demand 'Take or Pay' charges from the Informant for the years 2014, 2015, 2016 and 2017. This amounted to abuse of dominant position.

93. It had been contended by the Informant that DG had given a finding that parties entered into a long term GSA in order to reap the advantage of long term pricing so as to insulate from short term price volatility. However, a perusal of the price information chart, contained in the Investigation Report would establish that the long term contract did not insulate the Informant from short-long term price volatility, which struck at the very foundation of assurances made by the Opposite Party. In January 2009, the unit price of RLNG was 6.42 USD which escalated to 15.77 USD in December 2014. This rise in price was very steep and almost to the tune of 250 % and Informant was on the verge of closure. It wrote many communications to the Opposite Party to address the issue, but the Opposite Party persisted with its demand of 'Take or Pay' liability on Informant, followed by suspension of gas supply and termination of GSA.

94. The DG failed to examine that the Opposite Party never informed its customers about existence of a policy to surrender the GSA or about the Board resolution whereby it was decided not to raise invoices for the period when it had not incurred any liability. Further till 22.10.2016 *i.e.* the date of invoking amicable resolution by the Informant, it was never called upon to discuss its demand constraints or suspension notice by the Opposite Party. Further though 'Take or Pay' liability clause was shown as a defining Characteristic of long term GSA, however, irrespective of increase or decrease in the unit price of gas, the Opposite Party ensured to itself a Profit Margin of 1 USD per MMBTU and irrespective of alleged competition, the Opposite Party ensured a Profit Margin of 1 plus USD which indicated *per se* abuse of dominant position. This, thus, belied the assumption of a flourishing competent market.

95. It was contended that the DG ought to have seen that 'Take or Pay' could not be a justification for steady recovery of fixed investment costs. A sample of the VAT Invoice placed in the Investigation Report indicated the separate components *viz.* Marketing margin, transmission charge, RLNG tranch transportation charges were separately

recovered. Thus it was incorrect to assume that an end consumer must pay 90% of cost of annual contracted quantity for recovery of fixed cost and investments. It was also submitted that DG had failed to consider the additional ground raised by the Informant in Additional Information Memorandum.

Reply of the Opposite Party to submissions advanced on behalf of Informants.

96. With regard to the allegations made by the Informant (Omax Autos Ltd) in Case No.17 of 2016, regarding suspension of gas supply by the Opposite Party without proper notice under Article 19.4 of GSA, the Opposite Party submitted that the said Informant *vide* communication dated 06.02.2015, was informed that its LC, in accordance with the terms of Article 12.7 of the GSA had to be renewed by 15.03.2015. Yet again, the said Informant was informed on 19.03.2015, that if it failed to renew the LC, the gas supply to its unit would be discontinued. On account of the failure on the part of Informant, in renewing the LC within the stipulated period, the gas supply to the Informant was suspended only on 31.03.2015, after 7 days of notice dated 19.03.2015 sent via email, in accordance with Article 19.4 of the GSA. Further the email dump of 19.03.2015, which was produced before the DG clearly established that the aforementioned email was sent, and a bald denial by the Informant could not suffice as proof of the fact that it did not receive the email. It was also an admitted fact that such LC was never renewed by the Informant, and thus any averment of the gas supply being suspended arbitrarily was baseless.

97. Next it was contended by the Opposite Party that LC could be invoked for any amount due or any liability arising out of the GSA. Besides, it was held by the Supreme Court, in *Federal Bank Ltd. v. V.M. Jog Engineering Ltd. & Others (2001),* as duly noted by the DG that LC is an independent contract . Also upon a construction of Article 12.7 of the GSA, the encashment of the LC for "any amount as may be due", was permitted. The relevant portion of Article was referred to during the course of arguments and is reproduced below*:*

> "12.7 (a) *In order to secure the Buyer's payment obligations under this Agreement the Buyer shall at all times during the Term open and maintain (and pay for such opening and maintenance) an unconditional, standby, automatic revolving and irrevocable letter of credit, without recourse to the drawer and in favour of the Seller, to secure any payments as may be due and payable by the*

Buyer to the Seller from time to time under this Agreement (The "Letter of Credit" or "LC")…"

98. From a perusal of the above, the DG found no merit in the contention of the Informant that LC could not be invoked to satisfy the Informants' 'Take or Pay' Liability obligation. Furthermore, it was noted by the DG that despite 'Take or Pay' Liability existing since the inception of the GSA, year 2014, marked the only instance wherein the 'Take or Pay' Liability had been pressed into service by the Opposite Party.

99. The Opposite Party further contended that Informants failed to make nomination of QCQ under Article 8 of the GSA, therefore it did not lie in the mouth of the Informants to take advantage of their own wrong as it was evident that they had not fulfilled their contractual obligations which would enable the Opposite Party to calculate the various contracted quantities. Also the DCQ could have been easily calculated from the monthly programme that was provided to the Informants. Furthermore, it was stated that *in Paharpur-3P, Paharpur Cooling Towers Ltd. Vs GAIL* (Case No. 99 of 2015), a five member bench of the Commission held that providing the monthly programme was due and sufficient compliance with Clause 8 of the material GSA.

100. With regard to the averments of the Informants regarding submission of incomprehensible invoice, the Opposite Party submitted that the same was completely baseless as the Informants were aware of the DCQs on the date of signing of the contract. Once the Informants were aware of the DCQ, the ACQ could have easily been computed because the Monthly Contract being MCQ was also provided to Informants. Also the issue of comprehensible invoices was never raised earlier by the Informants and had it been raised, the Opposite Party would have made an amendment to its invoice format, clearly reflecting the ACQ too.

101. It was also contended by the Opposite Party that as Informants did not communicate the QCQ to it, hence it did not make monthly nominations, i.e. MCQs as laid down in Article 8.2(c). Monthly nominations could only be given consequent upon the Informants giving the quarterly nomination.

102. Further, the Opposite Party adverted to whether price stability was an essential feature of long term GSA and in this regard submitted that the Competition Act, 2002 frowns upon charging unfairly high or discriminatory prices from its customers. The price

determination of any commodity does not lie in a vacuum. It is governed by the international trade market and other variable factors such as rates of foreign exchange in commodities like oil and gas. Thus it is not possible for any entity including the Opposite Party or even its competitors to determine prices at its own whims and fancies. Therefore, such fluctuation in price was only reflective of the prevailing conditions in the market and could not be regarded as unfair, discriminatory or in contravention of provisions of Section (4) of the Act. Further the DG had conducted a thorough analysis of how the Opposite Party prices RLNG and had found that the pricing policy adopted by it was fair and non-discriminatory and based on the formula with its upstream supplier. It was also pertinent to note that the Opposite Party operated as an intermediary in supplying gas to its customers and was not in such a position of dominance to determine prices without fulfilling its obligation to the upstream supplier. The Opposite Party also denied the allegation of the Informants that the Opposite Party had fixed profit margin of USD 1 per MMBTU, as being factually incorrect and baseless.

103. With respect to the issue as to whether the LC could be invoked for an amount exceeding the gas value of 16 days, as was provided in the terms of its invocation, the Opposite Party invited attention to the definition of the term "fortnight" as defined under Article 1.1 of the GSA:

> "*Fortnight means a period commencing at 0600 hours on first Day of calendar month and ending immediately prior to 0600 on the sixteenth Day of the calendar month or a period commencing from 0600 on the sixteenth day of the calendar month and ending immediately prior to 0600 hours of the first Day of the succeeding calendar month"*.

This term was also mentioned in Article 12.1 (A), which deals with invoices and the relevant part is reproduced as under:

> *"During the Term, within two (2) Days from the end of a Fortnight or preparation of the fortnightly Joint Ticket, whichever is later, the Seller will render or cause to be rendered to the Buyer Personally, by prepaid mail, facsimile, email, a signed invoice (the "invoice") which shall show, for such Fortnight (each such Fortnight, a "Billing Period")"*

The Opposite Party submitted that, thus, it was apparent that in context of the GSA the term fortnight and thus the period of 16 days were innately tied with billing and raising

of invoices. The Opposite Party placed reliance on Article 12.7 of GSA, which is as under:

> *"12.7 (a) In order to secure the Buyer's payment obligation under this Agreement the Buyer shall at all times during the Term open and maintain (and pay for such opening and maintenance) an unconditional standby, automatic revolving and irrevocable letter of credit, without recourse to the drawer and in favour of the Seller, with an Acceptable Bank in the form acceptable to the Seller, to secure any payments as may be due and payable by the Buyer to the Seller from time to time under this Agreement (The "Letter of Credit" or "LC")…*
>
> *… The LC shall permit multiple and partial draw downs; provided however that the LC shall, in a single instance at any giving point of time , be drawable only upto an amount equal to 16 (sixteen) Days supply of Gas at applicable Price. The LC shall be valid for one year and validity of LC shall be renewed at least 15 days before the expiry of the L.C.*
>
> *12.7 (b) If the Buyer fails to pay the amounts due under any Invoice, Provisional Invoice, Final Invoice, Correctional Invoice, Miscellaneous Invoice or Debit Advice/Debit Note, as the case may be on or prior to the Buyer's Due Date, the Seller would be entitled to draw upon the LC on any date after the Due Date by presenting to the Bank the following documents….",*

104. It was then submitted that LC permitted multiple and partial drawdowns and was required to be automatically replenished to its original amount (without being dependent on any action of the Informants), once the amount secured by LC reduced to less than 33% of the original amount. Therefore, effectively the LC should pay all the amount demanded by the Opposite Party during its validity and there was no cooling-off period between two invocations. Hence, invocation for an amount of more than 16 days value, in one instance and not multiple times, as was envisaged in the GSA was a mere procedural error which did not adversely affect the rights of the Informants under the GSA and did not tantamount to unfair conduct on the part of the Opposite Party.

105. In terms of the invoice regarding 3 days payment period, having been mentioned, it was submitted that the Opposite Party at no point of time enforced the 3 days payment period or took any penal action in this regard. Hence, there was no merit in such allegations.

This was merely a minor error that had crept into the invoice and such minor discrepancies did not tantamount to abuse of dominant position.

106. With regard to the allegation regarding usage of the term 'MGO' in the Standard Terms and Conditions for renewal of LC, it was submitted by the Opposite Party, that such term could not give rise to a contravention of Section 4(2)(a)(i) of the Act. The Opposite Party submitted that it had clarified before the DG that MGO and ToP were synonymous terms. ToP used in Article 14 of the GSA was for RLNG customers and the term MGO was used in the domestic gas contracts which is for customers of domestic gas. As the Opposite Party used a single format of LC for both types of customers *i.e.* customers who were supplied domestic gas and RLNG, therefore, the term MGO appeared in the invoice as a result of usage of standard form invoices and no liability was saddled upon the Informants. Further Informants, having been engaged in the trade of gas for a long period, would have known about these terms being used synonymously and thus, it could not be said to have created an ambiguity, much less a contravention.

107. The Opposite Party further submitted that entering into long term GSA would not amount to foreclosure of market. Also the Informants had entered into long term GSA with the Opposite Party out of their free will and volition and were not coerced to enter into contract for 20 years. The Informants also conveniently ignored the finding of the DG that there were other buyers of RLNG who had been procuring RLNG from other suppliers such as Indian Oil Corporation Ltd. (IOCL), Bharat Petroleum Corporation Limited (BPCL) and Gujarat Gas Limited. The Informants had not adduced any evidence suggesting that the GSA did not permit them to obtain gas from any other supplier or that the Opposite Party by its conduct precluded them not to obtain the same from other competitors of the Opposite Party. The reason for the long tenure of the GSA was because supplying gas required a massive investment and in order to assure returns, the GSAs are long term contracts. Further there was no evidence led by Informants regarding the Opposite Party having invoked the Right to First Refusal clause. Though the Informants asked the Opposite Party to reduce/surrender contracted quantities of gas, the fact is that GSA does not allow for the same and the Opposite Party would continue to be obliged to off-take the contracted quantities from PLL and PLL would continue to be obliged to off-take contracted quantity of gas from RasGas under back to back agreements. Also the Opposite Party being accommodative of the requests of its customers allowed reduction subject to certain conditions. But having regard to

considerable commercial disadvantage to the Opposite Party owing to such reduction, it wished to reserve the Right of First Refusal, to mitigate its losses to the extent possible.

108. It was submitted that the Commission has held in the past that long-term contracts in the energy sector are an established practice and are not inherently exclusionary and further this aspect had been dealt with extensively in the investigation report.

109. The Opposite Party assailed the findings of the DG, implicating officers of the Opposite Party under Section 48 of the Act. The Opposite Party referred to the order of the Commission in Re: *Director, Supplies & Disposals, Haryana and Shree Cement Limited (Ref Case no. 5 of 2013, Order dated 19.01.2017)* that where no specific investigation was undertaken in respect of individuals to link their role to the impugned conduct, then the proceedings initiated against such individuals were liable to be discharged. Reliance was also placed on the order of the erstwhile Competition Appellate Tribunal (COMPAT) in the case of *Alkem Laboratories Limited v. CCI and Ors.* that it was necessary to call upon individuals implicated under Section 48 to explain their position in regard to the alleged conduct. Since in the present cases, the DG failed to call upon the individuals implicated under Section 48 of the Act, therefore, the finding of the DG was liable to be set aside on this ground alone.

110. The next submission made by the Opposite Party was as to whether it had modified the timelines and procedure for suspension of gas under GSA through invoice and replaced the term "disconnection" in place of "suspension of connection" in the invoice and thereby contravened the provisions of Section 4(2)(a)(i) of the Act. The Opposite Party stated in this regard that the invoice mentioned that the sale was subject to the terms and conditions stipulated in the GSA. Therefore, irrespective of the statements made under the invoice, ultimately, it would be the terms of the GSA which would have governed the stipulations mentioned in the invoice. Also the Opposite Party never suspended or disconnected the supply to the Informants on account of non-payment or delayed payment of the invoices. So at the most such an action was a minor administrative error which could not be elevated to the level of contravention of Section 4(2)(a)(i) of the Competition Act.

111. With respect to calculation of seller's shortfall, the DG confirmed that Seller's Daily Shortfall and 'Take or Pay' Liability could be calculated using the information available with the Informants. The Opposite Party, *vide* notice dated 18.09.2014, had informed the

Informants of less drawl of RLNG and their respective approximate/indicative 'Take or Pay' liability for the period January 2014 to June 2014. The Informants thus very well knew their liability and should there have been any discrepancy, ought to have taken up the matter with the Opposite Party, which it never did.

112. The Opposite Party did not force Rico group of companies to sign an indenture and give up their right to Make-up Gas under GSA. Further the term used *viz.* "shall endeavour to" showed that the Opposite Party did not have an absolute obligation to provide Make-up Gas. Also the signing of indenture was not abusive because Informants out of their own volition signed the indenture to relieve them of their 'Take or Pay' liability. In the alternative they could always not sign the indenture by paying less than half of their 'Take or Pay' liability. The indenture was extremely fair because it took into account the interest of both the Opposite Party and the Informant. As Informant gave up its right to Make-up Gas, the Opposite Party also gave up its right to collect 94 % of 'Take or Pay' liability from the respective customer.

Analysis and Findings of the Commission

113. At the outset of making their respective submissions, the parties agreed on the delineation of the relevant markets as contained in the investigation report and which is extracted hereunder:

(i) Case No. 16, 17 & 20/2016: market for "*supply and distribution of natural gas to industrial consumers in the district of Gurgaon*";

(ii) Case No. 18 & 19/2016: market for "*supply and distribution of natural gas to industrial consumers in the district of Rewari*";

(iii) Case No. 45/2016: market for "*supply and distribution of natural gas to industrial consumers in the district of Ghaziabad*"; and

(iv) Case No. 2/2017: market for "*supply and distribution of natural gas to industrial consumers in the district of Alwar*".

The Commission examined the relevant market as delineated in the investigation report and is in agreement with the same.

114. The DG found the Opposite Party to be a dominant enterprise in all the relevant markets, based on the factors contained under Section 19(4) of the Act. The Opposite Party,

though in its objections stated that it is no more a dominant enterprise in the geographic market of Rewari, yet during the oral hearing, the Learned Senior Counsel for the Opposite Party, stated that the Opposite Party, accepts the findings of the DG in this regard, in respect of all the markets.

115. The Learned Counsel for the Informant in Case Nos 59, 62 and 63/ 2017, submitted that though the allegations leveled in these cases against the Opposite Party are broadly similar to the other cases being presently heard by the Commission, the investigation report of the DG has not taken into account the specific facts, as contained in the information filed in these three cases as the matters were not referred to DG for investigation. Further, the Counsel also requested that Informants in these cases may be given a chance to present their respective cases before the DG.

116. The Commission having perused the allegations levelled by the Informants in Case Nos. 59,62 and 63/2017, is of the opinion that such allegations pertain *interalia* to unfair imposition of Buyer's 'Take or Pay' obligation, unfair conditions in LC, improper calculation of 'Take or Pay' liability, refusal to consider proposal of suspension of gas, denial of dispute resolution, *etc.* which were broadly covered by the issues under consideration in Case Nos. 16-20, 45/2016 and 02/2017 and thus a common finding shall be applicable in all these cases, without referring these matters for investigation at this stage. The Commission observes that the facts and allegations in Case Nos 59, 62 and 63/2017 are not in variance, in material respects, with the cases which have already been investigated, so as to merit separate investigation. Therefore the Commission deems it appropriate to deal with these cases through the instant order.

117. None appeared in the final hearing for the Informant in Case No. 45/2016. The Commission observed that the Informant, *vide* its application dated 17.01.2018, had stated that it has settled all *inter-se* disputes with GAIL and in view of the same, it does not wish to pursue the present information and requested for withdrawal of the Information. The Commission considered the said request of the Informant and declined the request as the inquiry is into the matter and not limited to a specific complaint. Further, no provision of the Act or the Regulation made thereunder allows withdrawal of information filed before the Commission. Accordingly, the application of the said Informant was disposed of.

118. The following issues require determination in the present cases:

A. Whether Long Term Re-gasified Natural Gas (LTRNG) contracts entered into by the Opposite Party are anti-competitive and forecloses competition.

119. It has been vehemently contended by the Informants that they were forced by the Opposite Party to enter into LTRNG with it, for a period of 20 years. The Informant in Case No.02/2017 also contended that while entering into such contract, it did not have choice as the Opposite Party was the only supplier of gas in the relevant geographic market as its competitors entered into the market much after. Thus, the Opposite Party enjoyed monopoly. Further the product *i.e.* natural gas does not have a perfect substitute and thus the Informants were forced to be dictated by the terms laid down by the Opposite Party.

120. *Per contra*, the Opposite Party contended that LTRNG is in parity with the nature of energy industry where long term contracts are common. In this regard it submitted that, pursuant to negotiations held at the highest level between the Government of India and Government of Qatar, Ras-Gas, Qatar entered into long term contract of a period of 25 years with Petronet LNG (PLL) being the upstream supplier of natural gas to the Opposite Party. Thus PLL in turn entered into LTRNG with the Opposite Party and the arrangement between the Opposite Party with its suppliers was almost a back-to-back arrangement. The Opposite Party further contended, that it had offered better arrangement to its customers, than what it entered into with its upstream supplier. Thus it has borne a much greater risk than its customers. The Opposite Party also contended that because of the capital intensive nature of the industry, huge investments were required to lay down infrastructure through the length and breadth of the country. Thus long term contracts become an essential feature. Nevertheless, it contended that short term contracts were also available of a period of 3 years, 5 years and other periods less than 20 years, but the Informants, foreseeing the inherent commercial advantages of LTRNG, like assured and steady supply, taking care of price volatility *etc*., out of their own volition chose to enter into LTRNG. It also placed the name of some of its customers, with whom it had entered into shorter or mid-term contracts. Further the Opposite Party mentioned that supply of gas was also available through Spot market. Thus the essence of the submission is that LTRNG was neither the only option available to customers nor was forced upon the informants.

121. In the context of the nature of long term contract, the Commission has analysed that Long-term 'Take or Pay' liability contracts are common in the energy sector including

natural gas markets. These contracts link sellers and buyers for a long period and the 'Take or Pay' clause requires that gas has to be paid for, whether taken or not, and specifies an obligation on the seller to make available defined volumes of gas. A defining characteristic of projects in the energy sector is that they frequently require significant upfront capital investments on the part of producers for the exploration, design and construction of the facilities. This opens the door to the "hold up problem". Certain buyers may have an incentive to take advantage of the investments made by the seller, which strengthen the buyer's bargaining position, since these investments have little value for other uses. To help deal with the 'hold up' problem, buyers and sellers enter into long-term contracts, which are intended to guarantee a stream of revenue to the seller on pre-determined terms.[1] 'Take or Pay' obligations can be viewed as a mechanism for effecting appropriate incentives for contractual performance and also as risk sharing instruments. The downstream contracts are often mirror reflections of such upstream arrangements with similar tenures and contractual obligations. Should the downstream purchaser default in acceptance of the gas, it still remains obliged to pay the purchase price. On the other hand, it keeps the right to delivery of the contracted volume of gas.

122. Thus considering the nature of the industry and the product involved as well as having regard to the factors discussed above, it cannot be said that LTRNG entered into by the Opposite Party with its customers is inherently anti-competitive or entails foreclosure of competition. It is also evident that the Opposite Party as compared to the contracts it entered into almost a decade back, presently faces enough competition in the relevant geographic market. Thus it indicates that LTRNG entered into by the Opposite Party does not foreclose competition in market. Further enough justification is available for entering into these contracts, in view of the Opposite Party's commitment with upstream suppliers. Also it is on record, that for existing and potential customers, LTRNG is not the only option available for availing the gas supply from the Opposite Party.

123. Further in the context of long term contracts the Commission in Case No. 20 of 2017 (*Tata Power Distribution Ltd Vs NTPC Ltd)* had held as under:

> " *In view of the foregoing, the Commission is of the opinion that even if it is assumed that the OP was in a dominant position in the relevant market as identified by the Informant, a prima facie case of abuse of dominance in terms of the provisions of Section 4(2)(a)(i) of the Act is not made out in the instant matter*

[1] Paris Energy Series No.7: Take-or-pay Conditions in Gas Supply Agreements, Michael Polkinghorne,April 2013

because, firstly the Informant has entered into the PPAs with the OP being fully aware of the terms of the PPAs including the long term obligation stipulated thereunder, secondly there is a rational basis for binding the Informant and other procurers in the long term PPAs as the generating companies invest in establishing the generating stations based on allocation and the PPAs entered into with the parties (which are to be served through period agreed upon) and lastly, the Informant and other procurers have the option to approach the central government for reallocation of power allocated to them" (Emphasis supplied)

124. Thus the Commission in the facts and circumstances of the present case, observes that long term gas contracts entered into by the Opposite Party, with the Informants, cannot be said to be in the nature of foreclosing competition. Based on the dynamic and evolving structure of the market, a long term contract cannot be always said to be anti-competitive in nature. However, notwithstanding that the Commission has not found the GSAs entered into by the Opposite Party with the Informants, to be anti-competitive, still the Commission observes that the Opposite Party while entering into gas supply contracts should clearly reveal the available options to its customers, so that they can make an informed choice at the inception, without being burdened for the future. Also the Opposite Party in such LTRNG shall provide suitable exit clauses, both having regard to its commitment to upstream suppliers and the financial condition of its customers, especially in situations where the customer is burdened to a grave extent, such that its business has become unsustainable and is incurring losses, purely owing to its purchase commitments. LTRNG should not be a ground for wiping out the existence of the customers. This shall be borne in mind by the Opposite Party both in its existing and future contracts of long term nature and suitable amendments be brought in by the Opposite Party in this regard, in its contracts, having regard to the observations of the Commission.

B. Whether the manner in which operation of the 'Take or Pay' liability clause under the GSA has been imposed, is an abuse of dominant position by the Opposite Party and violative of provisions of Section 4(2)(a)(i) of the Act.

125. The Informants alleged that 'Take or Pay' liability has been imposed by the Opposite Party in an unfair manner, contrary to the provisions of the GSA. Further the Informant in Case No. 02/17 has also alleged that such liability has been fastened on it, contrary to the decision of the Board of the Opposite Party, in its meeting dated 24.07.2013, wherein

it was decided that the Opposite Party shall not charge such liability from its customers, unless it has itself suffered the liability in the hands of its upstream supplier i.e. PLL, on account of non-offtake of gas.

126. The Informants have vehemently contended that the Opposite Party, abused its dominant position, by forcing the Informants to make payment of such liability, which could not have been calculated, on account of shortcomings on the part of the Opposite Party, in making various nominations as was envisaged under the GSA. The various nominations (to be done both by seller and buyer periodically) as was envisaged under the GSA is as under:

Seller's Notice
Between 5th and 7th October, Seller shall give notice to Buyer of anticipated quantities available for delivery in each calendar quarter of forthcoming year.

↓

Buyer's Notice
After Seller's notice by 9th October, Buyer shall give written notice by 31st December to Seller of quantities, it wishes to take during each calendar quarter of the forthcoming contract year, including downward flexible quantity and upward flexible quantity.

↓

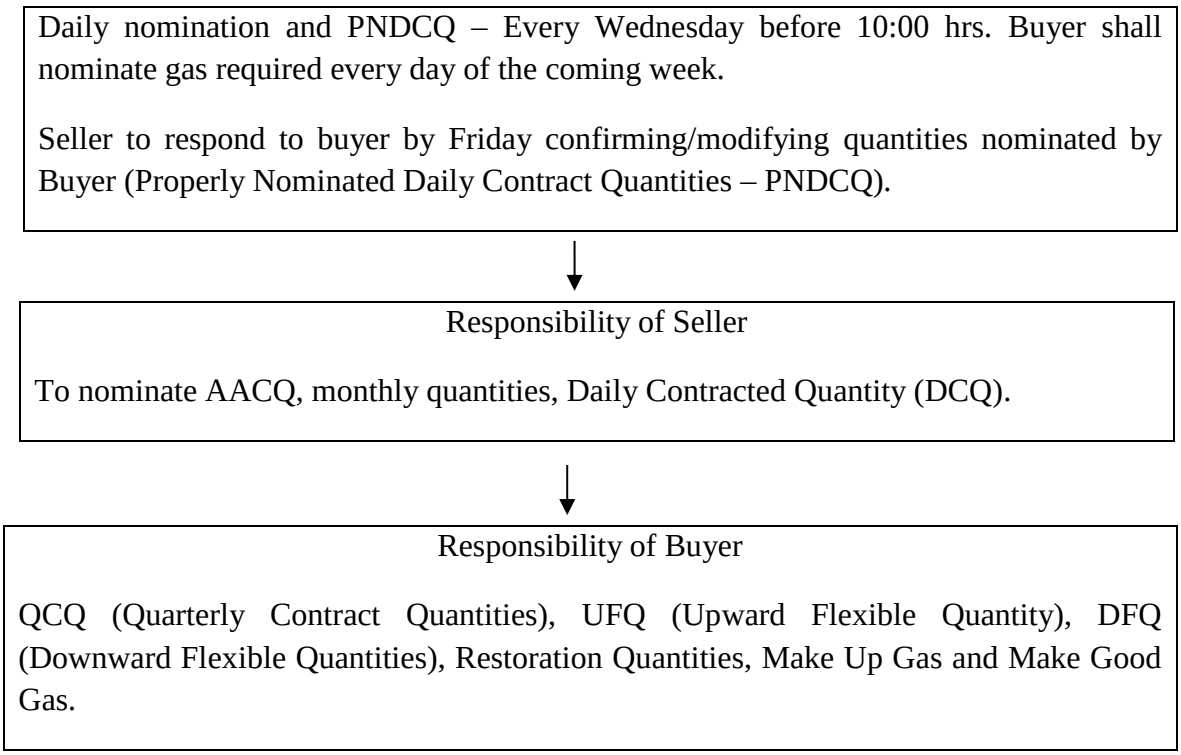
Annual Program
Seller shall provide Adjusted Annual Control Quantity (AACQ) of forthcoming year.

↓

Gas Nomination Procedures
Every 15th day of 2nd month of calendar quarter of contract year, Buyer to nominate Quarterly Nomination Quantity (QCQ) for immediately following calendar quarter. Seller to respond within 30 days – confirming or modifying the nomination of the Buyer – Properly Nominated Quarterly Nomination Quantity (PNQCQ)

↓

Monthly Nomination
10 days prior to expiry of every calendar month, Seller shall intimate expected deliveries during succeeding month (months quantities) as well as on each day during the month (Daily Contract Quantities)



127. The Informants in Case Nos. 16-20 of 2016, have not vociferously argued that the 'Take or Pay' Liability clause is violative of the Act, but have strongly contended that calculation of such liability by the Opposite Party has been in violation of GSA. It was submitted in this context that in the GSA, everything was precisely defined and nothing was left for presumption. Yet, the Opposite Party contrary to its own GSA, imposed such liability in a manner, strictly not contemplated in the GSA and forced the Informants to pay, a conduct which falls foul of Section 4 of the Act.

128. Thus, to put the factual controversy in a simple matrix and, shorn of too many technical and complex details, it can be said that the parties while entering into long term contract, and defining the amount of gas to be taken/supplied for each year (being ACQ), had not meant that the seller has undertaken on each day of the calendar year to supply the same amount of gas (i.e. ACQ divided by 365). This also does not imply that the buyer had agreed to take the same amount of gas that would be supplied by seller, each day. In the working of the contract, the daily off-take would vary based on the requirement of buyer for each day as also the ability of supplier to supply for such day. Thus, there could both be demand and supply constraints and for which reasons there was a reciprocal obligation on the buyer and the seller to make their respective nominations, on a yearly, quarterly, monthly, weekly and daily basis, subject to the overall quantity to be taken in a year being the ACQ, which was adjustable with some minor variations. The 'Take or Pay' liability kicks in when the buyer is not able to take the contracted quantity of gas

for the year and there is less-off take of gas at its end, but is required to pay for such gas not taken, which it can demand from the seller at a later point in time, during the contract period.

129. The contention advanced by the Informants is that provisions of Article 8.1(c) of the GSA required the Opposite Party to provide the Informants with the Annual Program, showing therein, *inter alia*, the ACQ, the quarterly quantities, monthly quantities and the indicative DCQs in million metric standard cubic meter (MMSCM) and million British Thermal Units (MMBTU) for each contract year. The Opposite Party, as per the GSA, was required to give the quarterly nominations *etc*., which it never fulfilled. Since such nominations were not properly made by either side, in terms of GSA, it was impossible to calculate either the DCQ or the PNDCQ, an important component for calculating the seller's shortfall, which further makes the 'Take or Pay' liability liability incomputable. The formula for calculating the 'Take or Pay' liability is as under:

'Take or Pay' liability = 0.9 AACQ – Quantity of gas taken by Buyer – Aggregate of Seller's Daily Shortfall.

According to Informants for calculation of 'Take or Pay' liability 'aggregate of Seller's Daily Shortfall" was a necessary component of calculation. But the Opposite Party, according to the Informant embarked upon a unique and arbitrary way of calculation, in a manner not contemplated in the GSA. Such calculation is discussed in the investigation report wherein the DG has mentioned that formula in GSA for calculation was as under:

'Take or Pay' liability = 0.9 AACQ – Adjusted Quantity Taken

Adjusted Quantity Taken = Quantity of gas taken by Buyer + Aggregate of Seller's Daily Shortfall + ∑ Force Majeure Gas – ∑ Make-up Gas

As regards Informants' allegation that the Opposite Party had not calculated Seller's shortfall according to the strict provisions of GSA, the Opposite Party made submission to DG with regard to calculation of Seller's shortfall, which are reproduced as below:

Table 17: Calculation of Seller's Shortfall by the Opposite Party

Rico Auto Industries – Dharuhera (All Figures in MMBTU)						
Month	**Monthly Quantity**	**Day**	**DCQ** (As per Annual Plan) Monthly Quantity divided by number of days in Month	**DCQ** (As per Actual Nomination**)**	**Actual drawl by Rico**	**Sellers Shortfall**
			1	*2*	*3*	*4= (1-2)*
Jan-14	10172	1	334	312	150.103	22
		2	328.129	312	161.13	16.129
		3	328.129	312	150.437	16.129
		4	328.129	312	146.509	16.129
		5	328.129	312	54.586	16.129
		6	328.129	312	170.8	16.129
		7	328.129	312	177.104	16.129
		8	328.129	312	174.132	16.129
		9	328.129	312	202.477	16.129
		10	328.129	312	237.503	16.129
		11	328.129	312	191.812	16.129
		12	328.129	312	52.265	16.129
		13	328.129	312	194.198	16.129
		14	328.129	312	170.709	16.129
		15	328.129	312	158.56	16.129
		16	328.129	312	184.912	16.129
		17	328.129	312	161.157	16.129
		18	328.129	312	163.547	16.129
		19	328.129	312	69.277	16.129
		20	328.129	312	269.24	16.129
		21	328.129	312	210.648	16.129
		22	328.129	312	215.316	16.129
		23	328.129	312	170.757	16.129
		24	328.129	312	204.978	16.129
		25	328.129	312	189.99	16.129
		26	328.129	312	56.94	16.129
		27	328.129	312	165.55	16.129
		28	328.129	312	214.934	16.129
		29	328.129	312	234.308	16.129
		30	328.129	312	215.517	49.129
		31	328.129	312	264.709	16.129
		Total	10177.9	9639	5,384.11	538.871

After perusal of the Opposite Party's submission, the Investigation found that:

i. The Opposite Party took the average of DCQ in column (1) of the table above as per the Annual Plan by dividing the quantity given in Article 6.1 of GSA by 12 (to compute monthly quantities) and thereafter dividing the figure so arrived with the number of days of the month.

ii. The Opposite Party took the DCQ in column (2) of the table above as per the actual nomination in the joint ticket duly signed by both the parties.

iii. The Opposite Party took the actual drawl in column (3) of the Table above as per the drawls recorded in the joint ticket duly signed by both the parties.

130. This method of calculation used by the Opposite Party found favour in the findings of the DG, though the DG qualified by stating that 'Take or Pay' liability has been computable to the "extent possible". The Informants have specifically prayed for a finding from the Commission that this calculation is wrong, beyond the terms of GSA and is an abuse of its dominant position by the Opposite Party.

131. The Opposite Party, quoted the specific findings of the DG and submitted that 'Take or Pay' structure has been the defining characteristic of long term supply and purchase of gas. It generates a stable and predictable revenue stream which is fundamental for project financing, specially of large infrastructure projects in which huge investments are entailed. The buyer bears the volume risks on account of its contractual commitment to pay for certain quantity of LNG every year, regardless of its actual demand. This is considered essential for large scale investment needed for exploration, production, transportation and creation of energy infrastructure. It was also submitted that the Opposite Party is subjected to 'Take or Pay' obligation in the upstream market and has passed it on to the downstream side. The customers normally chose to enter into long term contracts for securing uninterrupted supply of gas and reap advantage of availing long term pricing benefits, linked to global benchmark index so as to insulate from short term price volatility. In the early years *i.e*. till 2008 to 2014 period (during which crude prices witnessed a rising trend) customers have benefitted with low prices. Whereas when prices under this contract turned higher than prevailing market price or Spot price (Table 7, Page 23), the Opposite Party had to re-negotiate with PLL and in turn with Ras-Gas and the prices were brought down in line with prevailing market price. This could be achieved only after the Opposite Party agreed to lift additional volume from PLL. The Opposite Party had not passed on this additional burden to its customers, but passed the entire price benefits and quantity down-flex benefits to downstream customers. Since upstream suppliers have not backed out from their commitment to give gas which was cheaper under the contract than spot market price, accordingly down-stream customers are also required to honour the contract by off-taking their contracted quantity. Any default by downstream customers would affect the entire supply chain and

may affect the cash flow of the chain and may affect the investments adversely. Thus it was submitted that 'Take or Pay' liability and refusal of reduction of contractual quantity cannot be said to be in violation of the Competition Act.

132. The Opposite Party further submitted that the terms and conditions of RLNG GSA were duly evaluated by the Informants before finalising the agreements with it. All the Informants benefitted with low prices linked with crude prices for the years 2008 until 2014. In the year 2014, the Opposite Party incurred losses, because of less off-take of gas by Informants and other industrial customers. As long as Informants benefitted by the prevailing prices of RLNG, they were comfortable continuing with the GSA, but when markets became contrary to their expectations, especially in relation to prices of gas in 2014, they started refusing to off-take supply of gas. It was also submitted in this regard that enforcement of 'Take or Pay' obligation by the Opposite Party has not foreclosed the markets for Informants and have not forced them to close their business. In the present case, enforcement of some conditions of the GSA, by the Opposite Party, which are contractual in nature, cannot be attributable to a competition law concern, in the larger perspective of back to back upstream obligations of the Opposite Party with PLL. This provides the seller with certainty of project revenue and predictable cash flow.

133. The Commission having gone through the submissions of the parties and the findings of the DG observes that admittedly neither of the parties have strictly adhered to the nominations that was required to be made by them, yet the seller was supplying gas and the buyer taking it from the inception of the contract, without pointing fingers at each other. There were under-drawals by the Informants to a large extent and thus the contracted amount of gas was not being taken in terms of GSA. The Opposite Party never complained and sold such gas in spot market and recouped its losses or even would have earned profits. It is only when the spot market prices fell below the contracted price under GSA, during the period December 2014 till early 2016, and when the Opposite Party was unable to sell under-drawn gas, commensurate to or over the contracted price, in the spot market, that it demanded the differential from the Informants. In these circumstances where the conduct of both the parties, cannot be said to be without any blemish in discharging their *inter-se* obligations, to find fault only in the conduct of the Opposite Party may not be justified. This conduct where the Opposite Party has tried to mitigate its losses, purely on account of under-drawal by Informants cannot be said to be in the nature of raising any real competition concern, much less under the provisions

of Section 4(1)(a)(i) of the Act, when such party has also obligations to meet with its up-stream player. An infraction of a contractual provision by one party and a counter measure taken by another party to such contract, within the realm of contract, to mitigate its losses, in every case cannot be said to be anti-competitive and will have to be examined in light of the surrounding facts and circumstances, the conduct and its effect based on evidence, notwithstanding that one of them may be in a dominant position *vis-à-vis* the other. The conduct and its unfolding on the parties are also to be borne in mind. In the present case, Informants were not oblivious of the terms of contract or that they could avoid being visited with 'Take or Pay' liability, should there be any default on their part. Since it was not imposed in previous years on account of favourable market conditions, cannot be construed as a waiver for future or being subject to any permanent preclusion, unless the terms of contract, specifies otherwise. Further the Opposite Party has stated that it passed on the benefits to downstream customers that it accrued by negotiating with upstream suppliers. Also though it is a fact that the Opposite Party did not have to pay any 'Take or Pay' liability to upstream supplier, in the face of default by the Informants in off-take of contracted gas, but as stated by the Opposite Party, it was required to procure more gas than originally contracted under its GSA with upstream supplier. Thus the 'Take or Pay' liability was recast in a different manner qua it, rather than being waived by the upstream supplier. In these circumstances, the argument that the Opposite Party had demanded such liability from Informants, contrary to the decision of its Board meeting dated 24.07.2013, is not tenable. Although, it has been found by the Investigation that no 'Take or Pay' Liability was imposed on the Opposite Party by its upstream supplier, however, as stated by the Opposite Party, it had to take additional quantities of gas from the upstream supplier. It is not the case that there was no implication on the Opposite Party on account of its non-offtake of gas from its upstream supplier. Therefore, the contention that since the Opposite Party has not suffered any 'Take or Pay' liability, it could not recover from its downstream buyers *i.e*. the Informants is not sustainable.

134. The investigation found that the 'Take or Pay' liability, as imposed on the customers was only to neutralise the losses borne by the Opposite Party due to non-off take or under drawl by the customers as per the respective GSAs, and it was not making any profits on account of invoking the 'Take or Pay' liability. Further the Opposite Party had charged uniform 'Take or Pay' liability from all its industrial customers and there was no evidence of any discrimination.

135. The Commission does not consider it necessary to enter into the thicket of calculations done by the Opposite Party for computing 'Take or Pay' liability, which found favour with the DG as opposed to other plausible calculation in terms of the GSA, had the nominations of respective parties been available. Though the Informants have contended that in the absence of seller's liability being available, the 'Take or Pay' liability could not have been computed as per formula in the GSA, the Commission deems it fit to be determined by an appropriate forum, competent to adjudge on this aspect, rather than examining within the realm of competition law. Whether the calculation of a liability is within the four walls of a contractual provision or dehors it and if such calculation has resulted in abuse of dominance cannot be determined by the Commission, in the present proceedings, unless the Commission decides that 'Take or Pay' liability could not have been calculated in any manner other than as contended by Informants. This view has been adopted in the peculiar facts and circumstances of the case as both the parties have failed to give respective nominations *interse*, as envisaged within the terms of GSA. Further, neither the Informants nor the Opposite Party, pointed out to each other the shortcomings, if any, and the Informants readily accepted the nominations given as per Annual Program, all the years since inception of its contract with the Opposite Party. The Informants also accepted the deliveries of gas and paid for the same. Only after some years having passed by under the contract, they woke up to remind themselves, when situation on the ground was no more favourable to them in the unusual event of spot prices having fallen below the contracted price.

136. The Commission in the case of *Paharpur-3P, Paharpur Cooling Towers Lts V GAIL (India) Ltd, (Case No.99 of 2015),* upon similar facts had held as under:

> "*It appears that the Informant is aware of the gas consumed by it during the impugned period from which one could reasonably ascertain the deficiency and 'Take or Pay' liability and also verify the claims raised by the OP in this regard. Further in terms of the GSA, the Informant can also exercise the make-up gas facility for the shortfall in the off-take. Under these circumstances, the invocation of 'Take or Pay' liability by OP does not appear to be abusive. Rather the conduct of OP appears to be rational and not arbitrary in view of the fact that the amount demanded by OP was substantially lower than the actual liability. Safeguarding commercial interest or invoking contractual*

cases which are not unfair perse cannot be termed as unfair just because they are invoked by one of the parties to the contract".

137. Further with regard to similar allegation in the above referred case of the Opposite Party, not nominating monthly quantities and daily contract quantities, as required in terms of GSA, and as a consequence thereof, impossibility of calculating "Sellers shortfall" which in turn makes it impossible to compute 'Adjusted Quantity Taken' and 'Take or Pay' liability, it was observed by the Commission that mere technical non-compliances of certain terms and conditions of GSA cannot be subject matter under Section 4 of the Act, if the conduct arising out of the same *i.e*. imposition of 'Take or Pay' liability has already been held as not abusive.

138. The Commission, in Case No.94 of 2015 *(Gujarat State Fertilisers and Chemicals Ltd)*, has held in the context of long term gas supply contract and issue regarding 'Take or Pay' liability that GSA appeared to have been entered into after thorough negotiations and discussions and that the Opposite Party's conduct was rational in view of the fact that ToP liability of the Informant, in the said case was substantially reduced by the Opposite Party. Upon a similar contention having been raised regarding imposition of 'Take or Pay' liability, not being imposed in a manner contemplated under Article 8.2(c) of GSA, the Commission had observed that mere technical non-compliance of certain terms and conditions of GSA could not be a subject matter under Section 4 of the Act if the conduct arising out of the same *i.e.* imposition of 'Take or Pay' liability has already been held as not abusive.

139. Similar view has been taken by the Commission in Case Nos. 55 and 56 of 2015 *(M/s Gujarat Industries Power Company Limited Vs GAIL Ltd)* that safeguarding commercial interest or invoking contractual clauses which were not unfair *per se* could not be termed as unfair just because they were invoked by one of the parties to the contract. The GSAs when they were entered into appears to have been entered into after thorough negotiations and discussions.

140. There is no evidence that the Opposite Party has limited or has restricted production of goods/markets by abusing its dominant position. Further, there is no evidence to say that working of long term GSA or even the conduct of the Opposite Party has resulted in denial of market access or creation of entry barriers. DG has found that rival suppliers

of natural gas *viz.* IOCL, BPCL, *etc*. have secured access to natural gas from the same upstream source, i.e. PLL. Thus there seems to be no supply constraint on the competitors of the Opposite Party. Further, Commission notes that competitors are present in most of the geographic markets where the Opposite Party is operating. As per the findings of the DG the long term contract has had positive effects in developing the market. Thus it cannot be said with any definiteness, that a long term contract in all situations will bring an anti-competitive effect on the market and its participants. It will depend upon the nature of the market, the product, the industry, the level of investment involved, the technological aspects and the nature of customers involved in availing such product or services. The DG while referring to the case of *Standard Oil Company of California Vs United States 337 US 293 (1049)* in the investigation report has found that the Opposite Party has not entered into any agreement with its industrial customers that they will buy all their requirements of gas from the Opposite Party only. Rather such customers can procure gas from other competitors and use the pipeline infrastructure of the Opposite Party to transport such gas to their door step.

141. Even otherwise when two parties, who are in established business, have consciously negotiated and entered into an agreement having regard to their specific needs and bearing in mind their future interests, it may not be appropriate to impugn such agreements, unless it is clearly evident that one of the parties has been considerably prejudiced and competition is impeded, by the act of the dominant party. The circumstances that were prevalent when the contract was entered into and the way the terms of the contract were observed by the parties, during its operation, cannot be lost sight of, when the contract is sought to be impugned by a party, citing abuse of dominance by the other, much later in time.

142. While determining abuse of dominance, arising out of a contract, the conduct of the Party raising the competition concern is also relevant to be examined, and cannot be brushed aside. The extent of acquiescence of an affected party to the contract and the benefits, if any, derived by it on account of breaches on the other part are also relevant, in determining the abusive conduct of dominant party to contract.

143. PLL a joint venture, promoted by GAIL, IOCL, BPCL and ONGC imports LNG and is responsible for setting up LNG terminals in the country. LNG is mainly sourced through

long-term contract with RasGas, Qatar with back-to-back sales arrangement with GAIL, IOCL & BPCL. As the investigation has revealed, the Opposite Party has entered into a 25-year contract with 100 % Take-or-Pay obligations with PLL for supply of RLNG. The Opposite Party, in turn offered 20-years gas supply contracts to its downstream industrial customers with 90 % 'Take or Pay' obligations with attendant make up gas clauses. As per the investigation report, the Opposite Party draws 100 % committed volume from its upstream supplier and sells any surplus gas, due to under drawl by downstream customers, in the spot market to recover its cost.

144. Until 2015, the Opposite Party did not impose any liability on the downstream customer on account of Take-or-Pay deficiency since it did not incur actual loss owing to under drawl, though the Informants were under-drawing. The sharp decline in spot prices during 2014-15 (Table No.7, Page 23) resulted in substantial price-differential between the long-term contract price and spot price of LNG. This in turn caused significant under drawl by consumers tied in long-term contracts with the Opposite Party. The Opposite Party having had 100 % 'Take or Pay' obligation with its upstream suppliers drew the entire committed quantity as it had been doing in previous years but could not recover the cost by selling the surplus LNG in spot market. It incurred loss and as per the terms of GSA, and invoked the 'Take or Pay' obligations for the first time during the contract period with the Informants. The Informants asked for downward flexibility and declined to make the due payments. As the following Table No. 18 on next page, reproduced from the Investigation Report shows, there were negotiations thereafter and the Opposite Party asked Informants to make 38% of the contractual 'Take or Pay' liability to all Informants. Subsequently, an amount of 6% of the total liability was demanded from them as out of contract settlement. Thus it can be observed that the Opposite Party, during the period of investigation and even during the period of the spot price decline, absorbed the volume risk to a large extent.

Table No 18: ToP liability claim for Contract Year 2014 to the Informants

Customer Name	Contractual ToP Deficiency (MMSCM)	Contractual ToP Amount (Rs. Cr.)	Actual ToP Claimed (Rs. Cr.)	OTS Amount (Rs. Cr.) out of contract settlement with mutual consent	D/B (%)	C/B (%)
	A	B	C	D		
Omax Auto-Manesar	2.4	9.53	3.64	0.56	6%	38%
Omax Auto-Dharuhera	1.25	4.89	1.87	0.29	6%	38%
Rico Auto-Gurgaon	2.6	10.13	3.87	0.61	6%	38%
Rico Auto Dharuhera	0.84	3.29	1.26	0.2	6%	38%
Rico Casting Ltd	1.04	4.11	1.57	0.24	6%	38%
Mohan Meakin	6.87	26	9.94	1.6	6%	38%
Rathi Steel (Dakshin)	4.18	16.71	6.39	0.97	6%	38%

145. The above table reproduced from the Investigation Report indicates that the Opposite Party was charging uniform 'Take or Pay' liability from all the Industrial customers and demanding 'Take or Pay' liability to compensate the loss by the Opposite Party due to not off taking of RLNG by industrial customers.

146. Barring one customer who claimed plant closure issue, the others did not claim any reason for a genuine demand shortfall, thus the plausible reason for under drawl could be the price-difference and they would have partially shifted to cheaper alternatives. This is also reflected in the sharp decline in the Opposite Party's market share in 2014-2015 (except for Gurgaon where it maintained 100% share) in Rewari from 92% to 32.8%, in Ghaziabad from 71% to 58%, in Alwar from 100% to 86%.

147. It is well-known that the main drawback of long-term contracting is inflexibility in the face of demand and supply fluctuations. However, there is a trade-off between security of supply and flexibility of price. On the one hand, long-term commitments restrict opportunistic behaviour on the part of the supplier which could otherwise take advantage

of flexible conditions and sell gas in spot markets when that is more lucrative and curtail similar opportunistic behaviour on part of the buyers who could switch between contracts and spot markets suiting their convenience.

148. The conduct of the Opposite Party, in terms of imposition of a fraction of 'Take or Pay' liability, within the terms of GSA, and only when it started to incur losses, does not appear to be arbitrary or abusive. Further the impugned clauses in the contract were never objected to by the Informants prior to the market situation in 2014/15. The issue thus warrants a holistic appreciation of the market context. The gas price prior to 2015 was indexed to oil, linked to the 60-month average of Japanese Custom Cleared (JCC) oil prices. With the collapse of global oil and gas prices, long-term supplies at the upstream level had become unviable. Through a renegotiated contract, at a government-to-government level, PLL got the price linked to the 3-months average of Brent crude oil prices in 2015. The Opposite Party exercised the entire downward flexibility of the contract at one go in 2015 and the benefits were commensurately passed on to the downstream customers and no 'Take or Pay' liability was imposed in 2016. Seen in this context, the Opposite Party's behaviour in invoking the Take-or-Pay clause in 2015 appears to be an outcome of peculiar market conditions and not that of an abusive dominant enterprise, exploiting consumers to its advantage.

149. The long-term 'Take or Pay' contracts are considered the key risk covering mechanism in natural gas trade and have been traditionally viewed as essential for security of steady supply. Courts and arbitral tribunals have recognized the strong commercial and legal justifications for 'Take or Pay' clauses in energy contracts. The US Supreme Court has specifically noted in the *Morgan Stanley Capital Group Inc Vs Public Utility District No 1 of Snohomish County (2008),* that they have continuously recognized the stabilizing effect of long-term agreements and that these ultimately benefit consumers. Here the court referred to the California energy crisis in 2000, which was partially due to the decreased use of long-term electricity purchase agreements and the increasing reliance on short-term trading. The new sector-specific regulation in the EU also has consistently confirmed the valuable security benefit of long-term contracting (Talus, 2011)[2]. The literature too affirms the plausibility of long-term contracts. Hubbard and Weiner affirm that either abrogating long-term contracts (and direct all parties to recontract), or, more

[2] Talus. K, (2011), EU Energy Law and Policy Issues, The Journal of World Energy Law & Business, Volume 4, Issue 2.

drastically, replacing them with short-term market agreements and spot markets proposals is acceptable, as their analysis confirm that long-term contracts are effective at coordinating production and exchange in presence of potential opportunistic behaviour. Said differently, short-term contracts replace long-term contract temporarily. But to the extent that specific investment are the primary motive for long-term contract in these markets, long-term agreements cannot be eliminated.[3]

150. In EU, long-term take-or-pay contracts have been considered a fundamental piece of European security of supply. However, this view has started to change due to the increasing flexibility provided by the spot markets. Long-term contracts are no longer the only sources of supply as the EU purchasers have access to spot markets and development in the international pipelines further increase their supply options. A well-functioning spot market will provide transparent and robust (price) signals and will offer consumers a choice where from and how to source gas. It makes the market entry and exit easier and thereby enhances competition. The development of a secondary market, availability of international pipelines and LNG *etc*. have reduced the need to rely on 'Take or Pay' contracts. With the availability of these market-based flexibility tools in short-term trading, the volumes covered by the take-or-pay obligation would be reduced (Talus, 2011).

151. The Regulators have examined the 'Take or Pay' contracts as a potential barrier to entry or impediment to development of competitive gas markets. Few companies having large portfolio of long-term contracts can potentially restrict competition since they have an incentive to avoid face-to-face competition for final customers. The main rule applied by the European Commission for gas supply contracts was defined in the 2007 *Distrigas* decision: long-term gas supply contracts are not *per se* prohibited, but their impact must be appreciated on an individual basis, in order to determine whether they restrict competition to an unacceptable extent. In assessing the effects of the agreement on competition, the European Commission focused on various objective criteria such as market position of the supplier, availability of the buyer for other suppliers, duration of the long-term supply contract, overall market share and benefits arising from the new contract.[4] It is now widely accepted that long-term contracts and spot transactions will

[3]Long-term contracts and take-or-pay clauses in natural gas markets, Anna Creti, Bertrand Villeneuve, University of Toulouse
[4] See footnote 1.

coexist and the optimal mix of long-term contracts and spot transactions would be determined by a number of factors such as the stage of evolution of gas markets, maturity of secondary markets, number of suppliers, upstream market arrangement, local production vis-à-vis imports etc.

152. The Commission also observes that the experiences of developed gas markets globally, and particularly in the EU, have demonstrated that for gas markets to be competitive, gas transmission and distribution/supply segments need to be unbundled. This will ensure non-discriminatory access to the network and deter vertically integrated companies from taking undue advantage of their dominant position, thus preventing conflicts of interest.

C. Whether Invocation of LC by the Opposite Party for purpose not contemplated in the GSA is correct.

153. With reference to the allegations of the Informants on encashment of LC for purposes beyond what was contemplated under Clause 12.7 of the GSA, the Investigation has stated that LC has to be construed independent of the main contract and has to be interpreted in light of the terms of such LC, based on the judgment of the Hon'ble Supreme Court in the case of *Federal Bank Ltd. Vs. V.M. Jog Engineering Ltd. and Other, 2000 Supp(3) SCR 542*

154. Further, as per Article 12.4 of the GSA, Informants were required to pay any amount due and payable within specified time, which also included 'Take or Pay' liability and, therefore, an attempt by the Opposite Party to encash the LC for recovering such liability cannot be said to be beyond the terms of GSA and hence in violation of Section 4(2)(a)(i) of the Act. The Commission observes the finding in the investigation report in this regard to be valid and thus no violation is found on the part of the Opposite Party on this aspect.

D. Whether the Opposite Party had forced the Informants to make payments against incomprehensible invoices, drawn up arbitrarily by the Opposite Party without indicating the requisite necessary details stipulated in the GSA.

155. Investigation has found that the provision of GSA mandates that all the information as mentioned in GSA is to be provided in Joint Tickets and in the invoices for each fortnight. However, the Informants, submitted that invoices given by the Opposite Party did not show the requisite details, as was required to be submitted as per GSA, thereby making them incomprehensible and yet the Informant shall be coerced to make the payment demanded in the invoice under threat of disconnection if the invoices were not paid within 3 days.

156. Upon a detailed examination of the invoices issued by the Opposite Party, Joint Tickets signed on a fortnightly basis by the parties, replies of the parties and the requirement of GSAs in relation to contents of invoices, the DG observed that all the information on PNDCQ, DCQ, Allocated Quantity of Gas, Net Heating Value, *etc.* was either provided in the Joint Ticket or in the invoices and as such both were to be read simultaneously. Joint Tickets were signed by both the parties, *i.e.,* buyer and seller, and based on these Joint Tickets, invoices were generated. The Opposite Party in its reply to DG also enclosed copy of invoices and joint tickets for reference. The DG concluded that information required to be mentioned in terms of Article 12.1 (A)(i) of GSA was either provided in the Joint Tickets or in the invoices, further the joint tickets were signed by both the parties, buyer and seller, and based on Joint Tickets, invoices were generated. The investigation also ascertained whether items (a) to (i) of Article 12.1 (A) of the GSA were captured on the invoices and corresponding joint ticket or not. The investigation pursuant to an examination concluded that invoice did not contain any of the particulars about each day covered in the fortnight, the particulars were either cumulative or the average for the fortnight, as the case may be. Further to cover particulars of such nature for each day in the invoice would make invoice bulky upon a repetition of the data captured in the Joint Ticket, which has been duly signed by both the parties.

157. The Opposite Party contended that Joint Tickets were signed by the Informants fortnightly and those invoices were then paid without questioning or seeking clarification by the Informants as they were aware of the RLNG withdrawn by them. In case the Informants were unaware or unsure of any of the provisions relating to the

supply of RLNG, they were free to approach the Opposite Party. However, the Informants did not do so.

158. Further, the DG concluded the allegation of incomprehensible invoices issued by the Opposite Party in the investigation report as under:

> " It *can at best be said to be an outcome of literal application of GSA by IPs without establishing any harm caused to them i.e., case of non-compliance to the 'form' rather than 'substance' by the OP and accordingly, in the facts and circumstances of the matter, cannot be said to be a competition issue at all. Nothing can be said to be 'unfair condition' which can be considered to have been practiced by the OP. In view of it, the Investigation is of the opinion that the allegations of contravention of the provisions of Section 4(2)(a) of the Act on this account are not established. However, to avoid any sort of grievance, the Commission may direct the OP to make appropriate change in the Invoice to clarify the matter in the context of GSA*".

159. The Commission, after having gone through the rival contentions of the parties and the findings of the DG, agrees with the findings of the DG, that the non-compliance by the Opposite Party is only in form and not in substance. No evidence has been given by Informants that they made payments to the Opposite Party under the invoices without understanding the same, especially when they signed the joint tickets and were aware of the information relating to quantity and quality of gas, availed by them. There has neither been any allegation by the Informants, nor was any evidence submitted by them, during the investigation or before the Commission, that the Informants were either overcharged by the Opposite Party or they had to pay more than what was due and payable by them, on account of such invoices. No loss or actual prejudice was caused to the Informants. In the given circumstances, Commission does not find contravention of the provisions of Section 4 of the Act against the Opposite Party, in this regard.

E. Whether the Opposite Party has forced the Informants to maintain the Letter of Credit in a format which enabled the Opposite Party to secure payments, which are not envisaged in the GSA.

160. The Informants alleged that the Opposite Party was forcing them to maintain LC to cover the amount of Minimum Guarantee Offtake (MGO) and 'Take or Pay' Liability. In this

regard the Opposite Party submitted during the course of investigation that it maintained a standardized format of LC that is provided to the customers covering both customers availing domestic gas as well as customers taking RLNG from it. The term 'MGO' is used in case of supply of Domestic Gas contracts whereas the term 'Take or Pay' is used in imported gas contracts. Upon considering the provisions of GSA and the terms of LC, the DG concluded that the concepts of MGO and 'Take or Pay' liability are used synonymously and the standard LC terms of the Informants mentioned only MGO. The DG found that the Opposite Party, being in a dominant position in the relevant market, has a higher responsibility and should have restricted the application of the LC only to those items which emanate from GSA. Accordingly, investigation concluded that there was contravention of Section 4(2)(i)(a) of the Act, by the Opposite Party, yet may be regarded as a minor mistake on its part.

161. During the hearing, the Learned Senior Counsel for the Opposite Party contended that since uniform LC existed in case of supply of domestic gas and RNLG, both the terms were mentioned. However, the Opposite Party has never invoked the LC on the Informants for any liability of MGO and in any case the Opposite Party has revised the format of LC to remove any confusion. Presently, neither the term 'MGO' nor the phrase 'Take or Pay' liability' is mentioned in the new format. A copy of such format has also been filed by the Opposite Party alongwith its objections to the Investigation Report. Further it has been contended that in the investigation report though DG has mentioned that it is a minor mistake, yet contravention of Section 4 has been found against the Opposite Party, which according to him is not correct as legally the concept of mistake has to be understood differently from an abuse under provisions of Section 4 of the Act.

162. Having considered the rival submissions of the parties and the findings of the DG, the Commission observes that no prejudice has been caused to the Informants, by the mention of the term 'MGO' in the LC, which does not concern the contract that the Informants have with the Opposite Party. Neither the Opposite Party ever invoked the LC on the ground of 'MGO', nor has any loss been occasioned to the Informants. The term remained as a surplusage in the LC, not acted upon ever and the Opposite Party, has already removed the same, to avoid any confusion for future. Thus it was in the nature of a mistake and cannot be construed as an abuse, which caused any serious prejudice to the Informants. Further, the Opposite Party submitted that it has rectified its

mistake and has taken corrective action. In view of the foregoing, no contravention of provisions of Section 4(2)(i)(a) of the Act, is found against the Opposite Party.

F. Whether the Opposite Party invoked LC beyond the limits prescribed under the GSA.

163. The Informants alleged that the Opposite Party attempted to encash LC for 'Take or Pay' liabilities of the Informants, the values of which were higher than the said limit contemplated under the GSA. The DG found that as per GSA, LC could be drawn at one point of time, up to an amount equal to sixteen days of supply of gas at applicable price. The value of LC is, however, value of Gas for a period of three fortnights. The DG thus concluded that the Opposite Party's act of invoking LC beyond 16 days could be termed as a one sided unilateral conduct, which was not contemplated in the GSA. The Opposite Party was expected to have been circumspect in making financial claims, which otherwise would impinge upon the key contractual provisions of GSA and the reputation of the party on the other side. Therefore, the DG found the Opposite Party to be in contravention of Section 4(2)(i)(a) of the Act.

164. The Opposite Party submitted having regard to the definition of 'fortnight' and Article 12.1(A) of the GSA that it was apparent that in the context of the GSA the term 'fortnight' and the period of 16 days are innately tied with billing and raising of invoices. The Opposite Party also placed reliance on Article 12.7 of GSA to state that the LC permitted multiple drawdowns and partial drawdowns and was required to be automatically replenished to its original amount (without being dependent on any action of the Informants), once the amount secured by LC reduced to less than 33% of the original amount. It was further submitted by the Opposite Party that the LC should pay all the amount demanded by the Opposite Party during its validity and there was no cooling-off period between two invocations. Thus, invocation of LC for an amount of more than 16 days value, in one instance and not multiple times, as was envisaged in the GSA was a mere procedural error which did not adversely affect the rights of the Informants under the GSA and did not tantamount to unfair conduct on the part of the Opposite Party.

165. The Commission observes the terms of Article 12.7 of the GSA, which is as under:

"12.7 (a) In order to secure the Buyer's payment obligation under this Agreement the Buyer shall at all times during the Term open and maintain (and pay for such opening and maintenance) an unconditional standby, automatic revolving and irrevocable letter of credit, without recourse to the drawer and in favour of the Seller, with an Acceptable Bank in the form acceptable to the Seller, to secure any payments as may be due and payable by the Buyer to the Seller from time to time under this Agreement (The "Letter of Credit" or "LC")…

… ***The LC shall permit multiple and partial draw downs; provided however that the LC shall, in a single instance at any giving point of time , be drawable only upto an amount equal to 16 (sixteen) days supply of Gas at applicable Price.*** *The LC shall be valid for one year and validity of LC shall be renewed at least 15 days before the expiry of the L.C.*

12.7 (b) If the Buyer fails to pay the amounts due under any Invoice, Provisional Invoice, Final Invoice, Correctional Invoice, Miscellaneous Invoice or Debit Advice/Debit Note, as the case may be on or prior to the Buyer's Due Date, the Seller would be entitled to draw upon the LC on any date after the Due Date by presenting to the Bank the following documents….",

166. Thus having regard to the terms of such clause, even if the LC permitted multiple and partial draw downs, yet in a single instance, it could not have been drawable for more than 16 days. Though this may not lower the overall monetary liability of the Informant, as the Opposite Party would invoke the LC on more than a single instance to recover the amounts due to it, yet Informants were required to structure the terms of LC with its bank. Thus strictly such invocation by the Opposite Party is at variance with the GSA. The Opposite Party has contended that it was a procedural error and multiple invocations were not prohibited. Without further adverting to such issue, it is suffice to say that though the Opposite Party did not act in accordance with the GSA, yet the Informants have not been able to show as to how the Informants were actually prejudiced by such invocation and were put to any consequent loss. Further it has been mentioned in the Investigation Report that LC was not able to be encashed on account of procedural shortcomings on the part of the Opposite Party. In these circumstances, the contravention of Section 4, on this account is not made out against the Opposite Party presently.

G. Whether the Opposite Party has arbitrarily advanced the 'Buyers Due Date' to the detriment of the buyers in violation of the GSA.

167. The Informants alleged that while GSAs allowed payments within four banking days from the receipt of invoice, but the invoices issued by the Opposite Party reduced the time period to three days. The findings in the Investigation Report supports the contention of the Informants and the DG has mentioned that this conduct of the Opposite Party could be taken as an instance of abuse of dominant position by the Opposite Party in contravention of Section 4(2)(a)(i) of the Act. The DG also stated that the Opposite Party's contention that its invoice format was an older version and has not led to computation of interest in wrongful manner, *etc.* could be taken as a mitigating factor at the stage of passing order under Section 27 of the Act.

168. The Opposite Party contended that its invoices followed a standard format formulated earlier when the payments were to be made within 3 days of receipt of the invoice. Further, in case of delayed payments, the Opposite Party had computed interest only after giving a grace period of four days from the actual due date stipulated in the GSA. Investigation also found that the Opposite Party did not levy interest for delayed payments on many occasions.

169. The Commission observes that notwithstanding such clause in the invoice, the Opposite Party has not acted in contravention of the terms of GSA in terms of the timelines to be allowed to Informants in making payments, post raising such invoice. Informants have not placed any evidence to show that the Opposite Party has acted as per the invoice in realising monies or calculating interest on payments due under the invoice. Further nothing is on record to show that these issues were raised by Informants with the Opposite Party for rectification. Thus since there is no evidence that the Opposite Party has conducted itself in direct violation of the GSA and as no prejudice or actual loss has been caused to Informants, the submission of the Opposite Party that the error persisted from use of old invoice formats, is accepted. Thus the conduct of the Opposite Party cannot be said to be in the nature of an abuse as contemplated under Section 4 of the Act. However, the Opposite Party shall cause the Invoice to be rectified, in terms of the directions of the Commission, contained hereinafter.

H. Whether the Opposite Party has arbitrarily and unilaterally done away with the period of 7 banking days after buyer's due date, before notice of suspension could be issued.

AND

I. Whether the Opposite Party has arbitrarily and unilaterally substituted the term "disconnection" in place of "suspension of connection".

170. The Informants alleged that the Opposite Party, through the invoices issued, was threatening them of disconnection of the supply of gas without any further notice if the amount of invoice was not paid within three days of its receipt. This according to them was contrary to the terms of GSA, which allowed the Opposite Party to suspend gas supplies if a buyer failed to make payment for a period of seven banking days after the buyer's due date. Also such suspension presupposes a notice from the Opposite Party to the buyer to be issued not later than three days from the expiry of the said seven days. The Informants also pointed out that Article 19.2 (a) of GSA clearly prescribed that after buyer's failure to make payment within Buyer's Due Date, 7 additional Banking Days have to be allowed to the Buyer, to make the payment and on buyer's failure to make such payment even in these 7 Banking days, seller can issue a 3 day written notice to the buyer for suspending deliveries of gas to it. Further, in terms of Clause 19.2(c) of the GSA, the Opposite Party could terminate the GSA if a buyer failed to make payment within 15 banking days from the Buyer's due date. The Informants also alleged that the Opposite Party, through the invoices issued, was threatening them of disconnection of the supply of gas without any further notice if the amount of invoice was not paid within three days of its receipt.

171. The Opposite Party submitted before the DG that irrespective of the statements made under the invoice, ultimately, it would be the terms of the GSA which would govern the stipulations mentioned in the invoice. It also submitted that at no point of time did it ever suspend or disconnect the supply of gas to the Informants on account of non-payment or delayed payment of invoices. However, with respect to delayed payment of invoices, interest had been levied on the payment as per the terms of GSA on certain Informants.

172. The Investigation concluded that Article 19 of GSA provided a detailed procedural mechanism for suspension or termination of gas supplies in case of failure to make payment against invoices. However, the stipulation in the invoice that gas supplies would

be disconnected if payment is not made within 3 days modified the contents of GSA and overruled the conditions agreed upon between the two sides and found that the conduct of the Opposite Party was one-sided, unilateral and arbitrary and held that the above act of the Opposite Party could be said to be fall foul of Section 4(2)(a)(i) of the Act. It also held that it was difficult to ascertain the intent of the Opposite Party in use of the term 'disconnected' in the invoice and also found such inclusion to be in contravention of Section 4(2)(a)(i) of the Act.

173. The Commission observes that with respect to the two issues raised above emanating out of certain terms in the invoices being contrary to GSA, the Opposite Party stated that notwithstanding such clauses in the invoice, it has not acted in disregard of the terms of GSA. The Commission finds that there is no evidence to suggest that the Opposite Party has acted in terms of such clauses in the invoice or that gas supplies of any of the Informants were disconnected/suspended by the Opposite Party by invoking such clauses. Further nothing is on record to show that these issues were raised by Informants with the Opposite Party for rectification. Thus there is no evidence that the Opposite Party has conducted itself in direct violation of the GSA and no prejudice or actual loss has been caused to Informants, hence the conduct of the Opposite Party on any of the issues mentioned hereinabove cannot be said to be in the nature of an abuse as contemplated under Section 4 of the Act.

J. Whether the Opposite Party Suspended gas supply without notice.

174. The Informant in Cases Nos. 17 and 18/2016, alleged that the Opposite Party had suspended gas supply on 31.03.2015, without any notice and the same amounted to abuse of dominant position. It was only on 01.05.2015, after around one month that the Opposite Party informed the Informants that supplies were suspended due to non-submission of renewed LC. It was vehemently denied that any mail dated 19.03.2015, was received by the Informant i.e. Omax Autos. The Informant asserted that the DG during the course of investigation had failed to examine either the e-mail dump of Mr. Kashif Hassan, officer with the Opposite Party, who had addressed the mail or even the email dump of Informant. Further there was no evidence that a hard copy of the notice was ever sent to the said Informant, prior to disconnection of supply. The Informant further contended that the Opposite Party also denied it dispute resolution envisaged under the GSA. In response to the above mentioned allegation, the Opposite Party

submitted that the gas supply to Omax was suspended by the Opposite Party on account of non-renewal of the LC by said Informant. The Opposite Party had sufficiently notified the said Informant vide emails dated 06.02.2015, 19.03.2015 and 30.03.2015, of the requirement of submission of LC, failing which gas supply would be disconnected. The Opposite Party also submitted that in the year 2014, as well, the Informant had submitted the renewed LC with much delay. Thus, the Opposite Party submitted that the statement of Omax that it was made aware of the reason for suppression of gas only on 01.05.2015 was false.

175. The investigation after examining in detail the email dumps of officers of the Opposite Party concluded that the claim of the Informant *i.e*. Omax Auto, that the Opposite Party, had not sent the notice by email dated 19.03.2015, is factually not correct. The investigation, however, found that no hard copy of the notice was sent by the Opposite Party. Further the DG has stated that Informant had failed to submit the LC, which it was required to do within the stipulated time and on account of the same, the, gas supplies were disconnected. Thus the investigation concluded that no contravention was found against the Opposite Party as alleged by the Informant.

176. The Commission observes that the allegations of the Informant are not supported by evidence. It was clearly brought out in the Investigation Report that the notice dated 19.03.2015 was served on the Informant, based on examination of the email dump of the concerned officers of the Opposite Party. The Learned Senior Counsel of the Opposite Party placed strong reliance on all the three communications dated 06.02.2015, 19.03.2015 and 30.03.2015, addressed by the Opposite Party to Informant, which has been referred to in detail, during the course of hearing and from which it can be gathered, that sufficient notice in terms of the GSA, was available with the Informant and it could not have been said to be taken by surprise. The Informant was well aware of its obligations to submit the LC and the communication dated 19.03.2015 and 30.03.2015 of the Opposite Party was categorical to the effect that it would be constrained to suspend the gas supply in case LC was not received by it. Further Learned Counsel for the Opposite Party submitted that such dis-connection of supply was made at the premises of the Informant and the Informant was well aware of the reasons for such disconnection. The Commission agrees with the findings as contained in the Investigation Report and also notes the submissions made by the Opposite Party. Accordingly, the Commission holds that no contravention is found against the Opposite Party in this regard.

177. With respect to other allegations regarding denial of dispute resolution and forced signing of terms of settlement indenture, the investigation has not found any evidence of abuse on the part of the Opposite Party. The investigation report mentions that the terms of settlement indenture were an effort to negotiate the claims and counter-claims and could not be said to be an abuse of dominant position by the Opposite Party. The Opposite Party had, pursuant to negotiations both with its upstream supplier and downstream customers, reduced the amount of claim considerably upon buyers. The Commission, based on records, does not find any reason to disagree with the findings of the investigation on these aspects.

178. The Commission also notes the submission made by the Opposite Party during the course of investigation, as contained in the Investigation Report that the profit margin of the Opposite Party is thin and is provided as a separate item in the invoices of RLNG and further industrial customers of the Opposite Party know about the profit margin of the Opposite Party, in the supply of RLNG through long term GSA. Further the prices are fixed being linked with international price of crude oil and some variable part of RLNG is linked through JCC and BRENT price index of international price of crude oil. Hence when the price of crude oil varies it may affect favourably/adversely the price of RLNG. Moreover all the components of price of RLNG are directly or indirectly determined by the PNGRB, MoP&NG and by PLL.

179. Lastly the Opposite Party had impugned the findings of the DG, implicating its officers under Section 48 of the Act. The Opposite Party in this regard referred to the order of the Commission in Re: *Director, Supplies & Disposals, Haryana and Shree Cement Limited (Ref Case no. 5 of 2013, Order dated 19.01.2017)* and also order of the erstwhile COMPAT in the case of *Alkem Laboratories Limited v. CCI and Ors*, to say that where no specific investigation was undertaken in respect of individuals to link their role to the impugned conduct, then the proceedings initiated against such individuals were liable to be discharged.

180. Without going into the merits of the arguments raised on Section 48, at this stage, since the Commission has observed that the Opposite Party has not been found to have contravened the provisions of Section 4 of the Act, as discussed above, consequently no liability is fastened on its officers under Section 48 of the Act.

181. The Commission observes that some of the allegations made against the Opposite Party in this case emanates from it, not having the formats of various documents like invoices, LC *etc*. in consonance with the GSA, that it had entered into with the parties. The Commission accordingly directs that the Opposite Party shall, within a period of ninety days from the receipt of this order, cause to make necessary rectifications/modifications in such formats, wherever required, and shall convey the same to all the parties with whom it has entered into such GSAs. An undertaking on affidavit, of having complied with these directions shall also be filed with the Commission thereafter.

182. The Secretary is directed to communicate to the parties, accordingly.

Sd/-
(Sudhir Mital)
Chairperson

Sd/-
(Augustine Peter)
Member

Sd/-
(U.C.Nahta)
Member

New Delhi

Dated: 08 /11/2018