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Fair Competition
For Greater Good

COMPETITION COMMISSION OF INDIA

Case No. 20 of 2013

In Re:

**M/s Saint Gobain Glass India Limited
33A, 3rd Floor, RR-V Building,
SIDCO Industrial Estate, Guindy, Chennai – 32**

Informant

And

**M/s Gujarat Gas Company Limited
2, Shanti Sadan Society,
Ellisbridge, Ahemedabad - 380006**

Opposite Party

CORAM

**Mr. Ashok Chawla
Chairperson**

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

**Mr. Augustine Peter
Member**

**Mr. Sudhir Mital
Member**

**Mr. U.C. Nahta
Member**

Appearances:

For the Informant: (i) Shri Amit Sibal, Sr. Advocate

(ii) Shri Parag Tripathi, Sr. Advocate



- (iii) Shri P. Ram Kumar, Advocate
- (iv) Shri Avinash Amarnath, Advocate
- (v) Ms. Mansi Tiwari, Advocate
- (vi) Shri Ajiteshwar Singh, Advocate
- (vii) Shri Tahir Ashraf Siddique, Advocate
- (viii) Shri L. Venkateshwaran, Advocate
- (ix) Ms. Mahima Gupta, Advocate
- (x) Shri Tarang Pandya
- (xi) Shri Sourav Mitra

For the Opposite Party:(i) Shri Ramji Srinivasan, Sr. Advocate

- (ii) Ms. Nisha Kaur Uberoi, Advocate
- (iii) Shri Bharat Budhola, Advocate
- (iv) Ms. Aishwarya Gopalkrishna, Advocate
- (v) Ms. Shweta Vasani, Advocate
- (vi) Shri Rajshekhar Rao, Advocate
- (vii) Shri Ashis Mukherjee, (For GGCL)
- (viii) Shri Sarang Modi (For GGCL)
- (ix) Mr. Maqsood Shaikh (For GGCL)

Order

The present information has been filed by M/s Saint Gobain Glass India Ltd. (hereinafter, the '**Informant**') under section 19(1)(a) of the Competition Act, 2002 (the '**Act**') against M/s Gujarat Gas Company Limited (hereinafter, the '**Opposite Party/ GGCL**') alleging, *inter alia*, contravention of the provisions of section 4 of the Act.

2. **Facts**

The brief facts of the case, as stated in the information, are as follow:



- 2.1 The Informant is one of the eight companies of Saint Gobain Group and has been engaged in manufacturing and marketing of float glass. The Informant acquired the float glass plant of Sezal Glass Ltd (hereinafter, 'SGL') on 31.05.2011 on a slump sale basis.
- 2.2 The Opposite Party, Gujarat Gas Company Ltd. (GGCL), is a City Gas Distribution (CGD) entity, engaged in the distribution of natural gas to end customers in the industrial, commercial, domestic and CNG segments, in three districts of Surat (excluding, Hazira), Bharuch (excluding Vagra Taluka) and Veloda & Vyara Taluka of Tapi, in the State of Gujarat. Further, GGCL also operates a transmission pipeline network for the transmission of natural gas, which constitutes less than 5% of GGCL's business as its primary business is distribution of natural gas via the CGD network.
- 2.3 GGCL was formed in 1980 under the name of Gujarat Amico Chem Ltd. (GACL). In 1988 GACL signed a joint venture with Mafatlal group for supply of gas in Gujarat; name of the company was changed to GGCL. Subsequently, in June 2013 GSPC Distribution Network Limited (GDNL) acquired majority shares of GGCL. GDNL was established on 21.02.2012 and it is a wholly-owned subsidiary of Gujarat State Petroleum Corporation (GSPC). The main operations of GDNL include sale, purchase, supply, distribution, transportation and trading in natural gas, in the form of Compressed Natural Gas (CNG) and Piped Natural Gas (PNG).
- 2.4 As per the information, SGL had entered into a Gas Supply Agreement (hereinafter, 'GSA') with the Opposite Party on 15.06.2007 for supply of natural gas to its float glass plant located in Jhagadia. It is averred that since execution of the said GSA, the Opposite Party has amended it on several occasions, the second amendment to original GSA was made on 23.01.2009 and the last amendment was made on 27.01.2011 (hereinafter, '**amended GSA**').



2.5 The Informant alleged that following clauses of the 'amended GSA' are abusive, being unfair in terms of section 4 of the Act:

2.5.1 The Informant has submitted that, Clause 2 of the original GSA dated 15.6.2007, stated that the agreement will be for a period of 7 years from 15.06.2007 to 14.07.2014. However, the amended GSA dated 27.01.2011, revised the period of contract from 15.06.2007 to 31.07.2019. Thus, the duration of contract now being for a period of twelve years was in the nature of a long term contract.

2.5.2 It has been submitted that although such long term contracts may produce efficiency gains as they have a risk-reducing effect, protect the customers against volatile prices and the supplier against any quantity risk thereby offering stability, these long-term contracts may also reduce the potential for the competitive market structure to emerge, as they largely result in market foreclosure for competing suppliers. Such long-term downstream contracts may also reduce, if not eliminate, the ability of the customer to choose its supplier. In the present case the efficiency gains are outweighed by the adverse effects of the long term contract.

2.5.3 The Informant has further submitted that, in this matter, the contract between SGL and Opposite Party is for a period of twelve years (increased from seven years under the original GSA) with no exit option and the entire demand of SGL for natural gas is being supplied by Opposite Party leaving no options available to SGL and foreclosing the market to other suppliers.

2.5.4 It is alleged that by incorporating 'Clause 5' in the 'amended GSA' the Opposite Party imposed minimum guaranteed off-take (hereinafter, 'MGO') liability on the Informant. As per the Informant, the MGO liability was imposed even for the period during which the Opposite Party had not laid the natural gas pipeline connecting to its plant. It is submitted that even though 'Clause 5.1' stipulates that the seller shall sell the natural gas from 02.09.2008 and 'Clause 5.2' stipulates that MGO liability would commence



from 01.12.2008, 'Clause 5.3' of the amended GSA prescribes that the MGO liability would be from 01.02.2009. It is averred that since SGL was unable to off-take the minimum guaranteed quantity of natural gas from the Opposite Party with effect from 01.02.2009 due to some technical and financial difficulties, it was required to pay nearly a sum of Rs. 100 crores to the Opposite Party as MGO liability. It is stated that the MGO liability clause and several other clauses were deliberately inserted in the 'amended GSA' by the Opposite Party to derive benefits and extract payment in the name of MGO liability. The Informant submitted that the Opposite Party did not incur any loss due to failure on behalf of SGL as the contracted quantity of gas was sold in the spot market for a higher price. The same is evident from the balance sheets of the Opposite Party for the years 2008 and 2009 which do not account for any losses occurred due to burning of gas. It is alleged that, despite selling the contracted quantity of natural gas in the spot market at a premium, the Opposite Party forced the SGL and the Informant to pay Rs. 11 crores as MGO liability in monthly instalments of Rs.17 lakhs.

2.5.5 It is averred that through amended 'Clause 15', the Opposite Party removed the buyer's right to terminate the contract. As per the Informant, this condition in the 'amended GSA' deprives the buyer of the right to terminate the contract even in case the seller is not able to meet Informant's natural gas requirements. The Informant has no option to approach another supplier in spite of the fact that stoppage of even one minute of natural gas by the seller can lead to huge financial loss to it.

2.5.6 The Informant further averred that by incorporating 'Clause 22', the Opposite Party introduced the right of first refusal to the Opposite Party. Accordingly, in case the buyer requires any additional quantity of natural gas for its plant during the term of agreement, a written proposal will have to be made to the Opposite Party to meet such additional requirement, prior to making any proposal or offer to any third party (natural gas supplier) for entering into any agreement/arrangement.



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2.5.7 It is also averred that at the time of acquisition of its float glass plant from SGL, the Opposite Party (through a tri-partite agreement between the SGL, the Informant and the Opposite Party on 30.09.2011) compelled the Informant to mandatorily obtain a 'No Objection Certificate' from the Opposite Party to proceed with the acquisition and to accept all the unfair terms and conditions of the GSA and amended GSA. The Opposite Party also compelled the Informant to submit an incremental bank guarantee of Rs. 1, 50, 61,000 towards security deposit and an additional bank guarantee of Rs. 20, 50, 00,000 by 15.06.2011. Further, the Opposite Party asked the Informant to make timely payment of instalment of Rs. 17, 00,000 due on a monthly basis from 01.06.2011 as per the 'amended GSA'.

2.6 The Informant has submitted that in South Gujarat the market share of the Opposite Party is more than 80%. In 2009, it had 875 industrial customers which accounted for 81% of its gas volume which increased to 82.9% in 2010. In 2011, its natural gas sale volume increased by 3% compared to the previous year and it is one of the most profitable companies in the country. Accordingly, the Informant averred that the Opposite Party holds a dominant position in the market for supply and distribution of natural gas (other than the gas covered by allocation policy of the Government of India) in south Gujarat.

2.7 Accordingly, the Informant has alleged that the Opposite Party has abused its dominant position which is in contravention of the provisions of section 4(2)(a)(i), 4(2)(b)(i) and 4(2)(c) of the Act.

2.8 Based on the above submissions, the Informant prayed the Commission to: investigate the matter; direct the Opposite Party to introduce exit clause in its GSA; direct the Opposite Party to remove 'Clause 22' which was introduced in the 'amended GSA'; grant interim injunction on the payment of the monthly instalment of Rs. 17 Lakhs towards MGO liability till the matter is decided by the Commission; direct the Opposite Party to remove 'Clause 11.6.b' of the GSA imposing MGO liability; direct the Opposite Party not to discontinue or reduce the natural gas supply to the Informant's



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float glass plant during the pendency of the matter; direct the Opposite Party to provide transparent pricing mechanism in GSA; and pass any such order as the Commission may deem fit in the light of the facts and circumstances of the case.

3. The Commission, upon examining all aspects of the case, vide its order dated 31.05.2013 under section 26(1) of the Act held that the conduct of the Opposite Party was indicative of the existence of a *prima facie* contravention of the provisions of the Act and accordingly, directed the Director General (hereinafter, the 'DG') to investigate the matter.

4. DG's Investigation

- 4.1 In accordance with the provisions of section 26(3) of the Act, the DG has submitted the investigation report to the Commission on 21.04.2014.
- 4.2 The DG has investigated the matter focusing on the alleged contravention of the provisions of section 4 of the Act by the Opposite Party.
- 4.3 For the purpose of defining the relevant market in the matter, the DG stated that natural gas has distinct characteristics and is cheap compared to other sources of energy. Based on the difference in characteristics, prices, consumer preference and specialised expertise required for its supply and distribution network, the DG has stated that natural gas is a distinct product and it cannot be considered as a substitute for other sources of energy. Further, the DG has opined that natural gas priced under Administered Pricing Mechanism ('APM') and gas falling under Non-Administered Pricing Mechanism ('Non-APM') form different relevant product markets because of the Central Government order dated 01.07.2005 which mandates that a particular group of consumers (consumers of power sector, fertilizers sector, or covered under court orders or having allocations of less than 0.05 MMSCMD) are entitled for supply of gas under APM. Since, the Informant



is an industrial customer which falls in the category of non-APM natural gas user, the DG has considered the supply of non-APM natural gas to industrial consumers as the relevant product market in this matter. Considering the Petroleum and Natural Gas Regulatory Board's (hereinafter, 'PNGRB') reply that the Opposite Party comes under the purview of the Petroleum and Natural Gas Regulatory Board Act, 2006 and since it has been granted infrastructure exclusivity and market exclusivity for the city or local natural gas distribution (hereinafter, 'CGD') network in the geographical area of Surat, Bharuch and Ankleshwar, the DG has reported that the condition of competition in the geographic area of Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat is homogenous and can be distinguished from other adjacent areas of Gujarat. Therefore, the DG deduced that the relevant market be considered in this case as 'the supply of non-APM natural gas to industrial customers located in Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat'.

- 4.4 As per the DG report, there are four players operating in the relevant market *i.e.*, the Opposite Party, GAIL (Gas Authority of India Limited), IOCL (Indian Oil Corporation Limited) and GSPC (Gujarat State Petroleum Corporation) and among these four players, the Opposite Party has the highest market share in terms of volume and value of sale of natural gas. Further, the DG has stated that the size of the Opposite Party is significant with substantial resources at its command. Also, the Opposite Party has the advantage of vertical integration and the exclusivity granted to it for marketing and infrastructure network. Furthermore, it is difficult for the consumers to switch to other suppliers as it may not be viable for the new supplier to lay down dedicated gas pipeline. As per the DG report, the capital intensive nature of this sector, the requirement of financial resources, technical expertise, *etc.* and the regulatory framework precludes the presence of any entity other than the Opposite Party to enter the market. Thus, the DG concluded that the Opposite Party is a dominant enterprise in the relevant market as defined *supra*.



- 4.5 In order to analyse the conduct of the Opposite Party in terms of the provisions of section 4 of the Act, the DG has examined the alleged clauses of GSA as well as 'amended GSA' relating to MGO liability, long term nature of the contract, elimination of buyer's right to terminate the contract and introduction of right of first refusal, arbitration, MGO caution deposit facility, differential pricing, *etc.* and concluded that the conduct of the Opposite Party in imposition of some such unfair clauses on the Informant is in infraction of the provisions of section 4(2)(a)(i) & (ii) and 4(2)(c) of the Act
- 4.6 The DG has reported that the structure of the MGO clause in the original GSA dated 15.06.2007 and subsequent amendment in the original GSA dated 23.01.2009, which continues to operate till today, amounts to imposition of unfair and exploitative conditions. It is revealed from amended GSA that in spite of the Opposite Party itself entitled for 'make-up' gas from its top three upstream suppliers, it did not provide this facility to SGL. Also, the Opposite Party imposed the MGO liability on SGL even for the period during which the Opposite Party had not laid the natural gas pipeline connecting SGL's plant. As per the DG report, there is no option with SGL to reduce/change MGO quantity and there is no option to the SGL to switch over to non MGO contract. It is further stated in the DG report that the Opposite Party had increased the MGO contracted quantity without even supplying a single molecule of gas to SGL and took away all rights to receive MGO quantity in future.
- 4.7 The DG reported that until 26.01.2011, SGL had the right to terminate the agreement in case the Opposite Party failed to supply natural gas of required quantity, meeting the quality and pressure requirement, *etc.* However, in the amended GSA, the clause relating to the right of SGL to terminate the GSA in case the Opposite Party failed to supply natural gas was removed. Though the Opposite Party has claimed that the termination clause was removed at the request of SGL, the DG did not find any corroborative evidence in this



regard. As per the 'amended GSA', the Informant has no right to exit before the expiry of the term which is highly exploitative and in contravention of the provisions of section 4(2)(a)(i) of the Act.

4.8 After having examined the average time period of the gas supply agreements of the Opposite Party with other industrial customers, the DG noted that the Opposite Party generally signs gas supply agreements for five years, which can be extended through mutual agreement among parties. As per the DG report, long term contracts are common feature of the natural gas supply market. However, in the present case, the extended long term contract has been tied-up with no termination rights to the buyer which has the effect of locking in a buyer to the Opposite Party that leads to foreclosure of the market for other suppliers operating in the same geographic market. Thus, DG deduced that extension of the term of the contract without giving any termination right to the buyer is unfair in terms of section 4(2)(a)(i) of the Act.

4.9 The DG reported that SGL had not requested the Opposite Party to include the clause of right of first refusal in the amended GSA dated 27.01.2011. As per the DG report, imposition of MGO liability without any right to SGL to revise MGO contracted quantity was an abusive conduct on the part of the Opposite Party. Therefore, consequent amendment in the agreement to take over right of first refusal by the Opposite Party is an abuse of conduct as well. By introducing the right of first refusal clause in the GSA, the Opposite Party foreclosed the market to other potential suppliers and thereby reduced competition in the market for supply of natural gas which is in contravention section 4(2)(c) of the Act.

4.10 The DG noted that clause 14 of the original GSA allowed both parties to appoint one arbitrator each to resolve any dispute which arose under the agreement whereas under the amended GSA, the Informant did not have the right to appoint an arbitrator. Under the amended GSA, the Opposite Party



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has the exclusive right to appoint a sole arbitrator to resolve disputes under the said agreement. As per the DG report, the same is unfair in terms of the provisions of section 4(2)(a)(i) of the Act.

4.11 Regarding the provision of compensation to buyer in case of seller's failure to deliver the daily contracted quantity, it is noted that there was no such provision in the GSA. However, from the agreements executed between the Opposite Party and its top three non-APM gas suppliers, the DG found that such agreements had the option of compensation to buyer in case of shortfall in supply of gas from the seller. Thus, as per the DG report, the fact that the Opposite Party does not provide any compensation to its industrial customers for shortfall in supply of gas, in spite of the Opposite Party itself having been given compensation rights from its upstream suppliers under similar circumstances amounts to imposition of unfair condition in contravention of section 4(2)(a)(i) of the Act.

4.12 The DG observed that the Opposite Party had introduced MGO caution deposit facility to industrial customers from 01.09.2011. Under this facility, the Opposite Party collects MGO caution deposits from its large industrial customers and at the end of each calendar quarter, it issues a credit note to the industrial customers for an amount not exceeding the MGO caution deposit collected after adjusting for its take or pay (MGO) liabilities. This facility gives some flexibility to industrial customers to manage MGO liability. However, this facility has not been provided to SGL which shows discriminatory conduct on the part of the Opposite Party.

4.13 The DG analysed the data related to the cost of gas procured by the Opposite Party from its suppliers and correlated it with the price being charged from the industrial customers. On examination of data, the DG observed that Opposite Party was charging differential pricing and it failed to substantiate the reasons for charging differential pricing. As per the DG, the act of the



Opposite Party in charging differential pricing amounts to contravention of section 4(2)(a)(ii) of the Act.

5. **Reply of the Informant in response to the DG Report**

5.1. In response to the DG report, the Informant filed its reply on 31.07.2014 wherein it agreed with the DG's finding with regard to the relevant market and the dominance of the Opposite Party in the relevant market and its abusive conduct in contravention of the provisions of section 4 of the Act.

5.2. The Informant concurred with the findings of the DG that the structure of the MGO clause in the GSA 15.06.2007 and the subsequent amendment amounts to imposition of unfair conditions on SGL/ Informant in contravention of section 4(2)(a)(i) of the Act.

5.3. The Informant has submitted that the Opposite Party did not suffer any financial loss due to non off-take of gas by SGL which is evident from its quarterly results for the period December 2008 to January 2010 that the Opposite Party was short of gas supplies during the aforesaid period and it procured significant quantity of its gas requirement from the spot market/ RLNG (Regasified Liquefied Natural Gas). During the said period, the Opposite Party was able to supply to 75% of the contracted capacity of industrial customers and it was not in a position to supply the contracted natural gas to SGL.

5.4. As per the Informant, the statement of IGL (Indraprastha Gas Limited), another gas supplier, that even though there is a provision for MGO quantity in its gas supply agreement, it does not levy any charges/penalty for non off-take of the MGO quantity as it is able to use up all the procured gas this clearly demonstrates the unfair nature and high-handedness of the Opposite Party's conduct. The Informant contended that even if SGL had the option to terminate the agreement, it would have still incurred a MGO liability for 1 year which is a significant amount. It is also stated that SGL had no other



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viable option to purchase gas from alternative suppliers as the Opposite Party was the only entity operating a gas pipeline in Jhagadia and it had already made significant financial investments in its plant. It is pointed out that the Opposite Party had completed the pipeline only on 28.02.2009, yet it imposed MGO liability from 01.12.2008 itself despite being fully aware that neither the pipeline for supply of gas was ready nor was SGL's plant commissioned on this date. It is stated that this conduct of the Opposite Party clearly indicates that the payment demanded by it is completely unreasonable and unfair, irrespective of SGL's delays in commissioning its plant.

5.5. It is submitted that the Opposite Party's argument that in order to accommodate SGL and to continue its supply of natural gas, it reduced the MGO liability of Rs. 100 crores of SGL to a meagre amount of Rs. 11.2 crores by way of monthly instalments of Rs 17 lakhs, in satisfaction of its debt is invalid. As observed in the DG report, the Opposite Party by its own admission did not suffer any actual loss due to non off-take of gas by SGL and the loss was purely notional. Secondly, the pipeline to SGL's plant was ready for supply of gas only in November, 2009 and there was no way the Opposite Party could have supplied gas before November, 2009. Yet, the Opposite Party calculated and imposed MGO liability from 01.12.2008. Accordingly, the so-called reduction in MGO liability is nothing but a sham to conceal the unfair nature of the Opposite Party's conduct.

5.6. The Informant concurred with the DG's finding that the clause stating that the Informant has no right to exit before the expiry of the term shows the unfair, exploitative and abusive nature of the GSA/amended GSA which is in contravention of section 4(2)(a)(i) of the Act. As per the Informant, there's no corroborative evidence to establish the Opposite Party's claim that the buyer's right to terminate was removed at the behest of SGL. The demand of MGO liability became the main reason for subsequent negotiations as the Opposite Party had constantly threatened not to supply gas and it had no other plausible alternative option for supply of gas. Furthermore, it is submitted



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that the Opposite Party's intention was not to supply gas to SGL until its demand for MGO liability was met.

5.7. The Informant has submitted that the Opposite Party is the only entity operating a gas pipeline network in Jhagadia and procuring gas from a pipeline network outside Jhagadia would not be feasible. It is further submitted that the DG had rightly concluded that even on the assumption that the buyer's right to terminate was removed at the behest of SGL, the amendments can be considered to be unlawful as being a dominant player in the market the Opposite Party has higher degree of responsibility .

5.8. The Informant has also argued that the long term GSA is highly discriminatory and the Opposite Party cannot justify the same by making mere general assertions about recovering costs of infrastructure and efficiencies without presenting specific verifiable evidence. As per the Informant, the practical effect of such clause is to prevent the buyer from procuring gas from another supplier and has the ability to foreclose the market to other potential suppliers, thereby, reducing competition in the market.

5.9. The Informant has stated that the Opposite Party had the unilateral right to appoint an arbitrator not only in the GSA which is unfair. The Informant has submitted that the clause relating to no compensation to the buyer in case of short fall of supply of gas by the seller is also unfair. It is submitted that the Opposite Party's justification on its discriminatory treatment towards the Informant by not making MGO caution deposit facility available because of SGL's past defaults is not valid.

5.10. On differential pricing, it is stated that all the industrial consumers in Jhagadia are similarly placed and differential pricing to such similarly placed consumers amounts to discriminatory pricing in contravention of section 4(2)(a)(ii) of the Act. It is submitted that the Opposite Party has failed to furnish any objective justification for such practice.



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5.11. The Informant has also submitted that during the period between 2007 and 2011, the Opposite Party was a part of the British Gas (hereinafter, 'BG') group. During this time, the policy and decision making of the Opposite Party was controlled and guided by the BG group. It is stated the BG group had a controlling stake of 65.12% in the Opposite Party with the remaining shareholding being held by the public. This gave the BG group effective control over the management and affairs of the Opposite Party. Accordingly, the Informant submitted that the BG group is also liable for the abusive conduct of the Opposite Party as its parent entity.

6. **Replies/objections of the Opposite Party in response to the DG Report**

6.1 The Opposite Party has submitted that the dispute in question in the instant matter is purely a contractual issue between it and the Informant and does not raise any competition law concern. The so called abusive clauses in the GSA were repeatedly re-negotiated by the parties in good faith to help SGL to commence operations and come out of its debt-ridden state. It is submitted that the SGL/Informant signed the agreement knowing well that they would be bound by the terms and conditions of the GSA. That there was no coercion or element of force that led SGL/Informant to enter into the GSA. It is stated that SGL's default is the primary reason for which the Opposite Party was put in a commercially uncomfortable position and due to which GSA was restructured. It is submitted that despite the efforts of the Opposite Party to accommodate SGL, the DG has arrived at an adverse conclusion against it demonstrating clear bias and malafide intention on the part of the DG.

6.2 The Opposite Party has submitted that the DG's delineation of the relevant market *i.e.*, 'the market for supply of non-APM natural gas to the industrial consumers located in Bharuch (excluding Vagrataluka) and Surat (excluding Hazira) districts of Gujarat' is incorrect, flawed and antithetical to the basic principles of competition law. It submitted that the DG has not considered the substitutability of various industrial fuels, the influence that pricing plays



on fuel choices of the customers, end use, *etc.*

- 6.3 It is stated that based on the end-use, natural gas competes with other fuels available in the market such as furnace oil, electricity, high speed diesel ('HSD'), coal and briquette. The customers have the ability to switch to these alternate fuels without incurring substantial costs. Since the primary application of natural gas is for heating, chilling and electricity generation; alternate fuel sources such as solid fuels like coal, furnace oil, briquette and grid electricity could be used interchangeably with natural gas.
- 6.4 The Opposite Party has contended that it serves only about 27% of the total market of industrial customers in Bharuch district which shows that the remaining industrial customers use the above said alternate fuels. As per the Opposite Party, out of total 1906 industrial customers in Bharuch district, it serves only 518 customers implying that the industrial consumers are not dependent only on natural gas. It is submitted that a few of industrial customers in Bharuch district also procure gas from the Opposite Party's competitors such as GAIL, IOCL, GSPC, etc. Furthermore, the prices of all these competing fuels are independently determined by various companies and their pricing poses sufficient competitive constraints on the pricing of natural gas.
- 6.5 Disagreeing with the DG's conclusion, the Opposite Party stated that the public sector undertaking such as IOCL, BPCL (Bharat Petroleum Corporation Limited) and HPCL (Hindustan Petroleum Corporation Limited) supply competing fuels in the state of Gujarat, while electricity is supplied by the State Electricity Board. Therefore, the natural gas supplied by the Opposite Party has to compete with these companies to replace the fuels already used by industrial units and the Opposite Party does not possess the market power to influence any of these competitors as they are completely independent and much larger than the Opposite Party in terms of capacity and business.



6.6 It is submitted that natural gas to industries is not subsidized by the government and is sold at market price and customers are free to choose the kind of fuel based on their specific needs. There is no government policy that mandates the use of natural gas in the industrial, domestic or commercial segment. It is further argued that natural gas can easily be substituted with alternate fuels by the customers. As per the Opposite Party, the Informant's own float glass plant in Sriperembudur near Chennai runs solely on furnace oil. Further, the float glass plant of the Informant in Jhagadia is equipped with an LPG tank. Thus, it is clear that natural gas is substitutable with other forms of alternative fuels.

6.7 It is submitted that the DG relied on the fact that natural gas prices are more stable as compared to other fuels and that natural gas is more cost effective as compared to other fuels in order to conclude that natural gas is a distinct relevant market. However, these factors alone do not result in natural gas constituting a separate relevant market. When tested on the parameters of end use from the view-point of customers coupled with pricing, natural gas can be used interchangeably with the other industrial fuels. Further, the DG has made no reference to any kind of empirical analysis/evidence in relation to the definition of the relevant market. Therefore, the conclusion arrived at by the DG in regards to relevant market and the dominant position of the Opposite Party in the said market is incomplete and flawed.

6.8 The Opposite Party has submitted that it is at greater risk than the customers when it comes to the arrangement of gas supply. While CGD entities are solely dependent on GAIL and other suppliers for supply of natural gas, retail customers can substitute fuels as well as the suppliers. Therefore, failure on the Opposite Party's part to comply with contractual obligations would have more stringent repercussion whereas in case of a default by a customer the effect of the same would be restricted to the business of such customer and not on other downstream players. It is submitted that neither the law nor industry practice (in the natural gas sector) mandates that terms and



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conditions in an agreement between entities in one level of the production chain should be identical to the terms and conditions of an agreement between entities in another level in the production chain. Therefore, the terms and conditions of the agreement between the Opposite Party and its top three upstream suppliers cannot be compared to the terms and conditions of the agreement between the Opposite Party and SGL/ Informant.

6.9 As per the Opposite Party, it is its independent commercial decision to enter into MGO contracts with customers who require more than 2000 SCMD of gas and the basis for the same cannot be questioned since it applies uniformly to all its industrial customers. The Opposite Party has stated that providing standard terms and conditions in such agreements is essential which cannot be held to be abusive. It is stated that from 01.12.2008 to 25.01.2010, SGL accrued an MGO liability of Rs. 100.24 crores. Based on the GSA, SGL had an option to terminate the GSA and avoid the MGO liability. However, it continued with the GSA. Further, it is submitted that SGL/ Informant has voluntarily entered into the GSA with it, knowing the obvious benefits and advantages associated with MGO contracts. Moreover, there is no material on record to show that the consent of the Informant was obtained by fraud or misrepresentation or unfair conditions were imposed by the Opposite Party by using its alleged dominant position.

6.10 The Opposite Party has contended that the fact that SGL did not commission its plant on time cannot be used as an excuse to avoid payments under a contract wilfully negotiated and entered into by SGL. As stated above, SGL entered into the original GSA in 15.06.2007 and the MGO liability under the contract was to start accruing from 01.12.2008. SGL therefore wilfully negotiated a contract with the Opposite Party more than a year in advance of the date when it would require gas supply as it was fully aware that the Opposite Party in-turn would have to make arrangements for such gas from its upstream suppliers. Considering the huge quantity of gas supply sought by SGL *i.e.*, 0.15 MMSCMD, the Opposite Party would have required at least



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six months to enter into negotiations with its upstream suppliers to ensure guaranteed supply since the supply of natural gas via CGD network involves a complex process.

6.11 It is stated that the sourcing of natural gas requires setting up of highly capital intensive infrastructure, the cost of which must be absorbed and recovered through adequate capacity utilisation and gas supply tie-ups of long duration. Further, it is submitted that given the fact that natural gas cannot be stored, the long term commitments need to be supported by financial guarantees and appropriate provisions in the contracts. From a financial and commercial viability perspective, all such financial and contractual guarantees/commitments must percolate from the upstream supply contract to the supply contract and to the last customer in the supply chain. Thus, all contracts in the gas supply chain operate on a back-to-back basis and any change in the quantity and/or financial guarantees at any level may result in a corresponding change in the upstream and downstream market, thereby disrupting the entire value chain of gas supply. It is submitted that since natural gas cannot be stored by the gas distribution company, once it takes gas into its system, it has to dispose it or burn it or auction it in the open market. Accordingly, inclusion of an MGO clause is a typical characteristic in the natural gas industry.

6.12 The Opposite Party has submitted that it is not the only supplier of natural gas around the Jhagadia region and there are other suppliers as well. Presently, GSPC, IOCL and GAIL supplying natural gas to the industrial consumers in the Opposite Party's authorised area. Moreover, there are few other suppliers such as GSPC and GAIL operating their pipelines in close proximity to Jhagadia region. Thus, the Informant/SGL was not obliged to procure gas from the Opposite Party alone. Further, according to the PNGRB Regulations, if an industrial user uses more than 0.05 MMSCMD of natural gas, it is not obligated to use the CGD network and can procure natural gas from any of the suppliers of natural gas, including GSPC, GSPC, AGL, CGS,



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VMSS and HPCL. The Informant in its own admission has stated that it falls in the category of the customer using 0.10 MMSCMD of gas and thus has the liberty to procure gas from any suppliers. Therefore, the question of the Informant being dependent on the Opposite Party does not arise.

6.13 It is contended that the Informant cannot claim to have been constrained in any manner and was free to negotiate on its own terms at the time of acquisition of SGL's business considering its own market power and size. Further, allegation that SGL had no opinion to reduce the MGO quantity is bereft of substance since it had requested for a change in daily contracted quantity (hereinafter, 'DCQ') on 25.02.2010, from 0.15 MMSCMD to 0.12 MMSCMD (i.e., a reduction in 20%) which automatically resulted in a change in the MGO. Moreover, it should be noted that the MGO percentage (i.e., 80%) is uniformly applicable to all the Opposite Party's customers and is a standard term included in all its gas supply agreements.

6.14 The Opposite Party has submitted that as per the second amendment to GSA on 23.01.2009, the MGO liability was imposed from that date, based on the contractual stipulation agreed to by SGL. Further, the allegation that the Opposite Party was facing shortage in gas supplies during 2008-2010 and, therefore, was not in a position to supply the contracted capacity to SGL has no substance, is completely false and devoid of any merit.

6.15 The Opposite Party has contended that an increase in the MGO from 80 % to 90% was its independent commercial decision which was uniformly applied to all its existing customers. It was ready to supply natural gas to SGL since 28.02.2009 but it was SGL's inability to receive gas that led to non-off take of natural gas. It is submitted that while the Opposite Party amended the right to revise MGO, it never took away the right of SGL/ Informant to amend the DCQ. As such, SGL/Informant had the right to change the DCQ which would have automatically led to a proportionate change in the MGO.



6.16 With regard to the DG's conclusion that the Opposite Party incurred no financial loss, it is submitted that DG failed to appreciate the fact that the Opposite Party has several customers, business operations and sources of revenue. Therefore, losses incurred by it in one business operation cannot be said to translate into net losses for the entire financial year. Such a conclusion is erroneous.

6.17 It is further submitted that given that the natural gas industry is a complex web of extremely tight high value long term contracts, the Opposite Party as a prudent operator, took steps to mitigate the losses arising on account of SGL's non-off take of gas by selling the natural gas in the open market on a spot basis. Since, gas once procured from an upstream supplier has to be burnt off or to be auctioned in the open market in case it is not consumed by the consumers, it is the seller's prerogative to decide the steps to be undertaken in order to mitigate losses.

6.18 On long term contract, the Opposite Party has submitted that the GSA was made long term at the behest of SGL and to recoup the losses incurred by it. It is submitted that SGL sought to reduce the debt burden of its outstanding MGO dues and offered to execute a long term gas supply contract by way of which it could recuperate its losses on account of reduction in outstanding MGO liability of more than Rs. 100 crores to Rs. 11.22 crores by gaining an assured customer for a longer duration. The Opposite Party has referred some internal mails exchanged between its office and the parties showing agreement of the Informant for extension of the contract. It is also submitted that long term gas supply agreement gives rise to massive efficiency gain and is beneficial to the supplier as well as to the consumers.

6.19 Further, the DG has noted that the Opposite Party's contracts with the top three gas suppliers range from 3 years to 22 years and contracts executed by other suppliers *i.e.*, GAIL, IOCL, AGL, IGL, and the Opposite Party with their respective industrial customers also range from 3 years to 20 years.



Thus, it is evident that long term contracts are an established industry practice and do not pose competition concern. It is also submitted that the GSA with the Opposite Party is valid until July 2019 which is effectively valid for eight years. Given that the DG has recognized contracts upto 20 years to be the norm in the natural gas industry, it is contended that the GSA should not be seen to be violative of the provisions of the Act.

6.20 The Opposite Party has submitted that the right of first refusal (hereinafter, 'ROFR') clause is most common term used in commercial contracts and that the courts in India on a number of occasions have upheld the validity of pre-emptive rights, including ROFR. It is further submitted that SGL requested the Opposite Party to revise its DCQ from 0.15 MMSCMD to 0.12 MMSCMD to mitigate the potential future MGO liability against which it would sign a ROFR for an additional DCQ of 0.11 MMSCMD expected from 01.07.2013. It is argued that given that SGL did not require additional quantity of natural gas, ROFR was never put into effect and therefore cannot be said to be abusive. Further, when SGL requested the Opposite Party to reduce the DCQ, despite the outstanding MGO liability the Opposite Party readily agreed to reduce the DCQ by 20%.

6.21 The Opposite Party has submitted that the arbitration clause is valid under section 7 of the Arbitration and Conciliation Act, 1996. It is submitted that Clause 14(b) of the amended GSA (amended by way of the 4th amendment Agreement) expressly provides for maintaining the independence and impartiality of the sole arbitrator appointed by the Opposite Party. Further, it is submitted that section 10 of the Arbitration Act provides for a sole arbitrator to be appointed by the parties to the arbitration agreement and as such, does not require both parties to appoint the sole arbitrator. Therefore, it is submitted that the Opposite Party has the exclusive right to appoint the sole arbitrator which cannot be held to be anti-competitive.

6.22 It has submitted that the DG has failed to appreciate that the terms and



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conditions in one agreement (relating to purchase or sale of goods or services) can only be ‘unfair or discriminatory’ when compared to the terms and conditions offered to another person at the same stage or level of production. Thus, the terms and conditions of the agreement between the Opposite Party and its upstream suppliers cannot be compared with the terms and conditions of the agreement between the Opposite Party and SGL/Informant. Any such comparison would be completely absurd and against the principles of competition law and also in violation of Article 14 of the Constitution of India.

6.23 It is submitted that the Opposite Party introduced the MGO caution deposit facility in its gas supply agreements for its industrial customers from 01.09.2011 whereby the Opposite Party collects MGO from its large industrial customers in the form of MGO caution deposit and holds it for a given period. At the end of such period, it issues a credit note to such customers for an amount not exceeding the MGO caution deposit collected after adjusting for its MGO liability to its suppliers. It is stated that SGL’s default is the primary reason because of which the Opposite Party was put in a commercially uncomfortable position, thereby leading to re-structuring of the GSA relating to the MGO caution deposit facility.

6.24 On differential pricing, the Opposite Party has submitted that the DG has failed to take into account its submissions providing reasons for differential pricing in Jhagadia region. It has submitted that “*price at which gas is delivered at Jhagadia includes a premium of Rs. 0.25 per scm (standard cubic meter) based on the application of natural gas by the industrial customers based on the industry involved, the availability of natural gas, use of alternate fuels, the payback period of capital investment and other similar considerations*”. It is submitted that the differences in the prices in the GSAs executed with industrial, commercial and domestic consumers are necessitated by the very nature of the different characteristics of such customers, the quantity of gas that they off take and the consequent technical/infrastructure requirements of each such segment.



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6.25 It has submitted that the customers consuming more than 50,000 SCMD of natural gas have the option to source gas from any other supplier under the provisions of PNGRB Regulations, 2008. Therefore, such consumers are not bound to procure natural gas from the Opposite Party and are free to approach any other suppliers. For example, consumers like United Phosphorus Limited, Piramal Glass limited, and Pragati Glass limited are procuring natural gas from GAIL, in addition to the Opposite Party.

7. Determination of Issues

7.1 The Commission has carefully perused the information, the report of the DG and the replies/objections/submissions filed by the Informant and the Opposite Party and other material available on record. The Commission also heard the arguments advanced by the learned counsel appearing on behalf of the Informant and the Opposite Party.

7.2 Having perused the facts of the matter in detail, it is observed that in order to arrive at a decision in the matter, the Commission has to determine whether the Opposite Party has infringed any of provisions of section 4 of the Act. However, determination of the said issue requires delineation of relevant market, assessment of the position of dominance of the Opposite Party in the relevant market and examination of the alleged abusive conduct of the Opposite Party in terms of section 4 of the Act in case it is found to be in a dominant position in the relevant market.

Relevant Market

7.3 The Commission notes that as per section 2(r) of the Act, 'relevant market' means the market which may be determined by the Commission with reference to the 'relevant product market' or the 'relevant geographic market' or with reference to both the markets.

7.4 The term 'relevant product market' has been defined in section 2(t) of the Act as a market comprising all those products or services which are regarded



as interchangeable or substitutable by the consumer by reason of characteristics of the products or services, their prices and intended use. To determine the 'relevant product market', the Commission is to have due regard to all or any of the following factors *viz.*, physical characteristics or end-use of goods, price of goods or service, consumer preferences, exclusion of in-house production, existence of specialized producers and classification of industrial products, in terms of the provisions contained in section 19(7) of the Act.

7.5 Further, 'relevant geographic market' has been defined in section 2(s) of the Act meaning as a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. To determine the 'relevant geographic market', the Commission shall have due regard to all or any of the following factors *viz.*, regulatory trade barriers, local specification requirements, national procurement policies, adequate distribution facilities, transport costs, language, consumer preferences and need for secure or regular supplies or rapid after-sales services, in terms of the provisions contained in section 19(6) of the Act.

7.6 While defining the relevant product market DG has considered that natural gas is a distinct product compared to the other sources of energy available to the consumers as it has distinct characteristics such as environmentally clean, efficient, no storage and inventory carrying costs, uninterrupted and available on tap source of energy, cheaper, stability of its prices, *etc.* compared to other sources of energy. Further, based on applicable price mechanism for natural gas distribution, DG has distinguished natural gas priced under administered pricing mechanism and non-administered pricing mechanism and considered non-APM natural gas as the relevant product in the instant case because the Informant and others industrial customers are not eligible for supply of APM natural gas. Thus, as per the DG report, 'the supply of non-APM natural gas



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to the industrial customers' is the 'relevant product market' in the instant case. In regard to the relevant geographic market, the DG has reported that since the matter is related to distribution of non-APM natural gas to the industrial customers through network of pipelines permitted to be laid within a defined geographical area as per the authorization granted to the supplier laying and operating the CGD network, the geographic area within which the Opposite Party is authorized to operate constitutes the relevant geographic market. Since the Opposite Party is authorised to distribute non-APM natural gas to the industrial customers through a network of pipelines in the areas of 'Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat', the DG has considered the said areas as the 'relevant geographic market' in this case. Thus, as per the DG report, the market for '*the supply of non-APM natural gas to industrial customers located in Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat*' is the relevant market in the present case.

7.7 While the Informant agreed with the DG's finding with regard to the relevant product market definition, the Opposite Party argued that the relevant market as considered by the DG is flawed and based on an incorrect appreciation of facts and competitive constraints in supply of natural gas. It is argued that the relevant product market not only constitutes the product or service in question, but also includes all the products/services which are regarded as inter-changeable or substitutable to the product in question. As per the Opposite Party, since the targeted customer group is 'industrial customers', while defining the relevant market end-use of natural gas by the customers, its characteristics and prices should be considered. It is submitted that based on the end-use, natural gas competes with other fuels such as furnace oil, electricity, high speed diesel, coal, *etc.* and the customers have the ability to switch to these alternate fuels without incurring substantial costs.

7.8 In regards to the 'relevant geographic market', the Informant contended that the area of Jhagadia should be the relevant geographic market in this case



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because the Opposite Party admittedly charges a premium of Rs. 0.25 per SCM for supply of gas to industrial consumers in Jhagadia as compared to other industrial areas within Surat and Bharuch districts. As per the Informant, the fact that Opposite Party is able to charge higher prices to customers in Jhagadia as compared to other industrial areas within Surat and Bharuch districts shows that the conditions of competition in Jhagadia are distinct from other industrial areas in Surat and Bharuch districts. However, the Opposite Party has not contested the relevant geographical market definition provided by the DG.

7.9 The Commission has examined the rival submissions on the issue of relevant market as well as the findings of the DG in this regard. On a careful perusal of the facts of the case and material available on record, the Commission agrees with classification of consumers of natural gas made by the DG on the basis of intended use and price. The Commission notes that while industrial consumers use natural gas to meet the energy requirements in their plants for heating *etc.*, the end use of natural gas for domestic consumers is for cooking and commercial consumers use it for commercial purposes. The prices at which natural gas is supplied to these different consumer groups are also different. Moreover, the technical considerations involved in supply and distribution of natural gas to the different consumer segments is different.

7.10 The Commission is of the view that natural gas is distinct and distinguishable from other sources of energy in terms of product's characteristics. Natural gas is a flammable gaseous mixture composed mainly of methane which is made available to consumers through a network of pipelines and does not require any storage facilities at the end of these consumers. Further, being almost free from sulphur compounds, natural gas is cleaner, smoke-free and soot-free environmentally clean fuel as compared to liquid hydrocarbons. Being available on tap, natural gas ensures an uninterrupted supply of fuel unlike liquid fuels which need to be periodically transported and stored by



consumers at their premises and natural gas is also considered as more efficient as it burns more completely than other liquid fuels.

7.11 The Commission observes that, as per the government of India pricing order dated 01.07.2005, APM natural gas is meant for a select group of consumers such as consumers of power sector, fertiliser sector, consumers covered under court orders and those having allocation of less than 0.05 MMSCMD of natural gas, therefore, it should not be clubbed with non-APM natural gas to form a single relevant product market. In the instant case, the Informant is an industrial consumer which does not fall under the above categories entitled for supply of APM natural gas and the Informant is procuring natural gas from the Opposite Party which is non-APM. Thus, the DG has rightly segregated the relevant product market on the basis of different pricing policy administered by the Government *i.e.*, APM and non-APM natural gas.

7.12 In the context of defining relevant product market in the instant case, it is pertinent to take into consideration the relevant provisions of the PNGRB (Authorising Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Network) Regulations, 2008 relating to categorisation of consumers based on quantity requirement/consumption. As per the said Regulations, the consumers having requirement of natural gas upto 50,000 SCMD shall be supplied through CGD network, consumers having requirement of natural gas more than 50,000 SCMD and upto 100,000 SCMD shall be supplied through CGD network or through a pipeline not forming part of the CGD network and customers requiring more than 100,000 SCMD natural gas shall be supplied through a pipeline not forming part of the CGD network. Accordingly, consumers of last category *i.e.*, whose requirement is more than 100,000 SCMD can procure natural gas from any of the suppliers through a pipeline, not forming part of the CGD network. However, considering the factual matrix of the present case and evidence available on record the Commission notes that original GSA between the SGL and the Opposite Party was entered into between the SGL and Opposite Party on



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15.06.2007 for a contracted quantity of 150,000 SCMD of natural gas which was reduced to 120,000 SCMD in the amended GSA dated 27.01.2011. Moreover, from the DG investigation it is revealed that the Opposite Party is presently supplying gas to the Informant by using CGD network. In this regard the statement of Mr Maqsood Shah, Head-Commercial, GGCL recorded by the DG may be noted wherein he has said that GGCL is supplying gas to the Informant through CGD network because this pipeline network was built in 2005-06 before the PNGRB Regulations, 2008 came into being. Based on above the DG has not segregated the relevant product market on the basis of requirement of natural gas by the Informant in terms of the PNGRB Regulations, 2008.

7.13 Considering all these factors, the Commission in agreement with the DG report, is of the view that 'the supply of non-APM natural gas to the industrial customers' is the relevant product market in the instant case.

7.14 In regards to 'relevant geographic market', the DG has considered areas of 'Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat' as the 'relevant geographic market' in this case because the Opposite Party is authorized to operate its network *i.e.*, to lay and operate the CGD network in the said geographic area. The Informant has argued that the relevant geographic market should be the Jhagadia area as the Opposite Party is charging different prices from the industrial consumers in Jhagadia as compared to other industrial areas in Surat and Bharuch districts.

7.15 The Commission observes that the Opposite Party has been granted infrastructure exclusivity and market exclusivity for the city or local natural gas distribution network in the geographic area of Surat, Bharuch and Ankleshwar under the PNGRB Act and regulations. Accordingly, the Opposite Party supplies natural gas to the eligible industrial customers in said areas by using CGD network. Because of the said regulatory barriers, the Opposite Party is constrained to supply natural gas to the industrial customers



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in the said areas only who are otherwise eligible to get natural gas from it. Moreover, the conditions of competition for supply of natural gas to the industrial customers in the said areas are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring areas. Thus, the 'areas of Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat' may be considered as the relevant geographic market in the instant case. The arguments of the Informant that the relevant geographic market should be the Jhagadia area cannot be accepted as the relevant geographic market cannot be delineated solely on the basis of pricing policy of the Opposite Party.

7.16 Based on the relevant product market and the relevant geographic market definition above, the Commission, in agreement with the DG report, defines the relevant market to be considered in this case as '*the market for the supply of non-APM natural gas to industrial customers in the geographic areas of Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat*'.

Assessment of the position of dominance of the Opposite Party in the Relevant Market

7.17 Explanation (a) to section 4(2) provides that a dominant position means a position of strength, enjoyed by an enterprise in the relevant market to: (a) operate independently of competitive forces or (b) affect its competitors or consumers or the relevant market in its favor. Thus, the underlying principle in assessing dominant position of an enterprise in any relevant market is that whether the enterprise in question can act independently of competitive forces in the relevant market and affect the relevant market in its favour to the detriment of its competitors and consumers.

7.18 To determine whether an enterprise is in a dominant position or not in a relevant market, the Commission may have due regard to all or any of the factors such as market share of the enterprise; its size and resources; size and



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importance of its competitors; its economic power including commercial advantages over competitors; vertical integration of the enterprise or sale or service network of such enterprise; dependence of consumers; whether monopoly or dominant position acquired as a result of any statute or by virtue of being a Government company or a public sector undertaking or otherwise; entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers; countervailing buying power; market structure and size of market; social obligations and social costs; relative advantage, by way of contribution to the economic development, by the enterprise enjoying a dominant position; and any other factor which the Commission may consider relevant for the inquiry.

7.19 The DG has reported that the Opposite Party is a dominant enterprise in the relevant market for supply of non-APM natural gas to industrial customers located in Bharuch (excluding Vagra Taluka) and Surat (excluding Hazira) districts of Gujarat' based on the factors such as market share of the Opposite Party, its size and resources, vertical integration of the Opposite Party or sale service network, its economic power including commercial advantages over competitors, dependence of consumers, authorization granted by PNGRB in favour of the Opposite Party and countervailing buying power of the consumers, *etc.* As per the DG report, the market share in terms of volume and value of gas sales of the Opposite Party in 2010 and 2011 is substantially high compared to its competitors like GAIL, IOCL and GSPC.

7.20 The Informant contended that the Opposite Party holds a near monopoly (over 90%) market share in the more accurate relevant market (*i.e.*, with the geographic market being limited to Jhagadia) and a market share of 47-52% in the widest possible market. Further, the market share has changed only marginally over the years. This clearly establishes that the Opposite Party holds a dominant position.



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7.21 However, the Opposite Party has contended that it is not in a dominant position in the relevant market and industrial customers are also procuring natural gas from its competitors such as GAIL, IOCL, GSPC, etc. The fact that there are other suppliers in the relevant market itself demonstrates that the consumers are not solely dependent on it.

7.22 The Commission perused the DG investigation report and the submissions of the Informant and the Opposite Party on the issue of dominance of the Opposite Party in the relevant market. The DG has arrived at the conclusion that the Opposite Party is a dominant enterprise in the relevant market because of its larger market share, significant size and resources, advantage of vertical integration, commercial advantages over other enterprise, etc. However, the Commission notes that the DG's conclusion in this regard is largely based on market share of the Opposite Party and other factors such as size and resources, size and importance of competitors, vertical integration of the enterprises, dependence of consumers of the Opposite Party, etc. were not analysed in the proper perspective before coming to the conclusion that the Opposite Party is in a dominant position in the relevant market. It has not been thoroughly assessed whether the Opposite Party is operating independently of competitive forces in the relevant market or has the ability to affect the consumers or competitors or the relevant market in its favour. This analysis assumes special significance in view of the fact that the most of the impugned clauses in the GSA are specific to the agreement between the parties to this case and it is nobody's case that the Opposite Party is imposing these conditions on all of its industrial consumers. The Commission is also not oblivious of the fact that SGL/Informant had derived substantial benefits under the restructuring of GSA.

7.23 The Commission observes from the DG report that in the relevant market players such as GSPC, IOCL, GAIL, etc. are operating and competing with the Opposite Party so far as the customers requiring more than 50000 SCMD gas are concerned. As the DG has calculated the market share of the Opposite



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Party in terms of total value and volume of sale taking into account the entire spectrum of customers of the Opposite Party and at the same time excluding the supply of APM gas by GAIL and IOCL in the relevant geographic market the conclusion drawn by the DG may not be depicting true picture of the market shares of the parties. Further, even the Informant has stated the market share of the Opposite Party is in the range of 47-52% in the relevant market and as per DG report the shares of IOCL and GAIL were in the range of 23-31% and 10% respectively in the same period. Further, the GAIL is supplying gas to the Opposite Party. The cumulative result of all these factors shows that on the one hand the market share of the Opposite Party has been calculated without applying any equaliser and on the other the presence of two heavy weights, i.e., IOCL and GAIL commanding consistently close second and third rank is definitely a factor which would constrain the behaviour of the Opposite Party. The Commission also notes that the Opposite Party has only one customer in its kitty which requires more than 1,00,000 SCMD gas and that is SGL/Informant. With the presence of such large companies including some of the 'Navratna' public sector undertakings of the government of India in the relevant market the Opposite Party, merely on the basis of questionable higher market share (based on the volume and value of sales of gas), the Opposite Party cannot be considered to be in a dominant position in the relevant market. Further, in terms of scale of operation, size, resources and economic power competitors of the Opposite Party are far ahead of the Opposite Party. It is amply clear from the following table that in terms of reserves and surplus, turnover, and total assets of the competitors of the Opposite Party such as GAIL, IOCL, and GSPC are much larger than that of the Opposite Party.



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(Rs. in Crores)

Parties & Year → Items ↓	GAIL			IOCL			GSPC			GGCL		
	2009-10	2010-11	2011-12	2009-10	2010-11	2011-12	2009-10	2010-11	2011-12	2010	2011	2012
	As on 31 st December											
Reserves & Surplus	15530.52	17984.86	20356	48124.98	52904.37	55448.75	2938.75	3499.40	4603.11	815.29	758.28	939.80
Total Assets	19668.94	23196.58	39084.68	99875.29	114402.78	209859.75	9606.39	12490.45	16413.46	1139.69	1140.0	1580.00
Income	25558.09	33109.71	40829.83	277756.07	336866.71	401675.68	3896.80	4805.99	8534.80	1871.72	2475.07	3136.23

Source: Annual Reports of the respective Companies.

7.24 Further, the consumers are not entirely dependent on the Opposite Party for supply of natural gas in the relevant geographic market. Since GSPC, IOCL and GAIL are supplying natural gas in the in the relevant geographic market, the consumers are not dependent on the Opposite Party. It is borne out from the fact that Gujarat Guardian switched to GAIL and terminated its contract with the Opposite Party.

7.25 Moreover, the competitors of the Opposite Party are such as GAIL, IOCL etc. are totally vertically integrated. They are operating in all three stages including production, transmission and distribution of natural gas throughout the country. Evidently, in presence of the competitors like GAIL, IOCL, etc., the Opposite Party cannot operate independently in the relevant market or affect the relevant market in its favour. As such the Commission, disagreeing with the DG's findings in this regard, holds that in the relevant market the Opposite Party is not in a dominant position.

7.26 Since Opposite Party is not found to be in a dominant position in the relevant market, there is no need to examine the alleged abusive conduct of the Opposite Party.



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7.27 Accordingly, no case of contravention of the provisions of section 4 of the Act is made out against the Opposite Party and the matter is ordered to be closed forthwith. It is decided accordingly.

7.28 The Secretary is directed to send a copy of this order to the concerned parties accordingly.

Sd/-
(Ashok Chawla)
Chairperson

Sd/-
(S. L. Bunker)
Member

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

Sd/-
(U. C. Nahta)
Member

New Delhi
Date: 23.04.2015