



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN
IN THE MATTER OF
SHOW CAUSE NOTICES ISSUED TO
JAMSHORO JOINT VENTURE LTD (JJVL)
&
LPG ASSOCIATION OF PAKISTAN (LPGAP)
(NO. 3/LPG/DIR(INV)/M&TA/CCP/2009)**

Dates of hearing: September 28, 2009, October 21, 2009

Present: Mr. Khalid A. Mirza
Chairman

Ms. Rahat Kaunain Hassan
Member (Legal)

Dr. Joseph Wilson
Member (M&TA)

**On behalf of
Jamshoro Joint Venture Ltd:** Dr. Parvez Hassan, Advocate Supreme Court
Mr. Ahmad Rafay Alam, Advocate

LPG Association of Pakistan: Nemo

Progas Pakistan Ltd: Mr. Basharat Qadir, Advocate Supreme Court
Mr. Abbas Bilgrami, Chief Executive Officer,
Managing Director
Mr. Omar Saboor, Director

**Sui Southern Gas Company
Ltd (SSGC)** Mr. Mirza Mehmood Ahmed, Advocate

ORDER

1. The Competition Commission of Pakistan (hereinafter referred to as '**the Commission**') took *suo moto* notice of the official report of Oil and Gas Regulatory Authority (hereinafter referred to as the '**OGRA**') regarding Liquefied Petroleum Gas (hereinafter referred to as the '**LPG**') and a number of media reports, news items, along with letter dated July 25, 2008, received from Progas Pakistan Limited (hereinafter referred to as '**Progas**') in order to verify as to whether Jamshoro Joint Venture Ltd (hereinafter referred to as the '**JJVL**') and Liquefied Petroleum Gas Association of Pakistan (hereinafter referred to as the '**LPGAP**') have engaged into actions that independently or jointly, violated Section 3 and Section 4 of the Competition Ordinance, 2007 (hereinafter referred to as the '**Ordinance**').

FACTUAL BACKGROUND

A. PARTIES TO THE PROCEEDINGS

2. Progas Pakistan Limited is a joint venture company between international companies KUB Malaysia Behhad (KUB) share holder of 41% and Progas Energy Limited share holder of 59%. Progas is the first fully integrated LPG Company in Pakistan and largest in terms of investment. Nationally, Progas owns 1/3 of the country's total storage facility. With special relationships amongst LPG producers worldwide, Progas ensures adequate and economical supply of LPG in Pakistan while creating greater price stability. Progas is an undertaking as defined in clause (p) of sub-section (1) of Section 2 of the Ordinance.
3. LPGAP is an association of LPG marketing companies in Pakistan, registered under Section 42 of the Companies Ordinance, 1984 (hereinafter referred to as the '**Companies Ordinance**') with the Securities and Exchange Commission of Pakistan. LPGAP is an informal organization with membership limited to OGRA

licensed LPG marketing companies. The process to incorporate LPGAP as a registered trade organization under the Trade Organizations Ordinance, 2006 is underway and its application is pending with the Director General (Trade Organizations), Ministry of Commerce. LPGAP is an undertaking as defined in clause (p) of sub-section (1) of Section 2 of the Ordinance.

4. JJVL is a public limited company incorporated under the Companies Ordinance on December 18, 2002 with a paid up share capital of Rs 1,650,000,000/-. It is foreign-owned to the extent of 35% shareholding. JJVL has so far made an investment of US\$100 million, which is the largest investment made in Pakistan's LPG sector. JJVL is also an undertaking as defined in clause (p) of sub-section (1) of Section 2 of the Ordinance.
5. Sui Southern Gas Company Limited (hereinafter referred to as 'SSGCL') is Pakistan's leading integrated gas company. The company is engaged in the business of transmission and distribution of natural gas besides construction of high pressure transmission and low pressure distribution systems.
6. OGRA has been set up under the Oil and Gas Regulatory Authority Ordinance, 2002 (hereinafter referred to as the 'OGRA Ordinance'), to inter alia foster competition, increase private investment and ownership in the midstream and downstream petroleum industry, protect the public interest while respecting individual rights and provide effective and efficient regulations.

B. ENQUIRY, SHOW CAUSE NOTICES, REPLIES:

7. Progas in its letter dated 25-07-2008, addressed to Chairman OGRA and copied to the Chairman of the Commission leveled serious allegations of cartelization and predatory pricing against some undertakings in the LPG industry.

8. The rapid increase in price of LPG was also highlighted in the press clippings, and the Commission deems it appropriate to conduct an enquiry into the matter and vide its resolution dated November 28, 2008 constituted an **Enquiry Committee** and directed them to compile and submit a comprehensive report on the allegations of anti-competitive practices in the LPG sector of Pakistan.
9. Progas was approached to obtain further information in this regard. In response Progas provided the Commission with pricing and other information that shed further light on the matter. Meetings of the Committee with Progas took place on 29 September 2008 and 6 November 2008 and again in December 2008.
10. The Enquiry committee also took into consideration the official report of OGRA regarding LPG¹ and a number of media reports and news items. It also considered the views of Mr. Irfan Khokhar, Chairman of the LPG Distributor's Association of Pakistan (hereinafter '**LPGDAP**').
11. The Enquiry Committee after analyzing all the material available on the record completed the Enquiry by producing Enquiry Report dated March 5, 2009 (hereinafter referred to as the '**Enquiry Report**'). The Enquiry Report concluded as follows:

- *From perusal of all the information and evidence available, it is concluded that JJVL and LPGAP have abused their dominant position by violating Section 3(1) read Section 3 (3) and Section 3 (3) (g) of the Ordinance by creating conditions which exclude Progas from competing in the relevant market.*

¹ State of the Regulated Petroleum Industry 2007-2008, OGRA

- *Moreover, JJVL has violated section 4(1) read with Section 4 (2) (a) of the Ordinance by being part of and leading a cartel engaged in price fixing.*
- *However, while there is indication that other LPG producers might be involved in a horizontal cartel with JJVL; the same cannot be concluded with certainty.*
- *JJVL, LPGAP and its members have violated Section 3 (1) read with Section 3 (2) and Section 3 (3) (d) & (e) of the Ordinance by charging premiums and third party commission from marketing companies without allocations. They have simultaneously violated Section 4 (1) read with Section 4 (2) (f) & (g) of the Ordinance on basis of the same actions.*
- *Furthermore, LPGAP and members of LPGAP have violated Section 4(1) read with Section 4 (2) (a) of the Ordinance by being part of a cartel engaged in price fixing.*
- *The associated marketing companies of JJVL, LPGAP and its members have violated Section 4(1) read with Section 4 (2) (a) of the Ordinance by being part of a cartel engaged in price fixing and by ensuring implementation of the price fixing decisions.*

12. On the above said findings and in light of public interest it was recommended by the Enquiry Committee to initiate proceedings under Section 30 of the Ordinance against JJVL, LPGAP and Members of LPGAP.

13. The Commission taking into account the recommendation of the Enquiry Committee and the public interest surrounding the case, decided to initiate proceedings under Section 30 of the Ordinance against JJVL and LPGAP. Show

Cause Notices No. 51 & 52 of 2009 dated March 20, 2009 were issued to LPGAP and JJVL respectively. Both LPGAP and JJVL were required to file written reply to the Show Cause Notice within fourteen days of the Show Cause Notice and also opportunity of being heard was also provided to them on April 15, 2009. Relevant paragraphs of the Show Cause Notices issued are reproduced below:

Show Cause Notice to LPGAP:

“8. **WHEREAS**, in terms of the Enquiry Report, the Undertaking appears to have entered into a vertical collusion/cartel with JJVL with the aim to fix prices and also to keep the LPG importers out from competing in the relevant market through its exclusionary conduct, thereby acting in contravention of Section 4(1) read with Section 4(2)(a), and Sections 3(1) read with 3(2) and 3(3)(g) of the Ordinance, respectively;

9. **WHEREAS**, in terms of the Enquiry Report, the Undertaking engages in price fixing primarily through announcements and statements in the newspapers, which has also been termed by OGRA as 'illegal' and is tantamount to cartelization. Also, there are media reports wherein the Undertaking and JJVL express their desire to maintain a 'fair price mechanism' in the relevant market at times quoting the LPG price, thereby prima facie keeping the price within a targeted range;

10. **WHEREAS**, the collusion and collaboration in price fixing LPG is substantiated inter alia from the fact that: a) many directors of JJVL and their relatives are directors or owners of marketing companies who are members of the Undertaking b) the chairman of the Undertaking is also the chairman of JJVI. And c)

the Undertaking operates from the JJVL's office in Lahore thus, prima facie establishing a collusive nexus between the Undertaking and JJVL in terms of the Enquiry Report;

11. **WHEREAS**, *in terms of the Enquiry Report, the concerted efforts on part of the Undertaking and JJVL has resulted in the implementation of a pricing mechanism that prices LPG at such a level which makes sale and distribution of imported LPG not viable thereby excluding importers as a competitor in the relevant market.*

12. **WHEREAS**, *the exclusion of importers from competing in the relevant market on part of the Undertaking and JJVL is not only detrimental to the consumers but has adverse economic consequences. The hold of JJVL on the relevant market through collusion with the Undertaking and exclusionary conduct against LPG importers does not allow competitive prices to prevail therein, thus subjecting the consumer to suffer inter alia LPG shortages, volatile supply and higher prices which otherwise may not prevail in a competitive environment;*

13. **WHEREAS**, *it has been found in the Enquiry Report that the undertaking through its members who are allottees of JJVL along with JJVL, is and has been engaged in practices whereby premium or commission is charged from marketing entities that do not have allocations with the JJVL;*

14. **WHEREAS**, *it is the responsibility and obligation of the Competition Commission of Pakistan under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect*

consumers from anti-competitive behavior including deceptive marketing practices;

15. **WHEREAS**, in view of the foregoing the Commission is satisfied that there has been and/ or is likely to be a violation or Section 4(1) in terms or Section 4(2)(a),(f)&(g) of the Ordinance and Section 3(1) read with Sections 3(2) & 3(3)(d)(e)&(g) of the Ordinance;”

Show Cause Notice to JJVL:

6. **WHEREAS**, according to the Enquiry Report, the Undertaking prima facie has been found to hold a dominant position in terms of section 2(1)(c) of the Ordinance inter alia being the biggest producer of LPG coupled with its entitlement to access LPG sources at reduced costs and enjoying control along with its subsidiaries, namely Mehran LPG (Private)Limited and Lub Gas (Private),over the largest share in the relevant market has the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers;

7. **WHEREAS**, LPGAP is the largest association of marketing entities having almost 71 members, out of which approximately 30 members have market allocations as allottees with the undertaking;

8. **WHEREAS**, INTERMS OF THE Enquiry Report the Undertaking prima facie appears to have entered into vertical collusion/cartel with LPGAP with the aim to fix prices and also to keep the LPG importers out from competing in the relevant market through its exclusionary conduct, thereby acting in contravention

of Section 4(1) read with Section 4(2)(a), and Section 3(1) read with 3(2) and 3(3)(g) of the Ordinance, respectively;

9. **WHEREAS**, in terms of the Inquiry Report LPGAP engages in price fixing primarily through announcements and statements in the newspapers which has also been termed by OGRA as illegal and is tantamount to cartelization. Also there are media reports wherein the Undertaking and LPGAP express their desire to maintain a 'fair price mechanism' in the relevant market, at times quoting the LPG price, thereby prima facie keeping the LPG prices within a targeted range;

10. **WHEREAS**, the collusion and collaboration in price fixing of LPG is substantiated inter alia from the fact that: a) many directors of the Undertaking and their relatives are directors or owners of marketing companies who are members of LPGAP b) the chairman of the Undertaking is also the chairman of the Undertaking is also the chairman of LPGAP and c) LPGAP operates from the Undertaking's office in Lahore thus, prima facie establishing a collusive nexus between the Undertaking and LPGAP in terms of the Enquiry Report.

11. **WHEREAS**, in terms of the Enquiry Report, the concerted efforts on part of the Undertaking and LPGAP has resulted in the implementation of a pricing mechanism that prices LPG at such a level which makes sale and distribution of imported LPG not viable thereby excluding importers as a competitor in the relevant market;

12. **WHEREAS**, the exclusion of importers from competing in the relevant market on part of the Undertaking and LPGAP is not

only detrimental to the consumers but has adverse economic consequences. The hold of the Undertaking on the relevant market through collusion with LPGAP and exclusionary conduct against LPG importers does not allow competitive prices to prevail therein, thus subjecting the consumer to suffer inter alia LPG shortages, volatile supply and higher prices which otherwise may not prevail a competitive environment;

13. **WHEREAS**, *it has been found in the Enquiry Report that the Undertaking, along with its allottees who are members of LPGAP, is and has been, engaged in practices whereby premium or commission is charged from marketing entities that do not have allocations with the undertaking:*

a) charging of premium by Undertaking from such entities results in applying dissimilar conditions, thereby placing such entities at a disadvantage as against marketing entities who have allocations with Undertaking which is in violation of Section 3(1) in terms of Section 3(2) read with and 3(3) (e) and 4(1) read with 4(2)(f) of the Ordinance;

b) charging of commission by the Undertaking from such entities whereby payments are required to be made to third parties amounts to making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage have no connection with the subject of such contracts, thus prima facie violating Section 4(1) read with section 4(2)(g) of the Ordinance;

14. **WHEREAS**, it is the responsibility and obligation of the Competition Commission of Pakistan (hereafter referred to as the “Commission”) under the Ordinance to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behavior:

15. **WHEREAS**, in view of the foregoing the Commission is satisfied that there has been and/or is likely to be a violation of Section 4(1) in terms of Section 4(2)(a)(f)&(g) of the Ordinance and Section 3(1) read with Section 3(2)& 3(3)(d)(c)&(g) of the Ordinance.

14. In response to the Show Cause Notices Dr. Parvez Hassan, Counsel for both LPGAP and JJVL vide his letters dated April 1 & 2, 2009, requested for extension of time to file replies to the Show Cause Notices and also sought adjournment of the hearing. The Commission, in its letter dated April 6, 2009, acceding to the request of the counsel extended the date to file the Reply to the Show Cause Notices by May 1, 2009 and also rescheduled the matter for May 14, 2009. Hearing in matter was again re-scheduled for May 19, 2009 *vide* Commission’s letter dated April 22, 2009.
15. The Counsel for LGPAP and JJVL vide his letter dated April 24, 2009 requested for four weeks extension on medical grounds for filing Replies to the Show Cause Notices. The Commission again acceding to his request adjourned the matter for June 9, 2009 and counsel was advised to file Reply to the Show Cause Notice one week prior to the date of hearing.
16. Thereafter, LPGAP engaged Mr. Aitzaz Ahsan of Aitzaz Ahsan & Associates and filed a Writ Petition No. 9518/2009 in the Honorable Lahore High Court, Lahore, (hereinafter referred to as the ‘LHC’) challenging therein *inter alia* the *vires* of

the Ordinance, the jurisdiction of the Commission and the Show Cause Notice. The LHC issued notices on May 18, 2009 and on May 27, 2009, the LHC was pleased to suspend the operation of the Show Cause Notice issued to LPGAP, notice was issued to Attorney General in terms of Order XXVII of C.P.C and the matter was adjourned for July 2, 2009.

17. Dr. Parvez Hassan, vide his letter dated May 27, 2009 informed the Commission that LPGAP has engaged the services of Mr. Aitzaz Ahsan and they have filed a Writ Petition in LHC and the LHC has suspended the operation of the Show Cause Notice issued to LPGAP. It was further stated that, as Show Cause Notice issued to LPGAP has been suspended by the LHC, which is substantially similar and based on the same facts, as the Show Cause Notice issued to JJVL. The Commission would not expect JJVL to submit reply to its Show Cause Notice on the dates directed by the Commission. Although written reply to the Show Cause Notice had been finalized for submission to the Commission before June 2, 2009.
18. The Commission vide its letter dated June 1, 2009 informed JJVL's Counsel that in view of the LHC's order dated May 27, 2009 the Commission would not proceed with the Show Cause Notice until further orders are passed by the LHC in this regard.
19. The Commission assailed the Order of LHC, suspending the operation of the Show Cause Notice before the Honourable Supreme Court of Pakistan (hereinafter referred to as 'SCP') in C.P No. 1022/2009. The SCP vide its order dated June 25, 2009 set aside the order dated May 18, 2009 passed by the LHC. The SCP ordered as follows:
 - a. *"Impugned order dated 18-05-2009 to the extent of interim injunction, whereby operation of the impugned Show Cause Notice has been stayed, is set aside.*

- b. Learned High Court first of all shall dispose of the question of its jurisdiction, raised by the petition by submitting application, before it.*
- c. If the High Court assumes the jurisdiction, then speaking order shall be passed on the stay application after hearing both the parties.*
- d. Till the decision of the question of jurisdiction of the High Court, no adverse action shall be taken by the petitioner against the respondents.*
- e. If the High Court declines to assume its jurisdiction then it shall grant time to respondents for filing of reply and till filing of reply of the Show Cause Notice by the respondents, no adverse action shall be taken against them.”*

- 20. Pursuant to the decision of the SCP, the Commission vide its letters dated July 1 & 3, 2009 requested JJVL and LPGAP to file the reply to the Show Cause Notices within fourteen days from the date of receipt of the letters.
- 21. JJVL’s Counsel vide its letter dated July 2, 2009 stated that as directed by the Commission the reply will be submitted by July 15, 2009. However on July 4, 2009 JJVL’s Counsel took a u-turn and insisted that as per the decision of the SCP, they were not required to file a reply to the Show Cause Notice and the Commission was in contempt of SCP decision. Meanwhile, LHC vide its detailed order dated July 2, 2009 assumed the jurisdiction. LPGAP also vide its letter dated July 8, 2009 accused the Commission of being in contempt of the SCP’s decision by requiring a reply.
- 22. The Commission in pursuance of the SCP’s order fixed the matter for hearing on August 7, 2009 at Commission’s office vide Hearing Notices dated July 24, 2009 issued to both JJVL and LPGAP. It was also intimated that despite several reminders no replies have been furnished.

23. In response to the Hearing Notices JJVL's counsel vide its letter dated July 25, 2009 stated that with the assumption of the jurisdiction by the LHC, it is their opinion that the letter and spirit of the order of the SCP dictates that no reply to the Show Cause Notice No. 52 be sought from them till final decision by the LHC in WP No. 9518/09. They further stated that order of the SCP protected JJVL from "*any adverse action*", including the requirement to file a reply to the Show Cause Notice No. 52 until such time as the LHC passed an order with respect to its jurisdiction. They also sought withdrawal of the Commission's letter dated July 1, 2009 and Hearing Notice dated July 24, 2009.
24. LPGAP also replied to the Hearing Notice through its counsel on July 28, 2009, stating that the contents of Hearing Notice are a reproduction of the letter served on JJVL. It was also alleged that the Commission is trying to proceed in 'unholy haste' in hearing them, harassment, usurpation of the constitutional courts powers, personalization of the matter on instance of a third party and an over zealous keenness to deprive them of the right to be heard.
25. The Commission, vide its letter dated July 31, 2009 informed JJVL that as per the advised of their Counsel, refusal to file a reply to the Show Cause Notice No 52 of 2009 borders on contempt of the SCP's order dated 25-06-2009. JJVL was also informed that non-appearance before the Commission would be construed as forfeiting the right to file the reply and if JJVL did not appear on the said date of hearing the Commission would proceed in accordance with law.
26. Similarly LPGAP was informed vide Commission's letter dated July 31, 2009 and position was clarified to LPGAP regarding Dr. Parvez Hassan's letter dated April 24, 2009 as communicated to the Commission. LPGAP was also informed that non-appearance before the Commission would be construed as forfeiting the right to file the reply and if LPGAP did not appear on the said date of hearing through an authorized representative the Commission would proceed in accordance with law.

27. LGPAP through its counsel's letter dated August 3, 2009 replied once again accusing the Commission of *mala fide*, harassment and undue haste. They reiterated that according to the order of SCP dated June 25, 2009, it is only for the LHC to determine the period during which LPGAP will be required to file a reply to the Show Cause Notice. The Commission has no jurisdiction to do so. As such, the Commission's contentions that LGPAP's refusal to file a reply will be construed as forfeiting its right to reply have no merit. They also called upon the Commission to withdraw its letter dated July 31, 2009 or else Commission will be violating the order of the SCP in letter and spirit.
28. JJVL through its counsel's letter dated August 5, 2009 requested for adjournment of the matter as he is leaving for New York for a pre-planned annual vacation. He also stated that LHC has extended the stay order against the Commission in the separate Writ Petitions filed by both the undertakings i.e. JJVL and LPGAP. The Commission vide its letter dated August 6, 2009 informed JJVL's counsel that there is no stay or bar against the Commission in proceeding with the hearing. As far as their request for adjournment was concerned the Commission adjourned the matter for next week and fixed the matter for August 13, 2009.
29. LPGAP also vide its counsel's letter dated August 6, 2009 informed that in WP No. 9518/2009 [Civil Miscellaneous Application No. 3356 of 2009] titled LPGAP v/s Federation of Pakistan, the LHC has been pleased to restrain the Commission from taking any adverse action against LPGAP.
30. JJVL through its counsel's letter dated August 7, 2009 informed the Commission they have filed Writ Petition No. 15493/2009 in the LHC in which they have challenged *inter alia* the *vires* of the Ordinance, the jurisdiction of the Commission and the legality of the Show Cause Notice No. 52 issued to JJVL. The LHC issued notices and suspended the operation of the Show Cause Notice.

31. The Commission assailed the Order of LHC suspending the Show Cause Notice issued to JJVL in W.P No. 15493/2009 before the SCP in C.P. No. 1694/2009. SCP vide its order dated September 16, 2009 set aside the order passed by the LHC in the aforesaid petition on the statement of the statement of the Commission's Counsel that if an adverse order is passed, it will not be implemented. Accordingly both LPGAP and JJVL were issued Hearing Notices dated September 16, 2009 and the matter was fixed for hearing on September 28, 2009. They were also required to file reply to the Show Cause Notice by September 25, 2009.
32. JJVL vide its counsel's letter dated September 17, 2009 informed the Commission that it will comply both the directions, whereas LPGAP vide its letter dated September 19, 2009 and through its counsel letter dated September 24, 2009 submitted its preliminary reply to the Show Cause Notice. They also provided the name of their representatives only to observe the proceedings on their behalf on 28-09-2009. LPGAP's counsel letter dated September 19, 2009 was replied through Commission's counsel letter dated September 26, 2009.
33. The Commission in response to the LPGAP letter, informed LPGAP vide its letter dated September 25, 2009 that it will proceed with the matter on the date notified to them earlier. As per Regulation 26(2)(a) of the Competition Commission (General Enforcement) Regulations, 2007 the case has to be presented by the parties concerned or an authorized representative in this behalf. Any person appears for or on behalf of LGPAP has to be fully conversant with the facts of the case. LGPAP vide its counsel's letter dated September 26, 2009 reiterated same grounds and refused to recognize the jurisdiction. They also held Commission responsible for subverting the judicial process by seeking to impose, without any cause or justification, Commission own authority over and above of the superior courts of Pakistan in violation of the orders of and commitments given before the competent courts. They also refused to attend the hearing on September 28, 2009. LPGAP's counsel vide its letter September 28, 2009 also informed the

Commission that they have initiated contempt of court proceedings against the Commission before the LHC and filed a Crim. Orig. Petition titled 'LGP Association of Pakistan v/s Khalid Mirza and Ikram ul Haque Qureshi'.

34. JJVL through its counsel filed a preliminary reply to the Show Cause Notice vide its letter dated September 24, 2009, salient points of the preliminary reply are as under:

- (i) The Ordinance is *ultra vires* the constitution being beyond the legislative competence of the Federation and all the proceeding purportedly initiated or conducted there under are thus without jurisdiction and void *ab initio*;
- (ii) Without prejudice to the above, the Ordinance stands lapsed;
- (iii) Section 41 and 42 of the Ordinance are *ultra vires* the Constitution and liable to be struck down. There is no effective appellate remedy or relief against any order that may be passed by the Commission and any proceeding there under will render a mere sham exercise without any lawful basis;
- (iv) Section 31 (a) of the Ordinance, which deals with Orders that might be passed by the Commission on findings an abuse of dominant position, is void for vagueness and uncertainty and also suffers from excessive delegation;
- (v) It follows from the foregoing that the Enquiry Report, the Show Cause Notice and the Impugned Proceedings are also bad in law in so far as they are based on the Ordinance. Once the Ordinance is held to be unconstitutional the Enquiry Report, the Show Cause Notice and the Impugned Proceedings would become void;

- (vi) The Commission has no jurisdiction over the matter of pricing of LPG or the maintenance of competition in the LPG market. Jurisdiction over both functions has clearly been conferred upon OGRA by Oil and Gas Regulatory Authority Ordinance, 2002 (the 'OGRA Ordinance'), reference in this regard may be made, *inter alia*, to the preamble and Sections 2(xiii), 2(xxii), 2(xxvi), 6(2)(g) (i) (k) (p) (q) (r) (s) (t) (w), 7, 21, 22, 23, 43, and 44 (3) of the OGRA Ordinance;
- (vii) The Enquiry, Enquiry Report, Show Cause Notice, and Impugned Proceedings all violate the jurisdiction of OGRA and are, therefore, against the law;
- (viii) Progas had itself filed a writ petition no. D-41/2008 before the Honourable Sindh High Court (hereinafter referred to as the SHC) and the same was disposed off vide Order dated 15-02-08 on the basis of joint statement that an appeal would be filed by Progas before OGRA. The Appeal was duly filed. All the points of Enquiry were raised in the Memorandum of Appeal. The appeal was dismissed vide order dated 07-03-08. Progas has raised its grievance before the Commission with the aim to circumvent the order dated 07-03-08 passed by OGRA;
- (ix) It is clear from the language of Section 43 of the OGRA Ordinance that Commission has no jurisdiction to deal with the matter, as it is a well settled proposition of law that where a special law applies the operation of general law is excluded, therefore, the Enquiry Report, the Show Cause Notice and the Impugned Proceedings are without jurisdiction and of no legal effect;

- (x) Even if it is assumed that Commission has jurisdiction over the matter, the Enquiry Report and the Show Cause Notice are incompetent in the absence of the Federal Government, OGRA, SSGCL and other producers of LPG;
- (xi) The Enquiry was not conducted by the Commission as provided in Section 37 of the Ordinance and the powers to conduct Enquiry cannot be delegated under section 28 (2) of the Ordinance, to the Officers of the Commission appointed under Section 23 (1) of the Ordinance;
- (xii) Even if it is assumed that the Commission had the power to validly delegate its powers to conduct enquiries to its, officers and assuming it had done the same in the instant case, the Commission's decision to order enquiry was an arbitrary and irrational exercise of power and jurisdiction, rendering the enquiry, the Enquiry Report and the Show Cause Notice null and void *ab initio*;
- (xiii) The Enquiry and the Enquiry Report are unilateral and bad for violating the principles of natural justice i.e., *audi alteram partem*;
- (xiv) The Enquiry Committee and the Commission with the pre-determined and prejudiced minds, and irrespective of the final determination, have decided to persecute JJVL at the behest of Progas and Mr. Irfan Khokhar, therefore, the Enquiry, the Enquiry Report and the Impugned Proceedings all suffer from *mala fide*, bias and malice;
- (xv) The requirements of Section 30 of the Ordinance (satisfaction of the Commission that there has been or likely to be a contravention of the Ordinance) and Section 37 (4) of the Ordinance (Public

interest) has not been addressed at all, therefore, the Show Cause Notice and the Impugned Proceedings are without lawful authority and of no legal effect;

(xvi) The Impugned Show Cause Notice has been issued by the Registrar of the Commission and not by the Commission itself, which is contrary to the provisions of Section 30 of the Ordinance, which empowers the Commission to issue a Show Cause Notice;

(xvii) The Enquiry Report, and by extension, the Show Cause Notice are against the law laid down in D.G. Khan Cement Company Limited vs. Monopoly Control Authority, PLD 2007 Lahore 1.

It is pertinent to mention here that the Show Cause Notice was issued to JJVL and LPGAP on March 5, 2009 and although JJVL's counsel informed the Commission vide its letter dated July 02, 2009 that the reply is final and will be filed shortly still it was not filed until September 25, 2009 i.e., only three days prior to the hearing and almost after a period of 203 days.

35. The first hearing in the matter was held on September 28, 2009. Dr. Parvez Hassan, Advocate along with Mr. Ahmed Rafay Alam, appeared before the Commission on behalf of JJVL and argued their case at length reiterating the arguments made in their written reply. No one appeared on behalf of LPGAP, whereas Progas was represented by Mr. Abbas Bilgrami, Chief Executive Officer/Managing Director along with Mr. Omar Saboor, Director Mr. Basharat Qadir, Counsel for Progas was also present during the hearing. Dr. Parvez Hassan also filed applications to implead OGRA and SSGCL in the proceedings as parties. He also filed application for production of basis of competence of the Enquiry Committee and requested the Commission for providing JJVL a copy of an order or notification of the Commission, if any, by which the Commission purportedly delegated its power to conduct the *suo moto* inquiry to the Inquiry Committee.

36. The Commission vide its letter dated 30-09-2009 forwarded a copy of the Enquiry Report to OGRA, inviting their comments. JJVL's Counsel was also informed vide letter dated September 30, 2009 that if he wish to make any further submissions in addition to the submissions already made before the Commission, he could file it by October 5, 2009.
37. Progas was also directed vide letter dated September 30, 2009 to file its submissions on the points raised by JJVL during hearing and in particular the following by October 5, 2009:
- *“The extent of ‘control’ that JJVL has over LUB Gas (Pvt.) Limited and Mehran Gas (Pvt.) Limited.*
 - *The alleged dominance of JJVL in the relevant market.*
 - *Whether the alleged exclusion of Progas from the relevant market occurred at production level or consumer level and how it has the object or effect of preventing, restricting or reducing competition within the relevant market.*
 - *Please elucidate, how and when precisely the de-linking of CP price took place (in terms of the record and/or as known in the industry)?*
 - *On what basis Progas asserts that the de-linked price mechanism excludes import of LPG.*
 - *Your perspective (along with relevant material) of the alleged collusive behaviour between JJVL and LPGAP.”*
38. In response to the Commission's letter dated September 30, 2009, JJVL's Counsel vide his letter dated September 30, 2009 stated that they filed their Preliminary Objections on September 25, 2009 and appeared before the Commission on

September 28, 2009. They await the orders of the Commission on their Reply and arguments and in the view of the legal infirmities and apparent *mala fides* in the matter, the Commission may not proceed further in the matter. They also stated that they are reporting to LHC in their WP No 15493/2009 that they had complied with the orders dated 16-09-2009 of the Supreme Court and the orders of the same date of the Commission in terms of their reply dated September 25, 2009.

39. The Commission vide letter dated October 5, 2009 informed JJVL that they were required to file a reply in the subject proceedings which was received on 25-09-2009 and included submissions on merit as well as objections relating to '*legal infirmities and malafides*'. JJVL along with other parties concerned were informed during hearing that any or all objections will be dealt with in the final order. They were also informed about the next date of hearing which was fixed for October 21, 2009 at Lahore on the request of their counsel. JJVL responded vide its letter dated October 7, 2009 and stated that it had misunderstood the communication during the hearing on September 28, 2009 and it now understand that objections raised by them during hearing will be dealt in final order. JJVL also thanked the Commission for scheduling the hearing at Lahore on October 21, 2009 and conveyed their courtesy and gratitude to Chairman of the Commission for this courtesy.
40. The Commission vide its letter dated October 9, 2009 also forwarded a copy of the Enquiry Report to SSGCL and invited there comments, as well. JJVL, Progas, LPGAP, OGRA and SSGCL were also informed vide hearing notices dated October 9, 2009 that hearing in the matter has been fixed for October 21, 2009.
41. Meanwhile Commission informed accordingly all the concerned parties about the change of venue from Islamabad to Lahore vide letters dated October 9, 2009. SSGCL was also requested to provide its comments on the Enquiry Report by October 15, 2009. Copies of Enquiry Report along with Show Cause Notices were forwarded to them with the letter. LGPAP, OGRA and SSGCL were intimated

- about the venue of the hearing vide Commission's letter dated October 16, 2009. OGRA and SSGCL were also requested to provide their comments at their earliest.
42. Progas provided their comments through their counsel's letter dated October 19, 2009 in response to Commission's letter dated September 30, 2009. SSGC also filed their comments on October 19, 2009, through their counsels Mr. Abid Hassan Minto and Mirza Mahmood Ahmad.
43. JJVL vide its counsel's letter dated October 15, 2009 filed the detailed reply to the Show Cause Notice. LGPAP vide its counsel's letter dated October 20, 2009 repeated its contention that they did not recognize Commission's authority or jurisdiction to proceed in the matter and will not do so until all remedies before the competent superior courts are exhausted as per its rights and *locus standi*.
44. On October 21, 2009 Dr. Parvez Hassan, along with Mr. Ahmed Rafay Alam, appeared before the Commission on behalf of JJVL and argued their case at length. No one appeared on behalf of LPGAP, whereas Progas was represented by Mr. Abbas Bilgrami, Chief Executive Officer/Managing Director along with Mr. Tariq Gilani and Tanveer Mehdi. Mr. Basharat Qadir, counsel for Progas was also present during the hearing. SSGC was represented by Mirza Mahmood Ahmed Baig, whereas no one appeared on behalf of OGRA.
45. JJVL's counsel vide its letter dated October 21, 2009 submitted that during the hearing on 21-10-2009 they have received the comments of SSGC but they have still not received the comments of Progas to their reply. Nevertheless he will endeavor to meet the rigorous deadline of October 26, 2009. The counsel of JJVL also submitted that it is their expectation then when all the replies have been exchanged by the parties they will be given an opportunity of hearing to address their arguments in support of their reply and the comments on such reply and the Enquiry Report by SSGC and Progas. They also stated that in response to implead

OGRA as proper and necessary party the Commission has sent a notice to OGRA and some other parties. The counsel requested for another opportunity of being heard in the interest of justice.

46. The Commission vide its letter dated October 26, 2009 extended the time for filing comments from October 26, 2009 to October 29, 2009, due to delay in filing of comments by Progas and parties were informed accordingly. Meanwhile Progas filed its comments on the reply of JJVL through their counsel's letter dated October 24, 2009. Progas also filed comments on SSGC's comments on October 29, 2009. Similarly reply to the comments submitted by SSGC to the Enquiry Report was also filed by JJVL through its counsel on October 27, 2009.
47. OGRA vide its letter dated October 26, 2009 informed the Commission that their Chairman is currently out of the country and that upon his return in the first week of November 2009, the requisite comments will be furnished accordingly. JJVL's counsels vide its letter dated October 26, 2009 requested for extension of time to file rejoinder to the Para wise comments of Progas till October 31, 2009 and the Commission acceding to their request extended the time for filing comments from October 29, 2009 from October 31, 2009. The rejoinder was filed by JJVL vide its counsel's letter dated October 31, 2009.
48. OGRA was informed vide Commission's letter dated November 2, 2009 to file their comments (if any) latest by November 5, 2009. OGRA filed the comments vide letter bearing no. OGRA-LPG-17(141)/09 dated November 4, 2009 which were forwarded to the concerned parties by Commission accordingly. The contents of the covering letter of OGRA are as follows:

“ Reference the CCP's letters bearing no. 03/LPG/DIR(INV)M& T.A./CCP/09 dated September 30, 2009 and dated October 16, 2009 on the subject above.

2. *It may please be appreciated that the Oil and Gas Regulatory Authority performs its functions under OGRA Ordinance, rules made thereunder and the policy of the Federal Government in the matter. Under the rules, policy, the Authority regulates the LPG Sector and monitors its prices and ensures that LPG consumer price remain reasonable and that the producer prices do not exceed Saudi CP. The Authority has no role in policy making or any changes brought therein.*

3. *The CCP started proceedings in the subject matter without taking any input from the Authority which in fact was not required and same was the case throughout the whole course of proceedings which is now at very advance stage. Therefore, though it seems inappropriate to ask for the comments of the Authority at this belated stage especially when the CCP is not required to do so, nevertheless, same are enclosed herewith.”*

49. An Application requesting for another opportunity of hearing on basis of the fact that replies of Progas and SSGCL had been received after the hearing of October 21, 2009 and it would be in the interests of justice that another hearing be held was filed vide JJVL’s Counsel letter dated November 2, 2009.
50. Another application under Section 151 of the Code of Civil Procedure, 1908 for permission to produce evidence and lead witnesses in support of its submission and to rebut and cross-examine the evidence and witnesses relied upon by the Enquiry Committee was filed by JJVL’s counsel vide its letter dated November 16, 2009.

C. **ISSUES**

51. The material issues that emerge from the submissions made by the parties are as follows:

Constitutional:

- (i) Whether the Ordinance has lapsed in terms of Article 89 of the Constitution after a period of 120 days; and whether the Ordinance is ultra vires the Constitution, and beyond the legislative competence of the Federal legislature?
- (ii) Whether section 31 (a) of the Ordinance, which deals with Orders that might be passed by the Commission on findings of abuse of dominant position, is void for vagueness and uncertainty and also suffers from excessive delegation?
- (iii) Whether the right of appeal provided under section 41 is illusory as alleged and hence ultra vires the Constitution by virtue of, allegedly, not providing right of appeal before an independent judicial forum?
- (iv) Whether by providing a right of appeal to the Supreme Court and hence enlarging the jurisdiction of the apex court section 42 of the Ordinance is *ultra vires* the Constitution?

Procedural & Jurisdictional:

- (v) Whether the Commission has jurisdiction to take cognizance of the alleged conduct?

- (vi) Whether Federal Government of Pakistan through Ministry of Petroleum and Natural Gas, OGRA and SSGL are proper and necessary parties for the proceedings?
- (vii) Whether the Commission can delegate its powers to its Officers for conducting Enquiry and issuance of the Show Cause Notice on its behalf?
- (viii) Whether the Commission acted in a partisan manner and with *mala fide* intentions in initiating the proceedings against JJVL & LPGAP?
- (ix) Whether the conduct of Enquiry and Issuance of a Show Cause Notice amounts to '*taking of adverse action*'?

Legal:

- (x) Whether or not JJVL occupies the “dominant position” in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007?
- (xi) Whether or not LPGAP occupies the “dominant position” in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007?
- (xii) Whether JJVL and LPGAP, severally have abused their dominant position:
 - (a) by creating conditions which excludes undertakings from competing in the relevant market hence violating Section 3(1) read Section 3 (3) and Section 3 (3) (g) of the Ordinance

(b) by charging premiums and third party commission from marketing companies without allocations hence violating Section 3 (1) read with Section 3 (2) and Section 3 (3) (d) & (e) of the Ordinance?

(xiii) Whether JJVL and LPGAP along with its members

(a) entered into any prohibited agreement towards achieving targeted prices hence violating section 4(1) read with Section 4 (2) (a) of the Ordinance ?

(b) entered into any prohibited agreement for charging premiums and third party commissions without allocations hence violating Section 4 (1) read with Section 4 (2) (f) & (g)?

D. DELIBERATION AND ANALYSIS

52. With respect to Issues (i) to (iv) above, we find ourselves in Agreement with the view taken by the Single Member of the Commission in *Banks' cartelization* case and in the *Stock Exchanges case* regarding placing/fixing a price floor for securities, which were subsequently followed in the matter of Karachi Stock Exchange (G) Ltd. *abuse of dominance case*. We also consider it relevant to refer to some of the excerpts from the judgment of the Superior Courts as relied upon by the Single Member in the said case of the Stock Exchanges. It is important to refer to the judgment of the full bench of the Supreme Court of Pakistan in *Pir Sabir Shah v. Shad Muhammad Khan, Member Provincial Assembly N.W.F.P.* (P.L.D 1995 Supreme Court 66), where the Court examined the question whether a tribunal is the competent forum to adjudicate on the constitutional *vires* of law under which it has been created. The Court noted as follows:

"...there is distinction between a provision of a statute, which creates a Special Tribunal and a provision of such statute which specifies disputes/matters over which such a Special Tribunal will

have jurisdiction. The Special Tribunal so created cannot decide that the provision under which it has been created is ultra vires the Constitution or that its appointment/constitution is defective or invalid.” (Emphasis added).

53. The *Pir Sabir Shah* Court discussed the case of *Akhtar Ali Parvez v. Altafur Rehman* reported at PLD 1963 (W.P.) Lahore 390, where a full bench of the High Court of West Pakistan, headed by Manzur Qadir, C.J., dealt with the question of jurisdiction of Special Tribunal in detail. The Court reproduced the following observation from the opinion of Manzur Qadir, CJ in *Akhtar Ali*:

“An objection to the jurisdiction of a Tribunal may take one of the following general forms-

(i) that the law under which that Tribunal is created is defective or invalid;

(ii) that the Tribunal is not constituted or appointed validly under the law;

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(iii) that a party or parties is or are not amenable to the jurisdiction of the Tribunal; and

(iv) that the subject matter is outside the field in which particular court is competent to act.

It seems to me that when an objection is taken to the jurisdiction of the Tribunal, that objection must be treated as a preliminary objection and must be resolved before taking any further action. . . . If a plea falling in the first or the second category is raised before a Special Tribunal, the answer of the Special Tribunal, which is a creature of the special law and is constituted or appointed under

that law, must be simply and shortly that these matters are not for the Special Tribunal to decide. If a party needs a decision on those points, it will have to apply to the Courts of general jurisdiction in appropriate proceedings for that purpose. If, for example, a Rent Controller is told by a party before him that the West Pakistan Urban Rent Restriction Ordinance is invalid, he ought not, on that ground, adjourn the proceedings in that case to hear elaborate arguments on some future date. Were he to do so, the logical procedure for him would be, not only to adjourn that case but to adjourn all cases, and not only to adjourn cases but also to wind himself up as a Rent Controller till he has decided whether he is a Rent Controller or not a Rent Controller under a valid piece of Legislature. Similarly, if a Rent Controller is told that his own appointment is defective, it is not for him to postpone the hearing in that particular case because his appointment is challenged as defective; if it is defective, it is defective not only for the case in which the objection has been raised but also for all other cases. In respect of all such objections, the obvious and short answer of the Rent Controller must be that he, being a creature of the very laws or notifications which are being challenged before him, cannot suspend himself till he determines that matter; and that he must proceed so far as he is concerned on the assumption that his existence as a Rent Controller is of legal validity until a Court of competent jurisdiction decides or directs to the contrary.”

54. Further, we would like to add that in *Mehr Dad v. Settlement and Rehabilitation Commissions* (P.L.D. 1974 SC 193), the Supreme Court of Pakistan held that “it is true that a Tribunal cannot go into the *vires* of the enactment under which it has been created and in *Chempak (Pvt) Ltd. v Sindh Employees’ Social Security Institution (Sessi)* reported in 2003 PLC 380, Court held that “ as observed by the Full Bench of Hon’ able Supreme Court, comprising 12 judges, in *Federation of*

- Pakistan v. Aitzaz Ahsan* (PLD 1989 SC 61) it is a well-settled principle of Constitutional interpretation that until a law is finally held to be *ultra vires* for any reason it should have its normal operation”.
55. As for the lapse of the Ordinance under Article 89, it may be relevant to add that the Honourable Supreme Court Bench comprising of 14 Judges in its most recent judgment dated July 31, 2009 titled *Sindh High Court Bar Association and another vs. Federation of Pakistan and others* (PLD 2009 SC 789) observed that the period of 120 days (within which Parliament has to validate an Ordinance as per Article 89) would be deemed to commence from the date of passing of the said Supreme Court order.
56. It would be relevant to add that the President of Pakistan re-promulgated the Ordinance with retrospective effect on 26-11-2009 and the same was also notified in the Extra-Ordinary Official Gazette, therefore, we are of the considered view that the Ordinance has not lapsed and is still in force.
57. In any event, the above supports the view that it is not for the Commission to address the objections raised as to the constitutionality of the Ordinance or the appointment of its members. Hence, we must proceed on the assumption that the existence of the Commission is legal and valid until a court of competent jurisdiction determines otherwise.

Issue No. (v)

Whether the Commission has jurisdiction to take cognizance of the alleged conduct?

58. In this regard, JJVL’s Counsel has submitted that the Commission has no jurisdiction over the matter of pricing of LPG or the maintenance of competition in the LPG market. Jurisdiction over both functions has clearly been conferred upon OGRA by OGRA Ordinance, reference in this regard may be made, *inter*

alia, to the preamble and Sections 2(xiii), 2(xxii), 2(xxvi), 6(2)(g) (i) (k) (p) (q) (r) (s) (t) (w), 7, 21, 22, 23, 43, and 44 (3) of the OGRA Ordinance. He also referred to the Rule 18(2) of the LPG (Production and Distribution) Rules, 2001 (hereinafter referred to as ‘**2001 Rules**’) and sections 3.42 and 3.43 of the LPG (Production and Distribution) Policy, 2006 (hereinafter referred to as the ‘**LPG Policy**’).

59. JJVL’s counsel has further stated that, it is clear from the language of Section 43 of the OGRA Ordinance that OGRA is the only competent authority to deal with the issues raised in the Enquiry Report and the Show Cause Notice, as it is a settled principle that ‘where a special law applies the operation of general law is excluded’. Hence, it has been argued that the Enquiry Report, the Show Cause Notice and the Impugned proceedings are of no legal effect.
60. The Counsel for Progas categorically denied that the jurisdiction of OGRA excludes that of the Commission. According to the preamble of the OGRA Ordinance, OGRA was created, *inter alia*, to ‘*foster competition*’ and not anything further and none of the references to the OGRA Ordinance, 2001 Rules and the LPG Policy cited by the Counsel of JJVL take OGRA beyond this very limited objective. He further submitted that the Commission, on the other hand, was created, according to the preamble of the Ordinance, *inter alia*, to ‘ensure free competition in all spheres of commercial and economic activity’, and as is only too well known to the Commission, its entire parent statute vests it with powers to fulfill its mandate.
61. We have also examined the comments filed by OGRA vide their letter bearing no. OGRA-LPG-17(141)/09 dated November 04, 2009 and noted that OGRA has not objected in any manner to the initiation of proceedings by the Commission under the Ordinance. The contents of Para 3 of the said letter are reproduced herein below:

...

3. The CCP started proceedings in the subject matter without taking any input from the Authority which in fact was not required and same was the case throughout the whole course of proceedings which is now at very advance stage. Therefore, though it seems inappropriate to ask for the comments of the Authority at this belated stage especially when the CCP is not required to do so, nevertheless, same are enclosed herewith.”

62. We would also like to refer to the letter bearing no. OGRA-LPG-17(87)/09 dated January 23, 2009 addressed to the Chairman LPGAP, wherein OGRA itself has acknowledged the jurisdiction of the Commission and directed the Chairman LPGAP to refrain from committing violation of OGRA’s directives in future; else, OGRA would be constrained to take up the case with GOP/the Commission for initiating legal proceedings against the LPGAP and its office bearers.
63. The difference in scope of OGRA Ordinance and the Ordinance will be outlined below in detail; also addressed is the relevance of provisions of OGRA Ordinance referred to by JJVL’s Counsel.
64. We find it pertinent to mention here that no provision in the OGRA Ordinance, 2001 Rules and the LPG Policy covers anti-competitive practices such as, inter alia, abuse of dominant position and cartelization by and among undertakings operating in the LPG sector. More pertinently, the legislative scheme under which OGRA operates carries no provisions that envisage/provide for *an enforcement mechanism to remedy anti-competitive practices*. Under section 6(2)(g), a part of OGRA’s powers and functions, OGRA shall promote competition. However, as stated such a provision by and of itself does not provide for an enforcement mechanism against anti-competitive practices. No provision has been placed on record to suggest that OGRA can investigate anti-competitive practices such as abuse of dominant position, agreements restricting competition, mergers without

approval, deceptive marketing etc. Section 7(2)(a) mentions the words ‘monopolistic and oligopolistic pricing’ but the context in which these words have been used is all-important. Section 7 relates to the *criteria for determining tariff and conditions of licence*. Therefore, OGRA can lay out conditions of licence stating that monopolistic pricing by an entity will be a violation of its conditions of licence but that does not grant OGRA the power to investigate and punish cartelization and abuse of dominant position etc on its own. Those are the anti-competitive practices that have been alleged in the Show-Cause Notice. Furthermore, no provision on record gives OGRA the specific power to impose fines for cartelization and/or abuse of dominant position.

65. Section 21 of the OGRA Ordinance vests in the Federal Government the power to issue policy guidelines. Citing this power is, in our considered view, irrelevant in the present context as this does not provide an enforcement mechanism for punishing the anti-competitive practices alleged in the Show Cause Notice. Section 22 and 23 relate to OGRA’s power to grant licences and this Commission has in no way denied such a power for the sector-specific regulator. However this power does not deal with the issues raised in the Show Cause Notice and citing it is again irrelevant here. Section 43, being a non-obstante clause, gives OGRA Ordinance over-riding effect over all other laws for the time being in force. It is an established principle of statutory interpretation that the phrase ‘for the time being in force’ applies to laws in force at the time of the enactment/promulgation of the law carrying such a non-obstante clause. It does not provide over-riding effect over future laws, especially if the laws later enacted/promulgated are special laws. We address this question of special laws in the Paras below too. Section 44 of the OGRA Ordinance relates to repeal and savings and is therefore not relevant to the issue of remedying anti-competitive practices and/or the relevant enforcement mechanism.
66. Furthermore, the areas of regulation envisaged by the laws governing OGRA and the Commission are completely distinct. The issue of jurisdiction of the

Commission against the jurisdiction of the OGRA can and will be examined below in light of legal principles governing general and special laws as well as *non-obstante* clauses. However, before delving into such matters the Commission would like to clarify the issue in a much simpler manner. We find ourselves aligned with the approach of the 3 member Bench of the Commission in the case of *KSE's abuse of dominant position* where it was stated: '*the issue of jurisdiction can be best understood with reference to which law is relevant and applicable to an entity in a given context*'. In line with the reasoning of the Bench in the aforementioned case, consider an entity engaged in the LPG sector; as far as this entity's regulation regarding, incorporation, filing of accounts, issuing of prospectus etc is concerned, the relevant law will be the companies legislation and the sector specific regulator i.e., Securities and Exchange Commission of Pakistan will have jurisdiction. In relation to this entity's filing of tax returns the Federal Board of Revenue will be the relevant regulatory body and the relevant law will be the tax code of Pakistan. Similarly, any trade-marks or intellectual property of the concerned undertaking will be subject to the intellectual property laws and the relevant regulatory body shall be the Intellectual Property Organization. Similarly, in relation to its licensing requirements and other related matters, the relevant law will be the licensing legislation in the LPG sector and OGRA will be the relevant regulator. Accordingly, if and when this entity indulges in practices or enters into agreements that allegedly prevents, restricts or reduces competition within the relevant market then the relevant and the applicable law will be the competition related legislation. In our considered view the instant matter involves an issue of competition which falls expressly within the purview of the Ordinance, we feel it ought to be abundantly clear that the matter falls squarely within the jurisdiction of the Commission and the concerned enforcement agency in our considered view can be no other than the Competition Commission of Pakistan.

67. The role of OGRA clearly is to ensure an orderly licensing regime and maintenance of certain standards in the LPG sector. However, wherever an

undertaking is in a position to influence the relevant market and competition within the relevant market then the Commission steps in. In our view there is no conflict regarding jurisdiction. An alleged abuse of a dominant position or cartelization in a relevant market (where the relevant market is to be determined by the Commission) is an area that squarely falls within the exclusive domain of the Commission. Hence the objections of the JJVL are misplaced and suffer from a lack of appreciation regarding the different mandates of two independent regulatory bodies.

68. In this regard, the issue of conflict of different laws should and does not arise in the absence of any provision on the competition aspect under review pursuant to the LPG legislation. It is the action of the corporate entity that determines which law will be relevant and applicable. However, since parties have spent considerable time in discussing the issue of statutory interpretation in case of alleged conflict of scope of statutes and the question of general and special law, we will in any case be addressing this issue. The OGRA Ordinance contains a non *obstante clause* which is reproduced below:

43. Ordinance to override other laws.- (1) *The provisions of this Ordinance, the rules and the regulations, and any licences issued hereunder shall have effect notwithstanding anything to the contrary contained in any other law, rule or regulation, for the time being in force, and any such law, rule or regulation shall, to the extent of any inconsistency, cease to have any effect on the commencement of this Ordinance and the Authority shall, subject to the provisions of this Ordinance, be exclusively empowered to determine the matters in its jurisdiction as set out in this Ordinance.*

69. The bare reading of the above section makes it quite clear that, incase any provision in any other law *for the time being in force* is inconsistent with the

provisions of OGRA Ordinance; the provisions of the OGRA Ordinance shall prevail. However, as mentioned above JJVL has failed to draw our attention to any provision relating to ensuring competition or to regulation of anti-competitive conduct under the OGRA Ordinance. On the other hand Progas drew our attention to the fact that the areas of regulation and enforcement envisaged by the OGRA Ordinance and the Competition Ordinance are different. However, it is pertinent to point out that, OGRA in their letters bearing no. OGRA-LPG-17(87)/09 & OGRA-LPG-17(141)/09 dated, January 23, 2009 and November 04, 2009, respectively, have admitted the jurisdiction of the Commission regarding the anti-competition conducts and competition issues. The Ordinance applies to competition in all spheres of economic activity and its application to the corporate entities is not excluded merely because the corporate sector (for matters others than competition) has its own regulators. Even then, at this point it would be relevant to refer to Section 57 of the Ordinance, which reads as under:

57. Ordinance to override other laws:- The provisions of this Ordinance shall have effect notwithstanding anything to the contrary contained in any other law for the time being in force.

70. The above section makes the intention of the legislature quite clear that, in case of any conflict the provisions of the Ordinance shall prevail over the provisions of any other law in force. As was relied upon by the 3 Member Bench in the case of *KSE's abuse of dominant position*: '*In the case of Sarwan Singh and another v. Kasturi Lal AIR 1977 SC 267 it was held that:---*

"Speaking generally, the object and purpose of a legislation assume greater relevance if the language of law is obscure and ambiguous. But, it must be stated that we have referred to the object of the provisions newly-introduced into the Delhi Rent Act in 1975 not for seeking light from it for resolving in ambiguity, for there is none, but for a different purpose altogether. When two

more laws operate in the same field and each contains a non-obstante clause stating that its provisions will override those of any other law, stimulating and incisive problems of interpretation arise. Since statutory interpretation has no conventional protocol, cases of such conflict have to be decided in reference to the object and purpose of the laws under consideration’.

71. In the case of KSE’s abuse of dominant position the 3 Member Bench, in our view, rightly analyzed the object and purpose of the two laws, i.e. competition and securities law, when deciding the question of jurisdiction of this Commission. We find ourselves aligned with that approach and applying the same principles in this case we analyze the object of the OGRA Ordinance and the (Competition) Ordinance. The object and purpose of OGRA Ordinance, was generally to provide for a regulator for Oil and Gas Sector regarding licensing and maintaining certain prescribed standards. However, the object and purpose of the Ordinance is to make provision to ensure free competition in all spheres of commercial and economic activity, including but not limited to LPG Sector, to enhance economic efficiency and to protect consumers from anti-competitive behavior. Therefore, upon comparison of the said objects, for the purposes of ensuring free competition, it is our considered view that Ordinance is a special law, and it will prevail over other laws including but not limited to the OGRA Ordinance. The (Competition) Ordinance is a special enactment, which has provided for special situations, (which are not provided in any other law for the time being in force) such as ‘Abuse of dominant position’, ‘Prohibited Agreements’, Merger Control, and Deceptive marketing practices, which prevent, restrict, reduce, or distort competition in the relevant market, therefore, it is our considered view that Ordinance, being a special law shall prevail over a general law such as OGRA Ordinance. The following judgments have been relied upon to support this conclusion: *Lahore Beverage Company (Pvt.) Limited vs. Muhammad Javed Shafi*; 2008 CLC 759, *Attaullah Khan vs. Samiullah*; 2007 SCMR 298.

72. As the 3 Member Bench held in the case of KSE's abuse of dominant position :
*'Even otherwise, it is an established rule of construction/interpretation that even if both laws are considered special statutes, having non obstante clauses, the subsequent enactment will prevail over earlier enactment (AIR 2000 SC 1535). The Division Bench of the Honourable Peshawar High Court in **Muhammad Saleem vs. The State and another, 2002 P Cr. L J 216, at Para 12 of the judgment held that,***

"The general principle of interpretation of statute is that special law shall have precedence over the general law and when there are two special laws and they are inconsistent on any provision/situation, then one which is later, shall prevail over the earlier one."

Issue No. (vi) Whether OGRA and SSGCL are proper and necessary parties for the proceedings?

73. In this regard, the Counsel for JJVL submitted applications during the hearing conducted on September 28, 2009 to implead OGRA and SSGCL as necessary parties in the Show Cause Notice in the proceedings. It was submitted by the counsel for JJVL that the Enquiry has been conducted without taking any comments from OGRA or SSGCL. OGRA is the LPG sector Regulator and LPG Base Stock price/Producer price in Pakistan is set and monitored by OGRA.
74. Counsel for JJVL has submitted that in the Enquiry Report repeated references have been made to SSGCL and the statements and allegations against SSGCL, including about its collusion with JJVL, for keeping low the level of royalties payment under the Implementation Agreement, go to the root of several allegations made against JJVL in the Show Cause Notice, therefore, it is just to implead SSGCL as a party to the proceedings.

75. Upon consideration of the application in light of the relevant facts and circumstances: It needs to be appreciated that the law envisages issuance of show cause notices to parties that appear to be in contravention of the provisions of Chapter II of the Ordinance. It was the behaviour of JJVL and LPGAP that in the view of the Commission merited issuance of a Show-Cause Notice. Whereas the Commission can request information from or request the views of other undertakings (including a regulatory authority like OGRA) it is not under any obligation to do so. However, keeping in view the requirements of fairness as well as the interests of the parties, this Bench deemed it appropriate to accede to the request for soliciting the views of OGRA and SSGCL and to provide them a due opportunity of hearing. . . The Commission solicited the views of OGRA vide letter dated September 30, 2009. As far as SSGCL is concerned, the Enquiry Report was also forwarded to SSGCL vide letter dated October 09, 2009. Both the parties were also issued hearing notices dated October 16, 2009.
76. SSGCL filed their comments on October 19, 2009 and also attended the hearing October 21, 2009. Whereas, OGRA did not attend the hearing and filed their comments vide its letter bearing no. OGRA-LPG-17(141)/09 dated November 04, 2009. It is pertinent to mention here that OGRA in its covering letter has categorically stated that ‘the Commission is not required to take OGRA’s views. The comments filed by SSGCL and OGRA were also forwarded to JJVL, LPGAP and Progas for information. We will take into consideration the comments made by SSGCL and OGRA while dealing with the legal issues in the later part of this Order. The application stands disposed off accordingly.

Issue No. (vii)

Whether the Commission can delegate its powers to its Officers for conducting Enquiry and issuance of the Show Cause Notice on its behalf?

77. JJVL’s Counsel has submitted that the Enquiry Report was not prepared by the Commission. The Commission has been defined in Section 2 (1) (d) of the

Ordinance and the three signatories to the Enquiry Report are not ‘the Commission’ as defined under section 12 of the Ordinance. Furthermore, it has been argued that nowhere in the Show Cause Notice is it indicated that the Commission delegated its function to conduct Enquiry into the matter. Counsel submitted that since, the Enquiry was not conducted by the Commission, therefore, it is completely without jurisdiction and its findings are nullity in the eyes of law. He further added that the Show Cause Notice has been issued by the Registrar of the Commission and not by the Commission itself. It has been argued that this is clearly contrary to the dictates of Section 30 of the Ordinance, which again only empowers the Commission to issue a Show Cause Notice once jurisdictional conditions are met. He also added that the power to delegate under Section 28 (2) of the Ordinance is inherently limited to the executive functions of the Commission.

78. As held by a Learned Bench of the Commission in the Cement Case: *‘The argument/ground that only the Commission and not any duly authorized person/body should conduct the Enquiry and issue the Show Cause Notice is disappointing. The consequence that flows from such ground is that each Enquiry Report and Show Cause Notice must be signed by five (5) members of the Commission’*. We find ourselves aligned with the view taken by the Bench in the Cement case that such an interpretation would result in rendering the Enquiry process and the issuance of Show Cause Notice ‘administratively cumbersome and complex’. For ease of reference the provisions of Section 28 of the Ordinance are reproduced herein below:

28. Functions and powers of the Commission.- (1) The functions and powers of the Commission shall be:

- (a) *to initiate proceedings in accordance with the procedures of this Ordinance and make orders in cases of contravention of the provisions of the Ordinance;*

- (b) *to conduct studies for promoting competition in all sectors of commercial economic activity;*
 - (c) *to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Ordinance;*
 - (d) *to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Ordinance, rules or orders made thereunder;*
 - (e) *to engage in competition advocacy; and*
 - (f) *to take all other actions as may be necessary for carrying out the purposes of this Ordinance.*
- (2) *The Commission may, subject to such conditions as it may think fit to impose, delegate all or any of its functions and powers to any of its Members or officers as it deems fit.*

79. Bare perusal of Section 28 of the Ordinance makes it clear that the functions and powers of the Commission are provided in clauses (a) to (f) of sub-section (1) of Section 28 of the Ordinance and sub-section (2) of Section 28 of the Ordinance empowers the Commission to delegate any or all of its functions listed above in sub-section (1) to any of its Members or officers. It is a cardinal principle of interpretation of statutes that, *the words are to be given their plain meaning and extraneous considerations are not to be imported to create hardships*. In this regard we are fortified with the judgments in the case of *Assistant Commissioner, Latifabad Hyderabad and 2 others vs. Messrs Muhammadi Enterprises (PLD 1999 Kar. 329)* and *Commissioner of Income-Tax, Karachi vs. Messrs Civil Aviation Authority (2002 PTD 388)*. Therefore, we are of the considered view

that, in the presence of an express power of the Commission to delegate any of its powers and functions to any of its Members or officers as it deems fit under Section 28(2) of the Ordinance the arguments and the objection taken is baseless and irrelevant and does not withstand legal and/or logical scrutiny.

Issue No. (vii)

Whether the Commission has acted in a partisan manner and with mala fide intention in initiating the proceedings against JJVL & LPGAP?

80. The counsel of JJVL submitted that the delegation of Enquiry Committee, The Enquiry, the Enquiry Report and the Impugned Proceedings all suffer from *mala fide, bias and malice*. It has been alleged that the Enquiry Committee and the Commission have a pre-determined and prejudiced mind and irrespective of the final determination, have decided to persecute JJVL at the behest of Progas and Mr. Irfan Khokhar.
81. The Counsel for JJVL further added that OGRA vide its letter dated January 07, 2008 directed Progas to stop the sale of LPG above the reasonable price determined by OGRA and notified vide letter dated 01-03-08. Progas objected to the same on the ground that a separate reasonable price be notified for it, based on the cost of imported LPG. OGRA vide its letters dated January 10, 2008, January 14, 2008 directed to stop the sale of LPG above the reasonable price and report the compliance to OGRA. Progas subsequently filed a constitutional petition D-41/2008 before the SHC challenging the said letters. The said petition was disposed off vide Order dated 15-02-08 on the basis of the joint statement by counsel that an appeal would be filed by Progas before OGRA. Progas then proceeded to file an appeal before the OGRA, and OGRA allowed other stakeholders, including producers and distributors, to participate in the proceedings following the filing of appeal by Progas. The essence of Progas grievance was that OGRA should not fix prices for the whole LPG sector. The

appeal was disposed off vide Order dated 7-03-08. The points raised in the Enquiry Report and the memorandum of appeal are the same. It was also pointed out by the JJVL counsel that in the said appeal Progas had specifically stated that there is no cartel in the LPG Sector. He further stated that since Progas could not achieve the object through constitutional petition before the High Court and subsequently from OGRA under the appeal, therefore, it is now seeking the same relief under the Ordinance which is a gross abuse of the law.

82. Counsel for JJVL submitted that the Enquiry Committee conducted a clandestine Enquiry for several months without involving JJVL, LPGAP, OGRA, SSGCL and the Federal Government and acted virtually exclusively on the dictates of Progas and the information provided by it. It was argued before us that as soon as the enquiry was complete, its results were revealed to the media and thereby to the public, even before JJVL was aware that it had been under Enquiry. As per Counsel, JJVL and LPGAP were placed in the court of public opinion before they had any opportunity of responding to the Show Cause Notices issued to them. In fact, Counsel has argued that JJVL learnt of the Show Cause Notice only through media reports, forcing it to take out public information notices of its own. He submitted that the Commission should have taken the comments and views of JJVL and LPGAP before issuing any notice or concluding enquiry.

83. We find the above arguments forwarded by the counsel of JJVL completely unfounded and unjustified. As has been discussed, the allegations leveled against JJVL and LPGAP, do allow for determination under the Ordinance. Hence the Commission has acted only to discharge its obligations under the Ordinance. An inquiry into issues such as those raised in Progas letter, news reports and the OGRA Report are directly envisaged by the Ordinance and the Commission, within the bounds of discretion conferred by law, felt that it is in the public interest to initiate proceedings under the provisions of the Ordinance.

84. Essentially JJVL has argued before us that since Progas, in its Appeal before OGRA, had pleaded that ‘there is no cartel’ it cannot allege a cartel now. This cannot be analyzed unless we place the submissions of Progas before OGRA in context. Progas had filed the appeal before OGRA contesting that OGRA should not interfere with the price set by a licensee as this violated the relevant rules as well as the Government’s stated policy in relation to this sector. Progas relied, inter alia, on Rule 2 (r), 18(1) and 18(2) of the Liquefied Petroleum Gas (Production and Distribution) Rules, 2001 (‘the LPG Rules’).
85. Rule 2(r) defines a reasonable price, which is to be set by the licensee. As per this rule a reasonable price would be one which is considered to be adequate to cover all operational and other normal expenses and provides a fair margin of profit to a licensee. As per Rule 18(1) each licensee is allowed to set a price (as long as its reasonable) for LPG base-stock and LPG, subject to prior notification period of 6 months. As per Rule 18(2) OGRA can interfere with this price if it is considered not reasonable. OGRA’s intervention as per Rule 18 (2) also has to be in line with the policy of the Federal Government which in this case was LPG Production and Distribution Policy 2006. As per this policy, Para 3.1.1, it has to be ensured that no cartels and monopolies are created. Therefore, Progas’s submission before OGRA was simply this: the rules generally do not envisage interference by OGRA with the reasonable price set by licensees. OGRA can only interfere where the price is not reasonable and to prevent cartels (as per LPG Policy). Hence Progas stated ‘there is no cartel’ in the context that since Progas was not part of a cartel therefore OGRA should not interfere. Progas was merely pointing to where the law allows interference with price by OGRA. Here the situation is completely different. Earlier Progas had asked OGRA not to interfere since Progas was neither part of a cartel and nor the price was unreasonable. In the present proceedings. Progas is alleging that other players in the market have formed a cartel. We find the two arguments are entirely distinct and the two can logically co-exist as the context differs. The attempt by JJVL to place the matter out of context is not understandable.

86. It has also been argued by the Counsel for JJVL that ‘the Enquiry Officers have relied upon selective material i.e. Progas letter, media Reports, statement of Mr. Irfan Khokhar, OGRA Report etc. JJVL, LPGAP, OGRA and SSGCL were, it is contended, never made part of the Enquiry process by the Enquiry Committee, hence the Enquiry and the Enquiry Report is one sided and not fair as per the submissions of JJVL.
87. We are of the considered view that a Show Cause Notice was issued upon *prima facie* allegations and no order, be it adverse or favourable was passed by the Commission but merely a show cause notice was issued and JJVL and LPGAP were called upon to submit their written replies and to avail the opportunity of hearing before the Commission. Detailed analysis of this follows Para 82 onwards in this Order. The Show Cause Notices were not only sent through courier but they were also sent through fax. Even after issuance of the Show Cause Notice, the Commission has given JJVL and LPGAP ample opportunity to file their written replies and to appear and place before the Commission all the facts in support of their contentions. Show Cause Notices were issued on March 20, 2009 to both JJVL and LPGAP. It is pertinent to point out that LPGAP refused to either file a written reply or to appear before the Commission and avail the opportunity of hearing despite the repeated opportunities made available to it. Accusations of mala fide and bias against a public body are a serious matter and require requisite substantiation. In this respect we would like to recap, summarily, the events as they unfolded in relation to LPGAP.
88. After being issued the SCN, LPGAP preferred filing a WP in the Honourable Lahore High Court, Lahore and on 18.05.2009 the Honourable LHC granted a stay order to LPGAP, suspending the SCN. The Commission successfully challenged this order of the Honourable LHC through CPLA No 1022/2009. While ruling on this Appeal the Honourable Supreme Court was pleased to set aside the stay order earlier granted by the Honourable LHC. Once the stay order

had been vacated the Commission, in line with its legal rights and duties, wrote to LPGAP through letter dated 3.07.2009 to file a Reply to SCN. Respondent's Reply through letter dated 08.07.2009 accused the Commission's lawful demand for filing a Reply to SCN as being "mala fide and clearly in contempt of court". This adamant stance of LPGAP continued right till the very end. Through its letter dated 28.07.2009 LPGAP continued to allege bias and 'unholy haste' on the part of the Commission. One fails to understand the malafide, as alleged, perpetrated by the Commission by merely asking an undertaking to furnish a reply to SCN. The Commission, acting within its rights and in compliance with the Order dated 25.06.2009 of the Honourable SC, once again informed LPGAP through Hearing Notice dated 6.08.2009 of the legal position, i.e. there is no stay or bar against CCP to proceed with *hearing* the matter. Respondent through its counsels vide letter dated 07.08.2009, inter alia, stated the following:

"Since Our Client does not recognize your jurisdiction and you are restrained from taking any adverse actions (Order Sheet of the Honourable LHC attached), we do not take your letter and threat seriously".

89. In line with its statutory responsibilities the Commission sent LPGAP a Hearing Notice, dated 16.09.2009, informing the respondent that 'the August Supreme Court in C.P.L.A. No. 1694/2009 vacated the stay order granted by the Honourable Lahore High Court vide its Order dated 5.08.2009 in W.P. No. 15493/2009 titled '*Jamshoro Joint Venture Limited vs the Federation of Pakistan and others*'. Hearing was fixed for 28.09.2009 and, yet again, LPGAP was requested to file written Reply to Show Cause Notice issued to it, latest by 25.09.2009. Through its letter dated 19.09.2009 LPGAP classified the Hearing Notice as 'wholly misplaced' as LPGAP contended that the said Supreme Court order related only to JJVL. Furthermore, LPGAP continued to allege that '...the unholy and indecent haste with which you continue to conduct yourself is a clear manifestation of bias on your part'. We are at a loss to understand how asking for

a reply to clarify the allegations against an entity amounts to bias. No stay order was in force and, in our considered view, there was no bar against the Commission hearing the matter. LPGAP's allegations, unsubstantiated as they are since nothing relevant/corroborative has been placed on record, were repeated vide LPGAP's Preliminary Reply dated 24.09.2009. This Preliminary Reply while ignoring the merits of the matter did inform us that two authorized counsel would be attending the hearing fixed for 28.09.2009 '*only to observe the proceedings*'. LPGAP, through this letter also stated: '*A Preliminary Reply is being submitted ONLY because of your persistent and threatening attitude seeking to arrogate jurisdiction where the Competition Commission of Pakistan has none*'. In order to clarify matters the Commission through letter dated 25.09.2009 denied allegations of, inter alia, bias made against it. The Commission stressed that it did not '*intend in engaging in correspondence that is irrelevant in the present context and would not serve any meaningful purpose. The aim should be to respect and implement in letter and spirit the Order dated 16.09.2009 of the Honourable Supreme Court.....The Commission is providing you with a full and fair opportunity of hearing in accordance with the law...Any person appearing for or on your behalf has to be fully conversant with the facts of the case. Therefore it is in your interest that the representative present is able to provide answers to the satisfaction of the Learned Bench of the Commission if and when required during the hearing*'.

90. In response to this LPGAP, through letter dated 26.09.2009, wrote back to the Commission stating that the Commission had 'unabashedly declared' its intention to proceed with the hearing against LPGAP. We fail to understand what was so 'unabashed' about the Commission's decision to hear the matter as this was and is strictly in accordance with law. In fact, in the absence of a stay order the Commission had stated, consistently, that it would hear the matter and act in accordance with the law. Nevertheless, LPGAP went on to state: '*LPGAP does not recognize your jurisdiction...the haste with which you wish to proceed shows that there is a collateral purpose to these proceedings. Your letter dated September 25.09.2009 leaves no doubt as to your bias. You are oblivious to your*

lack of jurisdiction in the matter and have predetermined the merits of the whole matter. Any proceedings are only going to be a charade....As such, LPGAP does not wish to be a party to those proceedings, which, it maintains are coram non judice. Therefore, we have instructions not to attend the so-called hearing, scheduled for September 28, 2009. LPGAP's representatives will not appear on the said date'.

91. The language and attempts to distort the Commission's lawful action as threats show that LPGAP was bent on being intransigent and causing delay to defeat and abuse the legal process. In our considered view, in the absence of any relevant, substantial or credible material placed on record, we fail to see any evidence of malafide or bias perpetrated by any officer of the Commission or the Commission itself in the subject proceedings.

92. On the other hand, JJVL filed their written reply on September 25, 2009 i.e., almost after 192 days. JJVL too followed LPGAP's tactics of causing delay till the Honourable Supreme Court on 16.09.2009 in CPLA 1694/2009 confronted its counsel with SC Order dated 25.06.2009. This ultimately led to JJVL submitting to the lawful jurisdiction of the Commission. The Commission in pursuance of its statutory obligations conducted hearings on 28-09-2009 and 21-10-2009 and JJVL was given full opportunity to avail the opportunity of hearing and place their contentions before the Commission. LPGAP even then chose not to avail this opportunity. Till this day LPGAP refuses to appear and argue the matter before the Commission. Choosing not to be heard is one thing and alleging mala fide in the absence of any substantial proof is quite another. The Commission has acted and shall continue to act at all times in accordance with the law. The Commission has the highest respect for and holds the superior courts of Pakistan in great esteem. However, the delaying tactics resorted to by both Respondents have been, to say the very least, regrettable.

Issue no. (ix) *Whether the conduct of Enquiry and Issuance of a Show Cause Notice amounts to 'taking of adverse action'?*

93. We would now proceed to ascertain as to whether conduct of Enquiry and issuance of a Show-Cause Notice is tantamount to taking of adverse action or not. The term 'adverse action' has not been defined under the Ordinance, therefore, we would revert to the Ordinary dictionary meaning of '*adverse action*' and '*Show Cause Notice*', The New Oxford Dictionary defines the term 'adverse' as '*preventing success or development: harmful, unfavourable*', Dictionary.com defines 'adverse action' as '*The word adverse means unfavorable or antagonistic in purpose or effect; opposing one's interests or desire, being or acting in a contrary direction; opposed or opposing.*' According to *Black's Law Dictionary Eighth Edition* '*Show Cause*' means "*to produce a satisfactory explanation or excuse, usu. in connection with a motion or application to a court*". The question then is whether the issuance of a Show Cause Notice amounts to an 'adverse action'? We deem it proper to look at relevant case-law while answering this question.
94. The Honourable Supreme Court of Pakistan has dealt with this issue clearly and consistently in cases such as **PLD 1998 SC 201 and 2000 SCMR 1017**. In both these cases their Lordships held that mere issuance of a Show Cause Notice does *not* amount to an adverse action. It has also been held by the Honourable Lahore High Court in **2003 P L C (C.S.) 1089** that 'the issuance of a Show-cause Notice is not an adverse action but is a step towards the passing of a final order', and of course the passing of such an order is challengeable. Therefore, after evaluation of relevant legal precedents it is our considered view that the contention that the issuance of a Show-Cause Notice amounts to 'adverse action' is not tenable.
95. Linked with the above is the question whether the steps preceding the issuance of a Show Cause Notice, i.e. conduct of Enquiry in the subject proceedings was an adverse action and required compliance with principles of natural justice. As

stated above, JJVL has argued that since it was not contacted during the conduct of the Enquiry therefore principles of natural justice have been violated. We deal with this question now.

96. Natural justice has been described as a concept ‘sadly lacking in precision’ (*as per R v Local Govt. Board [1914] 1 K.B. 160, referred to by De Smith’s treatise ‘Judicial Review’, 6th Edition (2007) at Para 6-010*). The Supreme Court of Pakistan has also held that rules of natural justice are not cast in a rigid mould and that depending upon the facts and circumstances of each case, there is no mandatory requirement of natural justice that in every case the other side must be given a notice before preliminary steps are taken. As per the Honourable Supreme Court, it might suffice if reasonable opportunity of hearing is granted to a person before an adverse action or decision is taken against him (*Commissioner of Income Tax and Others v Messrs Media Network and Others; 2006 PTD 2502*). Support can also be gleaned from the following precedents from the UK and USA.

Rees and Others; (1994) 1 All E.R. 833 at page 842-845:

97. It was held by the Privy Council that there were many situations in which natural justice did not require that a person must be told of the complaints made against him and given a chance to answer them at the particular stage in question. Essential features leading the Courts to that conclusion had included the fact that the investigation was purely preliminary, that there would be a full chance adequately to deal with the complaints later, that no penalty or serious damage to reputation was inflicted by proceeding to the next stage without hearing, that the statutory scheme properly construed excluded such a right to know and to reply at the earlier stage.

Regina v Saskatchewan College of Physicians and Surgeons; (1966) 58 D.L.R. (2d) 622.

98. Held that the preliminary inquiry committee had no power to decide whether a doctor had been guilty of misconduct; it had no power to affect any of his legal rights in any way whatsoever; and it had no power to impose any penalty or obligation upon him. Hence the requirements of natural justice did not apply.

Parry Jones v Law Society and Others; (1969) 1 Ch Division 1 at pp. 8 and 10:

99. Held by the Court of Appeal that where the only inquiry was as to whether there was prima facie evidence, natural justice did not require that the party should be given notice of it.

100. From the United States of America the following precedents may be referred to:

-Traditional notions of due process do not attach in non-adjudicative, fact finding investigations. This was held in **U.S.-Georator Corp. v. Equal Employment Opportunity Commission, 592 F.2d 765 (4th Cir. 1979).**

-Accordingly, the full panoply of due process safeguards need not necessarily be afforded to an individual during the investigative, as opposed to the adjudicative, phase of an administrative proceeding. **(U.S.-Tolbert v. McGriff, 434 F. Supp. 682 (M.D. Ala. 1976)).**

101. Putting things in context, a reading of the Competition Ordinance and General Enforcement Regulations 2007 makes it clear that there is no mandatory requirement on the Commission to issue a notice/hold a hearing at the inquiry stage. Regulation 16 allows the Commission to commence an inquiry, inter alia, suo moto or in the case of a complaint. The standard to be satisfied in the latter case is if facts before it appear to constitute a contravention of sections 3, 4, 10, 11 and/or provisions of Chapter II of the Ordinance. Thus there is no requirement of notice or hearing at the stage of inquiry. Therefore it is our considered view

that requirements of natural justice (a hearing) do not apply at the initiation of, and during an inquiry, by the Commission. Hence in light of clear local and foreign precedents we find no merit in the assertions made in this regard.

102. As quoted above the Honourable Supreme Court has stated in **2006 PTD 2502** that it might suffice if reasonable opportunity of hearing is granted to a person before an *adverse action or decision* is taken against him. This dictum of the apex court clearly draws a, quite logical, distinction between an *adverse order and an adverse action*. As will become clear, the latter is related to recovery proceedings and not a finding of contravention of the law. Such a distinction is amply evident from other cases as well. In the case reported at **2007 PTD 763**, an appeal against levy of sales tax on a vehicle was preferred. Sales Tax Department filed an appeal against the decision of the High Court with the Supreme Court. The appeal was pending before the Supreme Court when Adjudicating Officer passed an order against the tax-payer that amount in question could be *recovered* subject to the outcome of the said appeal pending before the Supreme Court. It was held that “*cause of appeal against this Order of the Adjudicating Officer did not arise as no adverse action had been ordered.*” Tribunal, for satisfaction of the appellant, determined that amount in dispute was not to be recovered until the Supreme Court gave its decision. Recovery could only be made if Supreme Court decided in favour of the Revenue Department. Similarly, in the case of **2006 PTD 2207**, Petitioner Company contended that it had already appealed to Appellate Tribunal against Impugned Order of the Department. Appeal was pending but due to non-availability of a Member (Technical) the Tribunal had not taken up the appeal for a hearing. Petitioner further contended that it would be satisfied if petition was disposed of with observation that till said filed appeal was taken by the Tribunal, no adverse action would be taken against the petitioner on the basis of Impugned Order. High Court ordered that Department would not take any adverse action against Petitioner on basis of Impugned Order and recovery notice, till appeal of Petitioner was taken up for hearing.

103. Furthermore, the Honourable Lahore High Court, Lahore, through its Order dated 24.8.2009 in W.P. No. 15616/2009 (related to the *Cement case*) observed the following: *‘There is a lot of sensitivity about the repercussions of an **adverse order** being passed as the same would affect the market capitalization of the petitioner companies and may expose them to further criticism and adverse action by other authorities. Be that as it may, for the present it is appropriate that the Commission be allowed to complete its proceedings in accordance with law; this includes the disposal of the pending applications by the petitioners and the issuance of final orders in the matter of show cause notices issued to the petitioners. However, **until the next date of hearing such order shall not be published nor be issued to the press nor any adverse action thereunder taken against the petitioners**’.*
104. Therefore, we feel it is pertinent to point out that, in our considered view on the basis of case-law and judicial pronouncements quoted above, even a finding of contravention of the law does not amount to an ‘adverse action’. From the afore-referred judgments, the position emerges that ‘*adverse action*’ relates to recovery proceedings. As a natural corollary of this, issuance of Show Cause Notices, requesting the parties to submit their written replies does not in any manner mean taking of adverse action as parties at that stage are only called upon to Show Cause in writing and also to avail the opportunity of hearing. Therefore, the contentions of JJVL and LPGAP that by issuance of Show Cause Notice and conducting hearing, the Commission has taken adverse action, having no force are hereby rejected.
105. In light of the above, we also feel that it is imperative to mention that upon receiving the Show Cause Notices both JJVL and LPGAP ran full-page ads in the news-papers dated 31.03.2009 and 01.04.2009 respectively. These ads were run as ‘Public Notices’ that claimed to refute ‘CCP Show Cause Notice’. These ads claimed that CCP had released information about issuance of Show Cause Notices to JJVL and LPGAP to the media prior to the Respondents receiving the Notice

‘thus generating accusatory sensationalism in the national media...’. There is no truth in such a claim. Show Cause Notices were issued and as per the established practice were faxed and couriered to both Respondents. The newspaper ad also claimed that the Respondents had been condemned unheard in violation of the doctrine of audi alteram partem. As we have already pointed out in the above Paras, principles of the right to a hearing do not apply at the Enquiry stage and this has been re-affirmed time and again by superior courts of Pakistan as well as foreign jurisdictions.

106. Most disappointingly, the JJVL run ad stated: ‘The reputations of JJVL and its principals are cherished assets, which are protected by the Constitution of Pakistan against invasion without the due process of the law. JJVL and its principals firmly reject any and all allegations made against them. Through this Public Notice, JJVL informs all concerned and the general public that it will take steps, including its response to the CCP, to ensure that all persons engaged in the slander campaign against JJVL and its principals are brought to justice’. In our considered view, the use of such language is not just regrettable but deserves condemnation. This Commission has acted and shall continue to act in accordance with law. Conducting an Enquiry as envisaged by law in no way amounts to slander. The hollowness of this claim of slander is evident. Initiating legal proceedings on the basis of prima facie evidence is a prime instance of the law taking its course. All Respondents have been provided due opportunity of hearing before this Bench. Such ads in our view amount to harassment of public bodies such as the Commission. In fact such an ad is tantamount to Respondents issuing a Public Show Cause Notice to a statutory body and such practices need to be discouraged. The law envisages and provides for an appropriate forum such as this Bench for Respondents to reply to issues raised in the Show Cause Notice. The due process of law, referred to by the ad, cannot be applied and resorted to selectively. Due process of law lies at the very heart of this Commission. Indeed, it is inclusive of the notion that entities charged with violating the law must answer before an appropriate forum. Running public ads to raise hue and cry and

adopting an unduly confrontational stance rather than responding to the Show Cause Notice is hardly an appropriate course and deserves discouragement.

Issue No. (x)

Whether or not JJVL occupies the “dominant position” in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007?

Relevant Market

107. Before we make an assessment of dominance, it is important to define the relevant market in which the undertakings operate. The Enquiry Report defines the relevant market as ‘the production and supply of LPG in Pakistan’. Even though this assertion has not been contested by JJVL we will make an independent determination of the relevant market in light of the characteristics enumerated in the Ordinance. Clause (k) of sub-section (1) of Section (2) defines the relevant market as

“the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises all those products or services which are regarded as interchangeable or substitutable by the consumer’ by reason of the ‘products’ characteristics, prices’ and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of competition are appreciably different in those’ areas”;

108. The product in question is Liquefied Petroleum Gas (hereinafter referred to as the **LPG**). LPG is a unique type of fuel mainly due to its usage. The closest possible

- substitute for LPG is natural gas and locally LPG can be used as an alternative to natural gas when the latter is not available. LPG is primarily used in those areas where natural gas infrastructure and natural gas itself is not and cannot be available to consumer owing to rugged terrain and harsh weather conditions. Practically domestic users either use LPG or natural gas because an LPG infrastructure can not be run on natural gas and vice versa. Therefore, it would be safe to say that these two products can not be readily substituted for each other.
109. LPG and natural gas also greatly in terms of price with natural gas being cheaper. However, as stated above, because natural gas is not available in some parts of the country, consumers have no choice but to use LPG. Furthermore, the intended uses of LPG and natural gas diverge. In the transportation sector, LPG is used in a limited manner in some public transport and personal vehicles. Using LPG in vehicles requires special modification to the fuel systems of those vehicles. Currently, there are two types of traditional engines for vehicles; those which run on petrol and those which run on diesel. In case of diesel engines, LPG cannot be used without modifying the engine in a substantial way which in turn renders it unusable with other fuels. Likewise for petrol engines, a special LPG kit is required before LPG can be used and once petrol based vehicles are modified for use with LPG, CNG cannot be used unless further modifications are made to the vehicle. All these modifications present a prohibitive switching cost for users. In other words, once consumers determine which fuel to use, they normally stick to that particular fuel. This carves for LPG a market of its own which does not include the other fossil fuels.
110. The geographic market consists of all the areas where there are homogenous conditions of competition. Simply put, two areas have homogenous conditions of competition as long as regulation, availability and pricing of the product in the two areas is such that consumers from region A can buy the former from region B, and vice versa, without incurring significant differences in price. In Pakistan, there is a single regulatory regime in place for the LPG business in the country. In

addition, due to lack of supply from the local market, there is no scope for exports. Similarly, imports currently constitute a small portion of the total LPG supply. Therefore, the trade is largely composed of inland trading. While there are some price differences across the various cities in Pakistan, with the lowest prices in Karachi and the highest in the Northern Areas of Pakistan, this difference in cost is not significant since the cost increase can be attributed to transportation costs.

111. Thus in a situation where imports constitute a very small portion of the total LPG supplied in the country, where there are no exports of LPG from the country, and the price differences between the product in different areas within the country can be attributed to transport costs, the relevant geographical in the case before us is the whole of Pakistan.
112. Hence we hold that the relevant market in question before this Bench today is that of supply and production of LPG in Pakistan.

JJVL's Dominance

113. Any allegation of a violation of Section 3 is premised on the undertaking having a dominant position. As per the Enquiry Report, JJVL is a dominant undertaking, *“since it has the ability to act independently of its customer, consumers, suppliers and competitors to an appreciable extent’*. In this regard reliance has been placed in the Enquiry Report on the following factors:

- (a) *JJVL and its subsidiaries control almost 37.5 percent of the relevant market.*
- (b) *JJVL has a unique method of production, and a favourable deal with SSGCL, which enables it to produce LPG very cheaply as compared to other producers.*

(c) JJVL directors and officers control LPGAP which is the largest association of LPG marketing companies. In addition, the market for supply of LPG is very limited. In this limited market almost 30 marketing companies have allocations with JJVL which makes them dependent on JJVL.

(d) JJVL was able to get the prices of LPG de-linked from the Saudi CP despite opposition of all the other producers.

114. JJVL has refuted the claim that it is a dominant undertaking or that it can act independently of its customers (i.e. the LPG marketing companies), and its competitors, the nine other LPG Producers. It has been asserted that JJVL has a market share of only 26.17% and that Lub Gas and Mehran Gas are independent of JJVL, their market shares having no bearing on JJVL's market position. Furthermore, it is also asserted that JJVL is independent of LPGAP.

115. The Ordinance lays down two alternate tests for dominance. Clause (e) of subsection (2) of Section 2 of the Ordinance states that the,

'dominant position' of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and supplier and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent.'

[Emphasis added]

116. The 'presumptive test' automatically assumes a position of dominance if the undertaking has a market share of 40 percent or more in the relevant market, and resultantly an enquiry into market dynamics in order to establish dominance is not required.. Neither in terms of the Enquiry Report nor in view of the assertion

made by JJVL the first test is relevant. However, the second test, relevant in the instant case is the ‘deeming test,’ which has been put in place because competition jurisprudence recognizes that market power does not flow solely from a large market share; an undertaking with a market share of less than the threshold stipulated in the Ordinance, can still influence and control the market and affect competition. This test analyzes the market structure and market dynamics and examines the undertaking’s ability to behave to an appreciable extent independently of its competitors, customers, consumers and suppliers.

117. In the strictest sense, the question before us is not whether JJVL has 37.5 % of the market share or just 27 %. The question is whether JJVL is dominant in the relevant market in terms of the test laid down in section 2(2)(e) of the Ordinance. According to its own website², JJVL is the ‘single largest producer of LPG’ in Pakistan. Even if we accept for argument’s sake that JJVL only has 27% share of the LPG market, it must be realised that this would make JJVL not just the single largest producer but the single largest producer with control over more than one-fourth of the entire market. This sort of market share would give any company appreciable market power. The Enquiry Committee assessed the dominant nature of JJVL under the ‘appreciably independent behaviour’ test and we find merit in the test adopted by the Enquiry Committee. In the present case this test entails a qualitative rather than quantitative analysis to determine whether or not an undertaking is dominant.

118. The Enquiry Report indicates that JJVL has a unique method of production. According to the Enquiry Report, JJVL is able to produce LPG inexpensively because “*It has installed an LPG extraction project at SSGCL Liquid Handling Facility at Jamshoro, Hyderabad, Sindh, whereby JJVL ‘skims’ off LPG from a number of pipelines already laid out by SSGCL. This places JJVL at an advantage because it can produce LPG at a very low cost as very little investment was initially required compared to other producers.*” The Enquiry Report finds that

² <http://www.ag.com.pk>

because of this unique method of production in which low costs are incurred, JJVL is able to act independently of its competitors and its pricing decisions are not dependent on those of its competitor.

119. JJVL has denied the contention that it has a low cost of production. It was submitted that as per the Implementation Agreement executed between JJVL and SSGCL, the royalty payable to SSGCL by JJVL is based on a Reference Price (i.e. ‘the highest ex-plant/ex-refinery price in Pakistan for LPG during a month of one of the (local) producers (OGDC, NRL, PRL, PARCO)’). JJVL contends that since its royalty payments, which are a form of costs, are dependent on the pricing data from its competitors; JJVL is not independent of its competitors.
120. However we must juxtapose JJVL’s submissions with that of SSGCL. SSGCL in its comments before the Bench has submitted that “*JJVL being fortunate in having the only LPG extraction plant that extracts LPG from mixed gas (i.e. natural gas plus LPG components of Butane/Propane) that is flowing in the pipeline system of SSGCL in Pakistan and having a large share of the total LPG market in Pakistan is able to produce LPG at much lower costs than any other producer.*” [Emphasis Added]. SSGCL being an independent party has verified that JJVL has a favorable cost structure entitling it to take pricing decisions independently of its competitors. Given that JJVL has a cost advantage over its competitors, the linkage of royalty based on other competitor’s prices would actually go to JJVL’s advantage as the advantage makes JJVL a price leader rather than a price follower. Hence other producers would generally reduce prices to compete rather than dictate prices. In turn the lower prices would translate into lower royalty costs for JJVL, thereby further reducing their costs. This substantiates the view that JJVL can operate independently of its competitors. It maybe relevant to add that although we notice from the OGRA report that PARCO also has a sizeable market share close to JJVL’s, in our considered view, the latter’s costing structures and uninterrupted supply, difference of production methods, along with the fact that LPG is not the primary business concern of

PARCO, provide it a considerable edge and significant competitive advantage.
From the above it follows that JJVL can behave appreciably independent of its competitors.

121. JJVL's customers are the LPG marketing companies. LPG marketing companies are allotted quotas by the producers and are licensed by OGRA to sell LPG. JJVL contends that it can not act independently of its customers, the marketing companies because it has to be cognizant of fluctuating customer demand. According to JJVL it has to make its product profitable for marketing companies because a failure to do so will mean that marketing companies will reduce off take and hence lead to production stoppages on account of full storage.
122. While there may be some truth to this claim, the fact is that LPG demand far outstrips LPG supply. While there are off seasons and peak seasons, as per its website, JJVL has extensive storage facilities and it can increase its storage capacity. The issue of acting independently is sufficiently simple. If JJVL, for some reason, is unable or unwilling to supply them with LPG, then these marketing companies will have to either procure LPG from other marketing companies at very high rates and consequently sell at very low margins, or they have to import LPG, which as explained before is not very profitable. There are currently 71 LPG marketing companies out of which around 35 have quotas with JJVL. There are many marketing companies which do not have an allocation or quota with any LPG producer. In such a case, economics of supply and demand dictates that while JJVL can easily manoeuvre between different LPG companies, the marketing companies on the other hand do not have much of a choice since there is little variation in LPG supply. They either work with JJVL or not work at all. **Accordingly JJVL can also act independently of its customers.**
123. The last prong of the test seeks to determine whether an undertaking is independent of its suppliers. JJVL's sole supplier is SSGCL and it receives all of its raw material (Butane/Propane) from the latter. Article 2 of the Implementation

Agreement read as, “*this Agreement shall commence and be effective of the date hereof, and shall, until the validity of GS, which is currently valid up to the 3rd of February 2011. It is agreed that the Agreement shall continue on the same terms and conditions for any extension of the GSA beyond 3rd February 2011.*” Under this clause, the Implementation Agreement confers certain safeguards for the same terms and conditions to continue. JJVL has argued that Article 2 of the Implementation Agreement is not unusual nor does it bind the parties in any unlawful way and it has pointed out the termination clauses in the Implementation Agreement and reference has also been made to Chapter II of the Contract Act, 1872 under which contracts can be set aside. We would not like to comment on this clause envisaging extension of the Implementation Agreement because it would be beyond the scope of this current discussion. The facts, as they are, entail that JJVL is assured a steady supply of LPG at present till 2011, and in that sense it can behave to an appreciable extent independently of its competitors and customers as JJVL is immune from any supply side instability. While there may be fluctuations in supply due to technical reasons, they are not due to SSGCL, its supplier. **The consequences of this are that naturally JJVL is positioned to act independently of its suppliers.**

124. Based on the above we find merit in the finding that JJVL is dominant in the market for the supply and production of LPG in Pakistan because it can behave to an appreciable extent independently of its customers, competitors and suppliers and that it occupies a “dominant position” in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007.
125. Without prejudice to the above, additionally we find it pertinent to address JJVL’s contention that it controls just 27 % of the relevant market and that its market power has no nexus with Mehran Gas and Lub Gas. JJVL denies that Mehran Gas and Lub Gas are subsidiaries of JJVL and that they are “*merely associated companies within the meaning of Section 2 (1) (2) of the Companies Ordinance 1984 in that JJVL and Mehran and Lub Gas have two common shareholders and*

a common chairman.” The Counsel for JJVL argued that these three companies are separate legal entities and there is no overlap in the scope of their operations.

126. While it has been rightly pointed out that Lub Gas and Mehran Gas are not subsidiaries of JJVL, it has been admitted that they are associated companies of JJVL within a single business group. In dealing with companies with separate legal status within the same group, their behaviour and market operations must be examined to ascertain whether the separate legal entities actually operate as a single economic entity. Corporate entities within the same group can be considered a ‘single economic entity’ when they pass either the ‘economic unity’ or the ‘actual or potential competitors’ test. There are two aspects of this test that need to be applied: 1) Firstly, it is determined whether undertakings are sufficiently integrated to qualify as a single entity and if the undertakings in question fail to affirm the test of integration, then 2) it is seen whether the undertakings are actual or potential competitors of each other.

127. A study of the corporate structure of JJVL reveals that JJVL, Lub Gas and Mehran Gas are part of the Associated Group of Companies and as per the website “*JJVL along with AG's [Associated Group] two marketing companies, Lub and Mehran, constitute our LPG operations.*” It is apparent from the Associated Group’s own website that Lub Gas and Mehran Gas are the vertically integrated distribution and marketing arms of JJVL and these companies work in the LPG sector collectively with JJVL being the upstream producer and Lub Gas and Mehran Gas constituting its downstream operations. The shareholding pattern of these companies, obtained from the Securities & Exchange Commission of Pakistan, reveals that there are two common shareholders between all three companies with one of the shareholders Mr. Iqbal Z. Ahmed being the majority shareholder in all three companies.

Name	Paid Up Share Capital	Iqbal Z		Qazi H.		Total	%
		Ahmed	%	Fareed	%		
JJVL	35,625,000	20,456,250	57	6,387,500	18	26,843,750	75.35
LUB	10,000,000	6,500,000	65	2,000,000	20	8,500,000	85.00
Mehran	1,600,000	1,280,000	80	320,000	20	1,600,000	100.00

128. As a consequence of this shareholding pattern, there is no doubt in our minds that the control of all three companies rests in the same party or person. Mr. Iqbal Z. Ahmad is the CEO and Chairman of JJVL and Lub Gas which Mr. Qazi H. Fareed is the CEO of Mehran Gas. In simple words this means that the ownership and control of all three companies rests in the same persons. Since economic unity relies fundamentally on ownership and control, all three companies under consideration here therefore emerge as a single economic entity.

129. It must be clarified that in competition jurisprudence, the concept of control has a different connotation than that found in company law. While the counsel for JJVL has referred to the statutory interpretation of 'control' as defined by the Companies Ordinance 1984, we would like to point out that control in terms of competition law means the presence of sufficient structural or economic linkages between two undertakings that would enable one undertaking to, directly or indirectly, influence or manage the decision making of the other. Such factors would include common aims of business, common directorship, vertical integration, and market structure etc. Being part of the same group of companies, with common shareholding, it is undeniable (and unavoidable) that the economic decisions of all three companies would have a common nexus. JJVL has itself admitted that there are important structural linkages between JJVL and Lub Gas and Mehran Gas i.e. that all companies have two common shareholders and a common chairman which evidences that the management and decision making structure of both companies is controlled by the same individuals. In addition to the economic and structural linkages, there are other contributory factors which lend further support to the contention that the producer arm and the marketing arms of the Associated Group form one single-entity including the fact that all

three companies operate from the same physical premises, Associated House located at 7 Egerton Road, Lahore. Based on these facts we find that while JJVL, Lub Gas and Mehran Gas maybe separate legal entities under corporate laws, they operate as a ‘single economic entity’ for the purposes of competition law. Since the economic unity part of the single entity test has been satisfied, applying the ‘potential competitor’ test is no more required.

Issue No. (xi) *Whether or not LPGAP occupies the “dominant position” in the relevant market in terms of Clause (e) of sub-section (1) of Section 2 of the Ordinance, 2007?*

130. The Show Cause Notice makes the finding that LPGAP violated Section 3 of the Ordinance in terms of Section 3 read with Section 3 (2) and Section 3 (2) (d), (e) & (g). The Enquiry Committee applied the presumptive test as laid out in Section 2 (1) (e) to determine the dominance of LPGAP. According to the Enquiry Report *“LPGAP is the largest association of LPG marketing companies”*. *Even on a very conservative calculation, it has members which control more than 40 percent of the relevant market. As an association, it has control over its members, with the latter following its policy. Hence, LPGAP can be deemed to be a dominant undertaking under the Ordinance with control of over 40 percent of the relevant market.”*
131. According to the assertions of Progas, the findings made in the Enquiry Report and the corroboration found in the Minutes of the Meeting of LPGAP dated 15 December 2008, LPGAP has around 68 members out of the 71 companies registered with OGRA. There is no doubt that LPGAP is the largest association of LPG marketing companies in Pakistan. It is only logical that LPGAP, or any association which represents a majority of undertakings in a sector, would have a significant market presence, as would be expected of an organization which has

such a large constituency of members. However, when analyzing the conduct of a trade association with regard to an abuse of dominance violation, one would have to assume that the association is making or implementing business decisions. If that is the case, then the conduct would inherently violate Section 4 of the Ordinance. The Commission in such a scenario would be inclined to deal with the issue under Section 4 rather than Section 3. The structure and behavior of LPGAP therefore makes it open to an investigation of a Section 4 violation rather than an abuse of dominance and we will analyze its behavior under that head subsequently.

Issue No. (xii) Whether JJVL and LPGAP, severally have abused their dominant position:

- (a) by creating conditions which excludes undertakings from competing in the relevant market hence violating Section 3(1) read Section 3 (3) and Section 3 (3) (g) of the Ordinance
- (b) by charging premiums and third party commission from marketing companies without allocations hence violating Section 3 (1) read with Section 3 (2) and Section 3 (3) (d) & (e) of the Ordinance?

132. The Enquiry Reports alleges that JJVL abused its dominant position to exclude importers by engaging in a two part strategy. Firstly, JJVL through advocacy and lobbying managed to introduce a pricing mechanism for LPG which allowed it to influence the producer price of LPG and hence eventually the derivative consumer price. And secondly, because JJVL could directly affect producer price and indirectly consumer price of LPG, JJVL took pricing decisions that have the effect of excluding importers from the relevant market.

133. In order to examine the veracity of this allegation made in the Enquiry Report we will make a two step determination, the first being whether the price of locally produced LPG has been or could have been manipulated by JJVL and the second whether JJVL has been engaged in exclusionary practices through its pricing decisions. In order to better understand LPG pricing policy we find it pertinent to reproduce a history of LPG Pricing policy as it has evolved based on the submissions of JJVL and Progas.
134. Out of the copious submissions that have been made by JJVL and Progas and the findings of the Enquiry Committee regarding the linking and de linking of the LPG producer price with Saudi CP, the following facts emerge.
- In 2006, the Federal Government issued the LPG (Production and Distribution) Policy, 2006, (hereinafter ‘LPG Policy’) where under, *inter alia*, (i) the Federal Government was to prescribe a formula for LPG producer (base-stock) price and (ii) OGRA was empowered to determine the reasonableness of LPG consumer price “keeping in view the import parity price of LPG” (Paragraph 3.4 of the LPG Policy). This power along with the powers given to it under the OGRA Ordinance 2002 meant that OGRA could intervene when it considered that the prevailing consumer price of LPG was unreasonable and notify an official consumer price. The government also made the decision to raise LPG producer prices to the level of Saudi CP in order to facilitate imports as is clear from the express requirement to keep in view the import parity price of LPG and OGRA was authorized to notify the Saudi CP every month as the maximum producer price of LPG. From prior to October 2005 to April 2006, producer price did not follow Saudi CP.
 - However, from May 2006 to November 2007, producer price followed the trend of Saudi CP, with OGRA notifying one months CP as the next month’s producer price.

- From December 2007 to November 2008, the policy was reversed and the producer price stayed de-linked. To indicate this, the government asked OGRA not to notify the maximum producer price and let producers to set their own price as long as it was below Saudi CP.
- From November 2008 to the present the producer price is again linked to CP, but now equal to that month's CP hence it is linked.

135. From the above it can be generalized that historically the determination of LPG producer price has fluctuated. It is either a price notified by OGRA or the producer price is fixed by LPG producers themselves albeit with a ceiling set by OGRA in accordance with the international standard known as the Saudi CP.

136. According to the Enquiry Report, JJVL has always been keen to keep producer price un-regulated, allowing it to manipulate LPG producer price. When the government introduced import price parity for the LPG industry, OGRA was authorized by the Federal Government to notify the Saudi CP on a monthly basis. JJVL was unhappy with the decision since it allowed importers to enter the market and compete with local producers. Therefore, JJVL and its allottees campaigned to have the prices de-linked from the Saudi CP. Due to their efforts, the import price parity was reversed and the prices were de-linked. Once the policy was reversed, JJVL took the decision not to follow the Saudi CP and instead maintained a low producer prices which made it impossible for importers to market their products. JJVL refutes that the local producer LPG price was ever 'linked' or 'de-linked' with the Saudi CP. It maintains instead that what is being shown as de-linking is nothing more than Federal Government instructing OGRA not to notify the producer prices. Therefore, JJVL contends that since there was no variation in LPG pricing policy ('linking' and 'de-linking') in no way could it have affected or manipulated the pricing of LPG.

137. Economic and statistical data has been provided by both the Enquiry Committee and JJVL regarding the connection between local LPG Producer price and the

Saudi CP. A perusal of the annexes of the Enquiry Report indicates that the usage of the terms 'linking' and 'de linking' with Saudi CP which JJVL has taken a strong exception to, is not an invention of the Enquiry Committee but was used extensively by certain individuals and groups whose interests are similar to JJVL's and who had opposed the import price parity formula. One of these individuals is Belal Jebbar, the CEO of Noor Gas which is an allottee of JJVL. Belal Jebbar in his article 'Import Price Parity: Tried, Tested & Failed' published in the energyupdate.com, says that the government has finally reversed its policy of linking local LPG prices with international LPG prices. Furthermore advertisement purportedly published by the some of JJVL's allottees LPG70, call upon the government to take back the decision to link the LPG prices to international price and de-link them. There are numerous other instances where directors of JJVL have publicly expressed their opposition to the 'linking' of the local LPG prices with international ones. Therefore, the 'linking and de-linking' LPG prices is a known phenomena and for JJVL to claim ignorance is does not seem to fall in place.

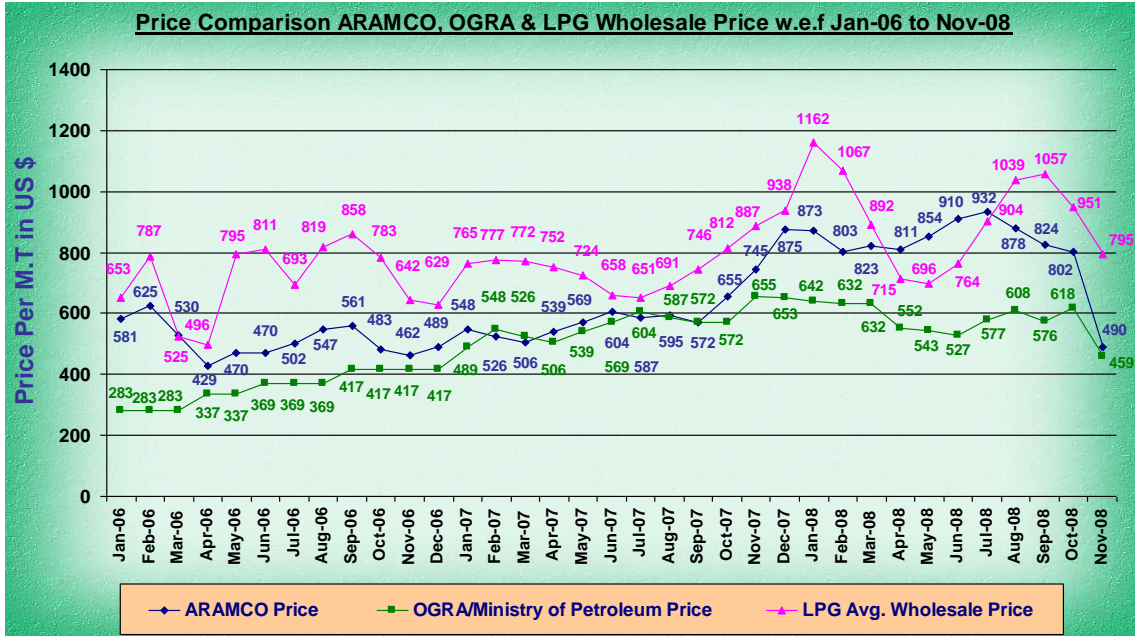
138. Leaving aside the usage of the terms 'linking' and 'de linking', the facts reveal that there was a period in time when OGRA notified a producer price and there was also a period when OGRA did not notify producer price and. Whether this is termed as linking and de linking is irrelevant. What is important for the purposes of our determination is that in times when OGRA did not notify the producer price, LPG producers, foremost amongst them JJVL which is a price leader, were able to set their own price of LPG. Contrary to JJVL's assertion, OGRA not notifying the price has an important connotation and is not merely a technicality. It means that there is no officially suggested or regulated price and in this case, it also provides local producer with the opportunity to influence/control the determination of the maximum consumer price of LPG in the market.
139. JJVL contends further that there is no evidence which indicates that it, or its allottees, used any influence to have LPG prices de-linked from Saudi CP. While

it is evident that JJVL and its associates raised both public and private voices to de link local LPG producer price from Saudi CP (there are a series of letters from various producers on 26 November 2007, including JJVL, to the Ministry of Petroleum and Natural Resources which bring out an interesting picture, as mentioned earlier in this Order as well). The producers include National Refinery Limited, Pakistan Refinery Limited, Pakistan Petroleum Limited, PARCO, OGDCL, SSGCL, OGDCL, and Orient Petroleum. When the Ministry asked the producers whether they wanted to stick to the import price parity or do away with it, all of them except JJVL stated that import price parity regime should continue), it is clear from the letters, media reports and articles on record that there was indeed an effort to have the local LPG producers prices de-linked from international prices. However, we must clarify that lobbying for a particular policy or government action is by no means anti competitive. JJVL seems to make the assumption that the influence implied in the Enquiry Report is tainted with illegality. That is not the case. We are not concerned with JJVL's attempts to de link with Saudi CP. As a business entity, JJVL is free to lobby for deregulated prices which in fact would be in keeping with competition ends. What we are concerned with is how JJVL used the de linked pricing mechanism as a means of engaging in anti competitive behavior. While lobbying is a legitimate and lawful practice, JJVL's campaign, directly and also through its allottees, to have the producer prices de-linked from the international prices needs to be seen in the context of abuse of dominance and the effect that it has had, if any, on competition.

140. This leads us to the determination of whether JJVL used this de linking to engage in exclusionary behavior via its pricing decisions. The facts laid out above perhaps only provide an explanation as to why JJVL wanted to have the producers prices de-linked. JJVL raises the plea that even after the de linking technically nothing has changed except that OGRA does not notify the maximum producer prices anymore and that the de linking of prices had no real bearing for JJVL. However, JJVL is overlooking the great benefit that it derived from an

unregulated producer price. As a matter of simple economics, whenever there is a notified price ceiling, the market players tend to move towards that price ceiling. However, with no notified price ceiling in place, the strongest player in the market gains the opportunity to take independent pricing decisions and JJVL, being the single largest LPG producer in the market and in a position of considerable dominance, greatly benefited from this action as LPG price deregulation enabled it establish itself as the unchallenged price leader in the market.

141. This provided it benefit on two levels. Firstly, as, JJVL kept its prices low as compared to Saudi CP and because it was a price leader, other LPG producers were also forced to keep down prices. The relationship between domestic and Saudi CP prices can be seen in the figure below. As mentioned before, JJVL's low prices flow from its ability to produce LPG at low costs due to the Implementation Agreement with SSGCL. Interestingly, because local LPG producer lowered their prices in response to JJVL, this also meant that JJVL had to pay less royalty as under the Implementation Agreement with SSGCL, royalty payments directly corresponded to price levels of its competitors. SSGCL in its statement filed before the Bench, has stated that it had wanted to link the royalty payments to Saudi CP but JJVL had insisted on the linking it to the local producer prices. From this statement it is apparent that linking of the local LPG prices with Saudi CP had started increasing the royalty payments of JJVL to SSGCL which was driving up its costs. Thus, with the prices de-linked, JJVL was free to lower its prices, forcing its competitors to keep the prices low which in turn cut its costs further. This again has no inherent anti-competitive connotations; infact taking independent pricing decisions and lowering prices is generally considered to be pro-competitive. We are more concerned with how JJVL's pricing decisions had strong anti-competitive exclusionary effects in the market. This brings us to the second benefit.



142. Keeping the prices low had the effect of keeping out and excluding LPG importers out of the market, both directly and indirectly. In the direct sense, the lower domestic prices reduced the ability of importers to sell their higher priced product. But more importantly, keeping the domestic prices relatively lower enabled JJVL to use OGRA’s price determining formula for LPG consumer price to make sure that higher priced imports could not be sold in Pakistan. OGRA’s formula predominantly uses the local LPG producer prices to come up with a ‘reasonable’ consumer price for LPG. With up to 90 percent of that consumer price dictated by local LPG producer price, the importers like Progas found it impossible to officially sell their imported products because marketing companies take LPG at lower prices and will not buy higher priced imported LPG. Thus imported LPG will not be able to distribute/retail its product and are foreclosed from the marketing/distribution market of LPG. JJVL did not place anything on record to rebut the evidence regarding pricing trends furnished by Progas. Therefore this Bench, in its considered view, finds itself persuaded by the arguments of Progas.

143. The idea of using low pricing as a method of abusing dominant position is not new. In *Michelin*³ the Court observed that:

An 'abuse' is an objective concept referring to the behavior of an undertaking in a dominant position which is such as to influence the structure of a market where, as a result of the very presence of the undertaking in question, the degree of competition is already weakened and which, through recourse to methods different from those governing normal competition in products or services on the basis of the transactions of commercial operators, has the effect of hindering the maintenance of the degree of competition still existing in the market or the growth of that competition. It follows that not all competition on price can be regarded as legitimate and that an undertaking in a dominant position cannot have recourse to means other than those within the scope of competition on the merits.

144. Low pricing to keep out competitors is known in competition law as limit pricing and serves as an artificial entry barrier to exclude competitors. According to OECD's Glossary on Statistical Terms, 'Limit pricing refers to the pricing by incumbent firm(s) to deter or inhibit entry or the expansion of fringe firms. The limit price is below the short-run profit-maximizing price but above the competitive level.'⁴

145. The idea is to lower price enough to make entry of new players unprofitable to the extent that the potential or new entrant does not find it feasible to enter or to continue business. In their article titled *Predatory Pricing in Air Transport*,⁵ Ryan and Soames content that:

³ Case 322/81 *Michelin* v Commission [1983] ECR 3461

⁴ See <http://stats.oecd.org/glossary/detail.asp?ID=3246>

⁵ Alan Ryan.& Trevor Soames, *Predatory Pricing in Air Transport*, *European Competition Law Review*, 1994 - ECLR 1994, 15(3), 151-164

Limit pricing consists in setting prices at a level below the profit maximising price but above average total costs and which is set at a level which is sufficiently low to discourage new entry. It is submitted that this constitutes an infringement of Article 86 consistent with the Court's judgment in *Michelin* where the Court stated that a dominant undertaking is under a special responsibility not to diminish further the degree of competition remaining on the market, which by definition is already weakened due to the presence of the dominant undertaking.

146. Not all forms of limit pricing are illegal under competition law; if the benefit of lower prices is passed on to the consumers and the economy avoids duplicate production, such pricing is beneficial.⁶ However, if there is no benefit to the economic and consumers, and it results in undue exclusion, then the behavior is condemnable under competition law.
147. In the case before us, the limit pricing by JJVL has kept its producer prices low in relation to Saudi CP in a market where the demand of a fuel commodity outstrips its domestic supply. In this regards OGRA's Annual Report and submissions before the Bench have informed us that there is always a shortfall of domestic LPG supply. By keeping the producer prices low in relation to Saudi CP, JJVL has created an artificial entry barrier for importers and has limited the ability of importers to sell LPG in the relevant market by reducing profitability in a situation where the LPG is required by domestic and commercial consumers.
148. JJVL has argued that it is in the public interest to keep the prices low as the public should not have to bear the brunt of high cost imported LPG. If this was true, all end consumers would have been benefiting from the low consumer prices and all

⁶ Robert E. Hall, Potential Competition, Limit Pricing, and Price Elevation from Exclusionary Conduct, Issues in Competition Law and Policy 433 (ABA Section of Antitrust Law 2008), Chapter 18

the local demand would have been met, hence no reason to view JJVL's behavior as anti competitive. The reality is that lower prices that JJVL proposes are at the producer's level not the consumer level. JJVL's customers (and beneficiaries of the lower producer price) are not ordinary people but commercial marketing companies. The marketing companies have their own profits to make and therefore, the assertion that that lower prices at producer level would automatically mean lower retail prices is at best a conjecture. In fact, due to the gap between supply and demand in the country, as admitted by OGRA in their reply before this Bench, LPG unofficially retails at very high level as evidence by the table below.

Date	LPG Stock Price/MT	Purchase of MC/11.8kg	Sale to Distributors/11.8kg	Profit Ceiling	Profit of MC
Jul-06	25573	301	480	109	179
Aug-06	28847	339	675	109	336
Sep-06	28847	339	605	109	266
Oct-06	28847	339	605	109	266
Nov-06	28847	339	419	109	80
Dec-06	28847	339	465	109	126
Jan-07	34349	404	605	109	201
Feb-07	38467	453	620	109	167
Mar-07	36839	433	535	109	102
Apr-07	35421	417	540	109	123
May-07	37729	440	540	109	100
Jun-07	39854	469	475	109	6
Jul-07	42266	497	430	109	-67
Aug-07	40842	480	475	109	-5
Sep-07	41568	489	515	109	26
Oct-07	40295	474	565	109	91
Nov-07	45886	540	595	109	55
Dec-07	45886	540	855	109	315
Jan-08	45886	540	950	127	410
Feb-08	45886	540	725	127	185
Mar-08	45886	540	650	131	110
May-08	39197	461	605	126	144
Jun-08	41000	482	685	130	203
Jul-08	41000	482	750	124	268
Aug-08	39809	544	750	136	206
Sep-08	46969	641	825	138	184
Oct-08	46969	641	790	138	149
Nov-08	40335	550	840	139	290
Dec-08	28274	386	850	139	464
Jan-09	30000	411	900	138	489

149. Despite the official ‘reasonable’ consumer price notified by OGRA, the actual retail price of LPG as evidenced by the table above is higher. JJVL did not place anything on record to rebut the evidence furnished by Mr. Irfan Khokar regarding pricing trends (shown above). Therefore this Bench, in its considered view, finds merit in this argument.
150. In such a scenario, ousting importers from the market actually helps in elevating LPG retail prices because it reduces the supply of LPG in the relevant market. Had the importers been free to market their LPG, and not held back by the exclusionary conduct by JJVL, the market dynamics of supply and demand would have provided for a fair and reasonable retail price, while at the same time ensuring that demand is met. We must emphasize here that the end result of competition law is not necessarily to ensure very low prices; the aim is to protect the structures of competition in order to ensure that there is both adequate supply and a competitive price. In *National Society of Professional Engineers v United States* (435 U.S. 679, 98 S.Ct. 1355), while declaring horizontal price fixing has facially invalid, the court held that competition law (specifically the Sherman Act) “reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services.... The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain-quality, service, safety, and durability-and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers”. In this case, since there is a shortage domestically, keeping lower prices to keep out importers only makes the situation worse – not only do the prices shoot up but a lot of customers are not able to get the product. If the forces of the free market were allowed to prevail then the market would reach an equilibrium whereby a competitive price would be reached and an adequate supply of LPG would ensure.
151. JJVL has argued that if the actual retail prices are higher than the official price notified by OGRA, then importers like Progas should not have any issue selling

their product in the market. Progas asserts that *“Since [it] is unwilling to resort to illegal devices and practices, it was unfeasible for Progas to sell at the OGRA-determined maximum price (although many marketing and retail operations were able to sell at far higher prices, due to the deficit created by the exclusion of imports).”* We cannot accept such an argument. Two wrongs do not make a right. As a creature of law, we cannot ask a private party seeking a lawful remedy to ignore a legal regulatory order and undertake an illegal activity. Regardless, the argument is untenable. As explained earlier, the marketing companies prefer to take LPG at lower prices and will not still buy from the importers. Thus Progas would not be able to distribute and retail its product.

152. We find that we cannot agree with JJVL’s contention that the relevant market is extremely competitive. The fact is that the market of supply of LPG is based on a quota or allocation system whereby there is a limited production of domestic LPG and that LPG is sold to certain LPG marketing companies. Many other LPG marketing companies do not get direct access to the product and instead have to buy LPG not from LPG producer but from other marketing companies or have to import it. Hence access to LPG is restricted. Despite getting numerous chances to address this issue, JJVL has not challenged these facts. In addition we have before us the calculations relating to the Herfindahl-Hirschman Index (HHI) of the LPG sector. The HHI is used to see whether a particular market is concentrated or not. A HHI of 1800 and above is generally considered to be a highly concentrated market which indicates that the latter is not competitive. According to our calculations using OGRA data for year 07-08, and assuming that the market share of JJVL is only 27 percent, the HHI of the sector is 2008 if imports are ignored and 1873 if imports are included. In both cases, the market is extremely concentrated and un-competitive at the moment. Therefore, on the basis of the record and facts, we cannot hold for JJVL in this regard. The table regarding HHI is reproduced below for reference.

Name	Annual Production (MT)	MS-Domestic	MS-Total	MSD-Company	MST-Company
PARCO	153677	28.01	26.95	28.01	26.95
National Refinery	14320	2.61	2.51	2.61	2.51
Pakistan Refinery	9247	1.69	1.62	1.69	1.62
Attock Refinery	6401	1.17	1.12	1.17	1.12
Bosicor	2842	0.52	0.50	0.52	0.50
OGCD	43710	7.97	7.66	17.34	16.69
OGDC	26793	4.88	4.70		
OGDC	12711	2.32	2.23		
OGDC	6485	1.18	1.14		
OGDC	5461	1.00	0.96		
OPII	19800	3.61	3.47	3.69	3.55
OPII	443	0.08	0.08		
POL	51455	9.38	9.02	9.38	9.02
PPL	46058	8.39	8.08	8.39	8.08
JJVL	149241	27.20	26.17	27.20	26.17
Total Domestic	548644	100.00	96.20		
Imports	21662		3.80		3.80
Total	570306		100.00		

HHI -MSD 2008.68

HHI-MST 1873.41

153. JJVL has further contended that during the time the import price parity was in place, there were still not enough quanta of imports to justify the success of the former. We believe that the argument does not hold simply because it was the first year of such a formula and that any market takes time to adjust to change in policy. It must be pointed out here that the data available with the Bench shows

- consistently that during the period the import price parity was in place, the margins of the marketing companies are reduced as compared to the times when import price parity has not been in place. These reduced margins indicate that the competition in the relevant market increased during the time import came in. This translates into more competitive pricing in the market.
154. JJVL also argues that despite the de-linking, imports rose in the current year. In this regard we are convinced by Progas' reply that the imports increased since the Ministry had this year stopped OGRA from issuing a single 'reasonable' price which allowed them to freely import and sell their product.
155. In light of the foregoing, we have no doubt that JJVL has abused its dominant position by targeting to keep producer prices low in relation to Saudi CP which has had the affect of excluding importers like Progas from doing business and has restricted competition in the relevant market. Such actions are anti competitive and violate Section 3(1) read with Sections 3(2) and 3(3) (f) & (g).
156. Coming to the issue of LPGAP's abuse of dominance, we find that the nature and structure of the undertaking require that we analyze its conduct under Section 4 rather than Section 3 of the Ordinance. In addition, the issue of charging third party commissions and premiums by JJVL and LPGAP will be dealt together while discussing Section 4 violations.

ISSUE No. (xiii) Whether JJVL and LPGAP along with its members

- (a) entered into any prohibited agreement towards achieving targeted prices hence violating section 4(1) read with Section 4 (2) (a) of the Ordinance ?

(b) entered into any prohibited agreement for charging premiums and third party commissions without allocations hence violating Section 4 (1) read with Section 4 (2) (f) & (g)?

157. In our view the Enquiry Report points out two prima facie instances of cartelization; one is a vertical cartel between JJVL and LPGAP and the other is a horizontal cartel amongst the LPGAP marketing companies.
158. Before moving any further, we must deal with the issue of LPGAP not taking part in the hearing proceedings. LPGAP has chosen not to appear before the Bench and has repeatedly refused to exercise its right to a hearing which the Commission has provided. In such a scenario, the Ordinance and the Competition Commission (General Enforcement) Regulations 2007 made there under empower the Commission to pass ex parte orders. The relevant portions are reproduced below; Section 30 (2) (b) of the Competition Ordinance 2007 states that; *“In case the undertaking does not avail the opportunity of being heard, the Commission may decide the case ex parte”*. Regulation 26 (2) (e) of the Competition Commission (General Enforcement) Regulations 2007 states that *“Where on the day fixed for hearing, including day of hearing re-fixed on adjournment, if any party or parties to the proceedings do not appear even after service of notice or having noted the date, the proceedings shall continue in the absence of such party or parties, not appearing and an ex-parte decision shall be made.”*
159. The power to issue ex parte orders is not an unfettered power and must be exercised with deliberation and all attempts must be made to ensure that the defendant is not placed at an unnecessary disadvantage. Case law has delineated that this discretionary power is to be exercised only when the defendant has deliberately ignored the court’s summons, and is hampering the process of justice. In PLD 1986 Pesh. 19, the court held *“if the defendant was properly informed of the action against him and yet knowingly he did not participate in the proceedings, it will be proof against him that he does not want to contest the*

claim of the plaintiff and so ex parte decree is warranted in view of his conduct.”.

The adjudicating authority must apply its judicial mind to all available evidence on record and must give a speaking order based on the findings of the issues framed. In PLD 1975 SC 678, the court laid out a two pronged test for ex parte orders; firstly, that the opposite party be duly served, and secondly that the Court should not wield its discretionary power mechanically or arbitrarily.

160. The thrust of all case law on the subject emphasizes that the pivotal concern of procedural fairness is that the defendant be given an adequate opportunity to prepare and present his case and be given the opportunity of a hearing, oral or written before the adjudicating authority. In this instance, LPGAP has been given multiple opportunities for appearing before the Commission and refuting the allegations made against it in the Enquiry Report. Allegations of bias and malafide have already been dealt with at Para 80. The Commission is bound to proceed in public interest and to apply its judicial mind to the evidence placed before and make a determination.
161. Before proceeding further, we must also express our disappointment and consecration on the attitude and stance adopted by LPGAP. This sort of behavior needs to be discouraged and parties should not view the adjudicating authority as their adversary. Rather they should fully assist the Commission in order to administer and enforce the law in its true letter and spirit.

Horizontal Collusion – LPGAP

162. Addressing now the question of collusion between the marketing companies through its association, we see that the Enquiry Report concludes that LPGAP, a representative trade organization of LPG marketing companies has taken decisions which appear to fix end-user consumer prices.

163. Representative trade associations are groupings created by competitors to discuss matters of general concern to the industry such as, taxation, industry standards, quality control and other policy matters. Since the Commission's inception, we have discovered that many trade associations have moved beyond the mandate designed for such organizations and instead have become forums for anti competitive behavior by undertakings. In the ICAP judgment the Commissions found the Institute of Chartered Accountants of Pakistan, an association of chartered accounts, guilty of taking a decision which amounted to price fixing. Likewise, in the cement case, the Commission found that members of the All Pakistan Cement Manufacturers Association had entered into an agreement to fix output and prices of cement in the country. Similar violations of competition law were also found in the All Pakistan Newspapers Society and the Pakistan Banking Association cases. In short, there is a plethora of instances where associations in various sectors have violated Section 4 of the Ordinance. And we must emphasize that the Commission has adopted a strict policy towards industry associations which collude or facilitate collusion between their members who are otherwise competitors. Associations are not business decision making entities and need to be extremely cautious when they discuss issues which have commercial consequences for their members. This includes any deliberation or decision on pricing and output.

164. A perusal of the facts reveals that LPGAP has on numerous occasions announced its decision to fix the price of LPG and has even belligerently threatened dire consequences for marketing companies who do not comply with its dictate. A couple of such examples are discussed. First there is the advertisement on September 10, 2008 by LPGAP in Daily Express in Urdu which is reproduced below.

The highlights of the contents are summarized in English thereafter.

- a. *It purports to say that a majority of LPG marketing companies who fall under LPGAP are not charging more than Rs. 72 per Kg.*
- b. *It states that given the maximum price of LPG marketing companies, LPG should not retail more than Rs 78 per Kg.*
- c. *It suggests that any retailers selling above this price should be reported to the Police, OGRA or LPGAP.*
- d. *It also states that “LPGAP is the guarantor of ensuring LPG at reasonable/appropriate price”*

165. The advertisement has all the requisite elements of a collusive economic decision by an industry association. It directly establishes LPGAP's standing in the industry by the claim that it represents a majority of marketing companies in the sector. It goes on to announce the maximum dealers' price of LPG, a clear indication that the association has detailed information about the pricing of LPG by its member companies. It also establishes, on its own, the 'reasonable' retail price of LPG which it believes is suitable at retail level without having the legal authority to do this. Not only does LPGAP unlawfully 'set' a price for LPG, it also advocates and tries to enforce this certain consumer price in the market. In this regard we have letters on record from OGRA to LPGAP dated September 19, 2008 and January 23, 2009 warning it to desist from making such a determination, stating that such an action would force OGRA to report LPGAP's actions to the Commission. The advertisement also suggests a policing and enforcement mechanism whereby violators of the association's decision would be reported to the state machinery and LPGAP for action. The advertisement also carries a reassertion that LPGAP is a guarantor of a reasonable consumer price. In short this advertisement is LPGAP's smoking gun for collusive behavior.

166. We find that the advertisement is a clear instance of price fixing and proof that LPGAP is engaging in this illegal and anti competitive activity. Furthermore this appears to be part of a consistent policy of the association as can be seen from

another statement by the LPGAP spokesman at the start of the year 2008 which is the second example mentioned above.

167. On January 16, 2008, a news item in The Nation titled **‘LPG users asked not to pay more than Rs. 65/kg’** carried an account of an interview the staff reporter had with Mr. Faish Ahmed, spokesman of LPGAP. It starts off by stating that: *‘Faish Ahmed, spokesman for LPGAP has urged the LPG users not to pay more than Rs. 65 per kg as any other demand made by retailers are completely unjustified.’* The account goes on to say that: *‘He [Fasih Ahmed] announced that the association was launching a media campaign to guide the common LPG user that there are few shops in Lahore, about 55, that are selling LPG at the correct price. He said that banners would soon be set up to guide the common LPG user in the process socially boycotting the retailers who were accruing unjust profit.’*
168. Horizontal collusion which aims to fix the price of a commodity is condemned per se under Section 4(1) of the Ordinance. There is a wealth of jurisprudence which finds horizontal price fixing as an act of blatant anti competitive behaviour. As competition jurisprudence has evolved, it has remained steadfast to the principle that unhindered competition will always ensure the highest degree of consumer welfare. In Northern Pacific Railways Co vs. United States, 356 U.S. 1, 78 S.Ct. 514, (1958) the court held that *“there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal under Sherman Act without elaborate inquiry as to precise harm they have caused or business excuse for their use.”* In United States v. Parke Davis and Company 362 U.S. 29, 80 S.Ct. 503, (1960) the court held that, *“Under Sherman Act, competition not combination should be the law of trade and a combination formed for purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing price of commodity... is illegal per se”* In United States v. General Motors Corporation 384 U.S. 127, 86 S.Ct. 132, (1960) the court held that *“substantial restraint upon price competition is a goal unlawful per se when*

sought to be effected by combination or conspiracy.”The Commission has been consistent in finding that a horizontal arrangement amongst competitors to fix price is condemned to facial invalidation not withstanding any pro competitive justifications that may be offered. In any event, no pro competitive justification or rationale has been offered as LPGAP has consciously decided not to appear before the Commission to avail the opportunity of being heard and to rebut any allegation against it. The rationale of taking the per se route is based on the experience competition regulators have accumulated in over a hundred years of competition jurisprudence, which has repeatedly avowed that price fixing by competitors in the same market cannot have any tangible and sound pro-competitive effect. The Commission has also consistently held this view and reference is made to the ICAP case wherein the Council of the Institute of Chartered Accountants of Pakistan took a decision to fix the minimum hourly charge out rate and the minimum fee for audit engagements. Both at the original and appellate stage, the Commission found that despite any public policy considerations that may be touted, the anti competitive effects of price fixing have been established through years of jurisprudence and the negative economic repercussions of price fixing lead to a prevention, restriction and reduction of competition in the market.

169. Likewise, as was held in the ICAP, we find that LPGAP has stepped beyond the ambit of its operations by publishing an advertisement announcing the maximum consumer price for LPG and also threatening action against deviant distributors. The LPG market is regulated by OGRA, and while OGRA, being a government body might fix the price for LPG, LPGAP has no statutory license to set or control prices. This is a clear instance of a decision of an association of companies fixing the price of a commodity in violation of Section 4 (1) and Section 4 (2) (a) of the Ordinance.
170. JJVL argues that since Progas is also a part of LPGAP, there can be no cartelization within LPGAP. We find this argument untenable. The decision to fix

the price could have been taken by a ‘majority of the LPGAP members’ without a member’s consent. Moreover, the fact that Progas brought this collusive practice to the notice of the Commission may help in dispelling any such participation. In any event, the purported inclusion of Progas in this collusive activity would not render such decision making by LPGAP lawful.

171. While the credibility of media reports as a source of evidence has not been challenged by LPGAP, it has been repeatedly stressed by JJVL. JJVL submits that “Media reports are not credible evidence and can not be relied upon unless and until the author of the same is present to adduce the same and respond to cross examination.” With regards to this assertion, we note that the purported media reports relied upon by the Bench are not third party accounts which need to be verified. The first purported media report is the advertisement by LPGAP which is not a media report but a public statement issued by LPGAP itself. The second report is an interview given by the spokesman of LPGAP which quotes Mr. Fasih Ahmed verbatim. Therefore, there are not media reports which need corroboration.
172. However, in any case we will address JJVL’s contentions in this regard. JJVL has relied on PLD 2004 Supreme Court 583 Muhammad Shahbaz Sharif vs. Federation of Pakistan. The facts of the case were that the petitioner claimed a violation of his fundamental right of being dealt in accordance with the law, as guaranteed by Article 4 of the Constitution of the Islamic Republic of Pakistan, 1973, because allegedly, the government had, through the press, made it clear that as soon as the petitioner landed in Pakistan, he would be deported. In this regard the court held that “*no evidentiary value is attached to the press reports and no reliance can be placed on a press report where a person claims a legal right on its basis.*” The court went on to state that evidentiary value can be attached to press reports if “*irrefutable evidence is brought on record for establishing their correctness.*” The court also stated that while there was one line of precedents

which held that no evidentiary value is attached to press reports, there is another line of authorities in which press reports are relied upon.

173. Reliance was also placed on Muhammad Ashraf Khan Tareen vs. The State, 1996 SCMR 1747 wherein the Appellant was challenging a conviction of homicide under Section 302 and 449 of the Pakistan Penal Code. As part of its defense, counsel for the Appellant wanted to enter certain newspaper cuttings as evidence. The court held that “*the newspaper cutting have not been properly proved in the way required by law of evidence. Particularly in a criminal case such cutting cannot be used either in favor of the prosecution or in favor of the defense, unless author of the same is examined in Court as a witness.*” The facts of this case are clearly distinguishable as it relates to a criminal offence and the court emphasizes that the evidentiary bar is particularly high. Like wise the counsel for JJVL also cited Raja Muhammad Afzal v Chaudhary Muhammad Altaf Hussain 1986 SCMR 1736. The Appellant in this case was a duly elected candidate to the National Assembly but he was disqualified from holding public office by a decision of the Election Tribunal on the grounds that his election was void for corrupt practices committed with his connivance. While determining the question of the evidentiary value of the reports made against the character of the Appellant, the court held that the election tribunal was bound by the law of evidence. This case is factually distinguishable from the current proceedings because the former relates to the defamation of character by a third party through media reports while in the latter we are relying on direct statements made by LPGAP through the media.

174. It must also be emphasized that the purported media reports relied upon by the Enquiry Report contain statements made by the respondents themselves. If it is asserted that these statements made the reports are false or manufactured, then it raises the question of why they were not subsequently retracted or any effort made to correct them in the media. Silence on the part of JJVL and LPGAP can only indicate that these statements were indeed made and the media reports were

published with their acquiescence. Additionally, in the Cement case, the undertakings had argued that they had not implemented the unlawful decision taken by the All Pakistan Cement Manufacturer's Association, but given the chance to present evidence, they were unable to prove their assertion. In such a situation, the Commission had relied on illustration (g) of Section 129 of the Qanun-e-Shahadat Order 1984 which states that '*The Court may presume that evidence which could be and is not produced would, if produced, be unfavorable to the person who withheld it.*' We find the same principle applicable here. JJVL and LPGAP could have produced arguments and evidence to negate the veracity of the news paper reports but have not done so. Thus we are constrained to believe in the factual correctness of these reports.

175. Given the facts, and the analysis above, we are of the view that LPGAP has violated Section 4 (1) read with Section 4(2)(a) of the Ordinance by taking a decision to fix LPG consumer prices.

Vertical Collusion – JJVL & LPGAP

176. The Enquiry Report makes a finding of a *prima facie* 'vertical cartelization.' As per the Enquiry Report, "*JJVL and LPGAP have formed a vertical cartel with the aim of fixing LPG prices. This is indicated by the following (in the Enquiry Report):*

Advertisements by LPGAP of September 10, 2008 which OGRA also deemed as cartelization and illegal.

Media reports of similar nature in which JJVL and LPGAP talk about desire to maintain 'fair price mechanism' in the relevant market.

JJVL's control over LPGAP and marketing companies through vertical linkages. Many directors of JJVL and their relatives are directors or owners of marketing companies.

177. LPGAP as mentioned above, has not come before the Commission and due to the reasoning given earlier, the latter is bound to proceed on the basis of the facts on record.
178. We note that the Enquiry Report points out that LPGAP, through its decisions and statements, has facilitated the creation of the artificial entry barrier that seeks to keep out importers from the relevant market. The Enquiry Report however, does not particularly point out towards any act(s) or action(s) of collusion between the two undertakings which could be construed as having the object or effect of affecting the competition in the market.
179. Competition jurisprudence acknowledges that a single producer or supplier can accumulate market power by taking over distribution networks downstream in the market. This can either be done by entering into vertical agreements, or by vertical integration. An examination of JJVL's downstream operations reveals that it is engaged in both types of relationships downstream. It has vertically integrated distributors, Lub Gas and Mehran Gas; and it has also entered into vertical agreements with some 30 or so LPG companies downstream. Hence the market structure and JJVL's dominance could possibly facilitate vertical collusion.
180. The core elements of any concerted practice are the communication, direct or indirect, of commercial information between undertakings and the anti competitive effect of the communication. The recent decision of the European Court of Justice is instructive in the matter of the Dutch mobile phone operators issued in June this year. In this case, the ECJ reaffirms the elements of a concerted practice that need to be proved before a collusive behavior can be made out.

181. The first element to establish is the communication of information between undertakings that enables them to establish their conduct as some sort of understanding between them. The understanding does not need to come from a formal communication or meeting. It can be in the form of ‘a nod and a wink’. The undertakings in question today are JJVL and LPGAP who have been trying to maintain a certain level of LPG prices in the country and have publicly demonstrated their intentions in this regard. We have found that JJVL’s pricing decisions have the effect of excluding competitors at the producer level. We have also held above that LPGAP has engaged in price fixing at the downstream level which is per se illegal.
182. The linkages between JJVL and LPGAP must be reemphasized here. LPGAP is an association of marketing companies, around 30 of which have long term supply agreements with JJVL. JJVL is vertically integrated with two associated marketing companies who share a common chairman and common directors. The chairman in question is Mr. Iqbal Z. Ahmed who also happens to be the chairman of LPGAP. Another common director Mr. Fasih Ahmed, who is the son of Mr. Iqbal Z. Ahmad, is the official spokesman of LPGAP. Many other directors of the marketing companies are also directors of JJVL. In such a scenario and given such strong linkages, it would be extremely easy for the two undertakings to exchange of information about the pricing decisions and exclusionary behavior. This is especially true when the decision making people are the same in both the undertakings. The argument is strengthened given that both the undertakings have subsequently engaged in actions that are indicative of a coordinated effort; JJVL have engaged in limit pricing while LPGAP took pricing decision to maintain LPG consumer prices at a particular level. Both the individual actions, prima facie, facilitate the creation of an artificial entry barrier for importers.
183. Regarding the effects of the exchange of information, it has been held by the ECJ in the Dutch mobile phone operator’s case that the competition authority need not show the effects as there is a presumption that commercial entities will use information it receives as long as they are in business in the relevant market.

Therefore for practical purposes concerted practices are anti-competitive by object, and not effect. The question is whether the object of any such concerted practice has the ability to result in restricting competition. In the case before us, the anti-competitive actions have already been established above i.e. exclusionary behavior and price fixing. Therefore, we need not labor on this point any further.

184. In our considered view while there are indicators to suggest that there are strong linkages between JJVL and LPGAP which might facilitate coordination and communication between the two for each to achieve their independent objective i.e. exclusionary behaviour and price fixing respectively, we do not find tangible evidence establishing the essentials of concerted practice for us to conclusively hold that a concerted practice took place between JJVL and LPGAP. These linkages required further probe to bring out and substantiate the collusive aspect amongst the two undertakings.

Premiums and Third Party Commissions

185. The Enquiry Report has found that JJVL and their allottees charge premiums and enter into third-party commission agreements with non-quota holder for the sale of LPG. According to the Enquiry Report, these actions place non-quota holders marketing companies at a competitive disadvantage vis-à-vis quota holder marketing companies. In addition, the report also holds that charging premiums and third party commissions is an extraneous condition on the sale of LPG. Since the alleged violation of the two Sections of the Ordinance deal with similar facts, we have clubbed them together.
186. The evidence taken into consideration by the Enquiry Committee includes three commercial agreements, statements by various stakeholders in the national media and a basic economic analysis of the facts before the committee.
187. The agreements in question are summarized as follows:

- *Commission Agreement between Mr. Ishtiaq Asif, CEO of Sehwan Gas, and Progas dated 21 February 2005.*
- *Commission Agreement between Ms. Sadia Ahmad and Progas dated 21 February 2005*
- *LPG Sale Purchase Agreement between Progas and JJVL dated 21 February 2005*

188. From the Form 'A' submitted to SECP by JJVL for the year 07-08 it appears that Mr. Ishtiaq Asif in addition to being the CEO of a marketing company is also a director of JJVL. According to information received from NADRA, Ms. Sadia Ahmed is the daughter of Mr. Iqbal Z. Ahmed who is the majority shareholder in JJVL. The agreements essentially ask Progas as the buyer to pay 16% and 2% commission to the people named above in order to purchase LPG from JJVL. Directors and relatives of directors getting or charging commissions from customers who buy their company's product is strange and certainly not as per established business protocols.

189. However, the question before us today is simply whether these agreements put extraneous conditions on the sale of LPG that JJVL sells. The commission fee as part of sales are common in particular industries or when the agent is acting as a dealer or agent to the seller or buyer in order to further business. For example, sale agents of office stationary would generally receive a commission from the seller for whom it is acting for making a sale. However, the commission is generally paid by the seller for some service rendered by the agent or dealer. In the case before us, the opposite is true; the buyer is paying a commission to a third party in order to purchase a product from the seller. In our view such practice does not appear to be a valid business custom in the LPG sector. Furthermore, there is no indication as to whether Mr. Ishtiaq Asif or Ms. Sadia Ahmed were ever appointed by JJVL or Progas as agents or dealers to sell/buy LPG. In fact Progas has submitted to the Commission that it was made to pay that commission to these third parties just to get the sales agreement through. The bench has heard this concern echoed by other people as well in general, including

- a statement by Mr. Tauseef Gilani, Chairman of the Non-Quota Holder Association. Without adjudicating on the ethics of such practices, it is clear that such commission agreements, if in place, would indeed constitute an extraneous condition on marketing companies which want to buy LPG from producers.
190. Both Progas and JJVL have submitted to the Bench that the LPG Sale Purchase Agreement was terminated within a year of its signing. Hence, as such no agreement on record is in force, or was in force after the promulgation of the Ordinance, which the Commission could take actions upon at this point.
191. In view of the foregoing, businesses need to be mindful that while the profit motive can and has brought enormous benefits there are certain responsibilities incumbent upon all market players- big businesses, in particular, cannot shirk from such responsibility.
192. The Commission has already enunciated the importance of this responsibility in the case involving KSE's abuse of dominant position wherein referring to the observation of the Court of First Instance in *the case of Case 322/81, Michelin v Commission [1983] ECR 3461* it was stated:
- ' [F]inding that an undertaking has a dominant position is not in itself a recrimination but simply means that, irrespective of the reasons for which it has such a dominant position, the undertaking concerned has a special responsibility not to allow its conduct to impair genuine undistorted competition on the common market '.*
193. We feel that this responsibility assumes greater importance in nations where competition culture still needs to be embedded. The burden of such a responsibility should rigorously guide entities engaged in businesses in relation to products and services that affect a large segment of the population. LPG market has a bearing not only on commercial users but its different uses, such as fuel for transport and cooking, also impacts the everyday economic lives and decisions of many Pakistanis including domestic end-consumers. JJVL by abusing its dominant position and LPGAP by leading a horizontal cartel have resorted to anti-

competitive practices that are particularly harmful in terms of their nature as well as their reach.

194. As a result of low supply of LPG, this clean fuel (LPG) cannot reach the areas that are not easily accessible, particularly the northern parts of the country. As a consequence of this, people resort to other sources of cooking fuel which is resulting in the burning of forests which is one of the factors contributing to environmental degradation in our country.
195. We want to make it clear that there is no binding or exhaustive list of criteria that must be taken into account while imposing penalty in every case. Being mindful of the stated Policy Objectives of the Fining Guidelines.
 - To deter undertakings from engaging in anti-competitive practices.
 - To reflect the seriousness of the infringement.
196. The nature and reach of the infringements, along with consequences, is serious indeed LPGAP have hurt not only the potential competition by creating an artificial entry barrier but also the end users. JJVL's abuse of dominant position, in light of a skewed market structure and one that it has exploited is indeed serious. Cartelization by LPGAP is no doubt the most pernicious of anti-competitive offences. Furthermore, both JJVL and LPGAP have been market leaders in many respects (as pointed out in this Order). These infringements, in our considered view, are born out of intention rather than genuine uncertainty. As detailed in the Order, LPGAP's cartelization, operating like a text-book case, has the object as well as the enforcement mechanism to ensure the running of a cartel. Also relevant is the fact that the entire conduct of the parties before the Commission has been rather adamant or obstructive. All these factors do not entitle the parties to avail any lenient treatment in the subject proceedings.
197. Keeping in view that the Commission is still at its nascent stage and awareness regarding competition law is still lacking and the fact that recently the Commission has shown a measure of restraint in imposing penalty even where

the sector had a history of cartelization therefore, despite the seriousness of the pernicious violations of law we are inclined to impose a lesser penalty (than it would have otherwise warranted) under the circumstances as we hope that at this point of time this would create the required deterrence as well as advance the interests of justice.

198. Accordingly, we hereby impose on JJVL a penalty amounting to 3.75% of last annual net turn-over i.e. PKR 278,087,448 (based on annual accounting statements for the year ending 30 June 2008 which records net turnover as PKR 7,415,665,289). Furthermore, we also note the fact that JJVL's arrangement, specifically the GSA, with SSGCL makes a significant impact on its cost structure. In fact the very basis of JJVL's dominance appears to result, in large part, from JJVL's arrangement with SSGCL. The GSA confers such a competitive advantage that JJVL can operate as a dominant undertaking notwithstanding its share in the relevant market. Whereas the GSA in and of itself is not a prohibited agreement, it has been the prime basis, in fact a trigger, for the behavioral violation of the law by JJVL. It provided the low-cost incentive which JJVL maintained and abused at the cost of restricting competition. We cannot condone such behavioral violations and feel it is incumbent upon us to provide guidelines for the future to prevent such violations. Although the Commission has the requisite powers under section 31 we would not like to interfere with the GSA for the time being. Disrupting commercial certainty is not our intention; however commercial certainty in no way takes precedence over promotion of competition. We therefore hold that for any extension of the subject GSA beyond 3rd February, 2011 the same shall be subject to an open and competitive bidding process before SSGCL enters into such a GSA with any another party including JJVL after 3rd February, 2011. The bidding process shall conform to international bidding standards and all relevant provisions of Public Procurement Rules, 2004. Furthermore, the award of GSA shall be subject to formal evaluation by the Commission, for any possible anti-competitive effects, to grant exemption under the Competition Ordinance.

199. While JJVL is hereby directed to cease and desist from restricting competition through limit-pricing, OGRA is strongly recommended to review its policy and implementation regarding 'reasonable consumer price' and is hereby directed to take necessary measures to ensure a level playing field for all stakeholders and to ensure that no party including importers should either be excluded from the relevant market through anti-competitive measures or be allowed to create or maintain artificial entry barriers in the relevant market.
200. Although cartel formation, because of its most deleterious effects on competition, deserves the highest penalties however we are of the view that taking the circumstances of the case and past precedents of the Commission into account we deem it appropriate to impose a sum of Rs. 40 million as penalty. We have not imposed the maximum (Rs. 50 million) keeping in view that LPGAP is not a repeat offender. We could not possibly have been more lenient as there are many aggravating factors including the nature and reach of the infringement, involvement of senior level management and implementation of retaliatory measures to ensure enforcement of its objective against other undertakings to ensure continuation of the infringement.
201. The parties are however reprimanded that if in future they are found to be indulging in anti-competitive practices in violation of the Ordinance this may have serious consequences.
202. Order accordingly.

Khalid Aziz Mirza
Chairman

Rahat Kaunain Hassan
Member (Legal)

Dr. Joseph Wilson
Member (M&TA)

Islamabad the December 14, 2009