



**BEFORE THE
COMPETITION COMMISSION OF PAKISTAN**

IN THE MATTER OF

**LENIENCEY APPLICATION FILED BY
M/S. SIEMENS (PAKISTAN) ENGINEERING COMPANY LTD**

(File No. 1(2)/Reg/S.39/CCP/2011)

Dates of hearings: January 19, 2012
January 31, 2012

Present: Ms. Rahat Kaunain Hassan
Chairperson

Mr. Abdul Ghaffar
Member

On behalf of M/s. Siemens (Pakistan) Engineering Company Ltd
Mr. Shahid Raza, Orr, Dignam & Co.

ORDER

1. Through this order the Competition Commission of Pakistan (the “Commission”) shall dispose of the Leniency Application filed by Siemens (Pakistan) Engineering Co. Limited (hereinafter referred to as the “Applicant”), under Competition (Leniency) Regulations, 2007 (hereinafter referred to as the “Leniency Regulations”) read with Section 39 of the Competition Act, 2010 (hereinafter referred to as the “Act”) to seek leniency in respect of Show Cause Notice No.27/2011 dated September, 2011 issued for, *prima facie*, bid rigging/collusive activities in the tenders called by electric power distribution companies (DISCOs) to procure switchgear and transformers from the manufacturers of electrical power equipments.

BACKGROUND

2. Earlier the Commission had initiated a formal enquiry under Section 37(2) of the Act on information received from an informant against the *prima facie* collusive bidding by electric power equipment manufacturers and their association in procurement tenders of different DISCOs and pursuant to the powers contained in Section 28(2) of the Act, appointed an Enquiry Committee to conduct an enquiry into the matter and to submit an Enquiry Report.
3. The Commission also authorized a team of officers for inspection of the premises in use of Pakistan Electric Manufacturers Association (PEMA), FICO Hi-tech (Private) Limited (FICO) and Pak Elektron Limited (PEL) under the power granted to it by Section 34 of the Act in order to collect any further evidence regarding the suspected

violations of the Act. During these inspections various documents including valuable information was seized and impounded by the authorized officers of Commission from PEMA, FICO and PEL offices.

4. The examination of the impounded documents enabled the Enquiry Committee to identify and record the methods used by the various electric equipment manufacturers to collude amongst themselves to fix prices and divide quantities of goods being procured. Broadly speaking the evidence impounded comprises, *inter alia*, email communications, minutes of meetings/decisions of manufacturers, data sheets, summaries and proposal documents.
5. Based on the evidence available in the form of impounded documents and other information, the Enquiry Committee completed its Enquiry Report which reveals a structured framework of collusive bidding in the public procurement of certain electric power equipment, by its manufacturers. Such equipment includes switchgear, energy meters, and transformers.
6. The Enquiry Report discloses in detail that various electric power manufacturers have formed fora/groups under, and at times beyond, the umbrella of the PEMA, according to the product in question to discuss and decide upon the prices and quantities to be quoted in response to tenders issued by various electric power distribution companies.
7. The Commission in light of the findings of the Enquiry Report initiated the proceedings under Section 30 of the Act and issued Show Cause Notices to all the undertakings, *prima facie*, found involved in collusive activities in different relevant markets in terms of the Enquiry Report. The undertakings who have been issued show cause notices include:

- i. Pakistan Electric Manufacturers Association (PEMA)
- ii. M/s Syed Bhais (Pvt.) Limited
- iii. M/s Syed Bhais Electronics Engineering & Control (Pvt.) Limited
- iv. M/s Creative Electronics (Pvt.) Limited
- v. M/s Pak Elektron Limited
- vi. M/s FICO Hi-Tech (Pvt.) Limited
- vii. M/s Micro –Tech Industries (Pvt.) Limited
- viii. M/s Transfopower Industries (Pvt.) Limited
- ix. M/s Elmetec (Pvt.) Limited
- x. M/s Hammad Engineering Company (Pvt.) Limited
- xi. M/s Ace Indigo Industries (Pvt.) Limited
- xii. M/s AB Ampere Private Limited
- xiii. M/s Siemens Pakistan Engineering Limited
- xiv. M/s Transfab
- xv. M/s Pan Power International Private Limited
- xvi. M/s Powertech Electrical Industries (Pvt.) Limited
- xvii. M/s Escorts Pakistan Limited
- xviii. M/s Metelex
- xix. M/s Siddique Sons Engineering (Pvt.) Limited
- xx. M/s Perfect Electro Mek Pakistan (Pvt.) Limited
- xxi. M/s Baig Electrical Co. (Pvt.) Limited
- xxii. M/s Tariq Electric (Pvt.) Limited
- xxiii. M/s Areva T&D Pakistan (Pvt.) Limited
- xxiv. M/s FICO Industries (Pvt.) Limited

FILING OF THE LENIENCY APPLICATION

8. The Applicant, M/s Siemens (Pakistan) Engineering Co. Limited, approached the Commission on 20 October, 2011 to seek leniency. Subsequently, on 28 October, 2011, it submitted a list of evidence to be disclosed along with the Leniency Application.
9. Siemens has been active in Pakistan, where it holds leading position in three application fields: energy & environmental care, industry & public infrastructure and health care. Siemens is engaged in business of

voltage grid stations, switchgear products and systems, power distribution and power transformers, and network consultancy etc. Siemens is an undertaking in terms of Section 2(1) (q) of the Act.

10. As per the request of the Applicant and the procedure laid down under Regulation 5 of the Leniency Regulations, the Commission allowed a time limit of 8 weeks i.e. by 15th December, 2011 to the Applicant to submit the Leniency Application.

SUBMISSIONS

11. The Applicant submitted the Leniency Application on 14 December, 2011 along with documents as evidence of prohibited activity mentioned in the Show Cause Notice in respect of switchgear and transformer. The Leniency Application claims leniency under Regulation 3 and 4 of the Leniency Regulations on the basis of following submissions:

- a. Applicant is the first one to provide evidence;*
- b. The applicant has filed the Leniency Application soon after the issuance of Show Cause Notice;*
- c. The Commission does not already have sufficient information to establish the existence of the alleged activity, particularly in the case of switchgear;*
- d. Evidence in case of switchgear is critical as it includes direct evidence of collusion. In case of transformers, evidence submitted adds significant value to the evidence already in possession of the Commission which further substantiates and corroborates.*

- e. *Applicant has made full and true disclosure and provided the Commission with all the information, evidence and document available to it regarding the prohibited activity;*
- f. *Applicant assures the Commission that it will maintain, genuine, continuous and complete cooperation with the Commission throughout the proceedings and until the conclusion of any action by the Commission arising as a result of the proceedings;*
- g. *Applicant assures the Commission that it will refrain from further participation in the alleged activity;*
- h. *Applicant assures the Commission that it has not taken any steps to coerce another undertaking to take part in any of the activities prohibited under the Act read with Regulation 3(1)(ii)(d);*
- i. *The documents filed with the application represent independent, additional, corroborating or contemporaneous evidence of activities prohibited under Chapter II of the Act, which is being submitted to the Commission prior to any order under Section 31 of the Act;*
- j. *Applicant shall comply with any conditions imposed by the Commission in accordance with law for entertaining or granting this application;*
- k. *Applicant assures that it shall comply with any direction of the Commission in accordance with law in relation to this application;*
- l. *Applicant assures that it has to date and shall continue to cooperate genuinely fully and on a continuous basis.*

12. After the Leniency Application was duly filed, the Commission examined the application along with the evidence submitted and required the Applicant to furnish some additional information. The Applicant fully co-operated and provided the Commission with the requested information.
13. Hearings in the Leniency Application filed by the Applicant were conducted on 19 & 31 January, 2012 by the undersigned Members of this Bench. Mr. Shahid Raza, Advocate, Orr Dignam & Co. presented the submissions on behalf of the Applicant. During the course of hearing, the Bench raised several questions for the counsel and the General Counsel of Siemens present during the hearing, relating to switchgear and transformer markets which included:

- a. General description of the industry and how it functions?*
- b. How pricing in the industry works?*
- c. What is regulatory framework and the nature of contract?*
- d. Is there any buyer or supplier countervailing power?*
- e. Who are the market participants?*
- f. What is the timeframe of the alleged conduct?*
- g. What are the entry barriers?*
- h. Whether other respondents have continued to engage in the prohibited conduct?*
- i. Have you ceased to continue to engage in the prohibited conduct?*
- j. What are the measures taken by the cartel members to hide their conduct?*
- k. What is the impact of the alleged prohibited conduct on commerce in terms of volume and value?*
- l. What is the current status of PEMA?*

14. The Counsel for the Applicant requested for some time and submitted the additional information on 27 January, 2012 which is summarized as under:

a. Industry Overview

The relevant data available with Siemens Pakistan for transformers and switchgear sets out information on total orders/volume, market share, break-up between utilities and industrial customers, regional break-up.

Transformer Industry

Transformer is one of the most important components in the power network which is used to transform power at different voltage levels, also used for economical transmission of power over large distances. They are primarily classified on the basis of construction, application and size.

Since 1950s, the domestic industry in Pakistan kept evolving in this segment and today there are around 12 local manufacturers of distribution transformers in Pakistan. However, its manufacturing was started by Siemens which is the only national company producing transformers in Pakistan. Apart from it there are only two local manufacturers of Power Transformers namely PEL and HEC.

In Pakistan, the only demand for transformers comes from Power Distribution Companies (DISCOs) and that is around 90%. Procurement of Distribution Transformers and 132KV Power Transformers is directly made by Distribution companies for their respective regions. They are installed for electrification of villages, housing societies and supplying power to the tube well pumps.

Market Trends: *The rated installed power generation capacity in Pakistan is around 20,000 MW which is planned to be increased to 40,000 MW by 2020 to cater the annual growth in demand. This market is expected to grow at the rate 10% per annum. However public procurement is primarily dependent on government policies; therefore no trend can be forecasted.*

During weak financial position states of government procurements are not made consistent with demand. Whereas in case of natural calamity, the rehabilitation works become the highest priority of the state, therefore demand for transformers also increases abnormally. Generally per annum demand of distribution transformers is around 3500 MVA.

Procurement Procedure/Trend: *The public utilities call open tenders in which all pre-qualified/registered domestic manufacturers as well as foreign manufacturers fulfilling the*

given pre-qualification criteria may participate. The procurement procedures are governed by state owned regulatory authority known as PPRA (Public Procurement Regulatory Authority).

The yearly demand is not uniform. Tenders are called by DISCOs mainly at the start of fiscal year upon receipt of funds from the government or at the end of the years when the funds are being lapsed. Therefore, major procurement is made in these two periods of a year.

In summing up: Transformers industry in Pakistan depends primarily on requirements of Distribution Companies. It is an open market where there are no specific restrictions as any new manufacturer can enter the market. Market is expected to grow but there are no permanent procurement trends; therefore to some extent it is an unpredictable market.

Market Data- Transformers (Procurement): Average number of Tenders issued in a year is 60. Value of Orders Issued in FY-2007 is PKR 6,950,000,000, FY-2008 is PKR 6,772,000,000, FY-2009 is PKR 6,390,000,000, FY-2010 is PKR. 8,300,000,000 and FY-2011 is PKR 7,879,000,000. Total orders issued are PKR 36,309,000,000.

Order received by [-----

-----]Further, as per the information submitted by Applicant with respect to market share of transformer manufacturers, Siemens holds [...%], PEL holds [...%] market share while the rest of manufacturers occupy [...%] of total market.

Switchgear Industry

Switchgears are very vital element of an Electric Power Network. It is combination of electrical disconnecting switches, fuses or circuit breakers used to control, protect and isolate electrical equipment. It is used both to de-energize equipment to allow work to be done and to clear faults downstream.

Switchgears are generally classified on the basis of voltage level, construction, as well application with respect to usage. However the most common way of classifying the switchgears is with respect to Voltage level:

Since the start of Switchgears' production in 1950s, the domestic industry has kept evolving in this segment and today there are around 10 local manufacturers of medium voltage switchgears.

WAPDA and its Distribution Companies follow obsolete standards and switchgears manufactured are not safe for

operators. Other industries require switchgears to be constructed as per prevailing international standards which are much safer and require lesser space. Although they cost slightly high but overall these are economical by saving cost in civil buildings, cabling, etc.

Except Siemens and Schneider, other manufacturers do not manufacture switchgears based on valid international standards. The demand of Medium Voltage switchgears come from utilities as well as industries. In Pakistan round 60-65% of demand for switchgears comes from Power Distribution Companies (DISCOs) whereas around 35-40% demand is attributed to industry, infra-structure projects and Power Generation Companies.

Market Trends: The rated installed power generation capacity of Pakistan is around 20,000 MW which is planned to be increased to 40,000 MW by 2020 to cater the annual growth in demand.

Generally, per annum demand of 11KV switchgears is around 2200-2500 panels out of which WAPDA's consumption is around 1500-1700 panels per year. The key factor that drives utility market is the availability of funds. However the progress in utilization of these loans is comparatively much slower than the plan. As a result the forecast of the Market Trend despite that there is a certain market need is not healthy.

Procurement Procedure/ Trend: The public utilities call open tenders in which all pre-qualified/registered domestic manufacturers as well as foreign manufacturers fulfilling the given pre-qualification criteria may participate. The procurement procedures are governed by the state owned regulatory authority known as PPRA.

The demand over the year is not constant. The DISCOs mainly call tenders at the start of fiscal year upon receipt of funds from the government or at the end of the years when the funds are being lapsed. Therefore major procurement is made in these two periods of a year.

In summing up: Switchgear industry in Pakistan depends on requirements and Distribution Companies as well as industry. It is an open market where there are no specific restrictions. Market is expected to grow but there are no permanent procurement trends; therefore to some extent it is an unpredictable market.

Market Share: The overall market for Air-insulated Switchgears in Pakistan as per Siemens own assessment for 2008-2011 was Rs. 9.2 billion. Out of this volume 60-65% approximately comprises of utilities whereas the remaining [35% to 40.0%] is consumed in textile, power generation, chemical and pharma, oil and gas etc. The market shares w.r.t. total market are Siemens

(...%), PEL (...%), Schneider (former Areva,...%), Siddiqsons (...%), others (including Tariq, Electric, ZGL, J&P, Bilal Switchgear etc. ...%).

b. Pricing

In the case of both transformers and switchgear, the price depends on (a). Cost, including material cost, labor and overheads;(b) Factory loading; and (c). In the case of supplies to DISCOS, the last/prevaling market price.

As explained in paragraph 10 of the application enclosed with our letter No. SR/6233 dated 15th December 2011 (“Application”), prices were largely determined by WAPDA/DISCOS, particularly in the case of transformers, through a combination of WAPDA procedures, pricing formula and tender terms which ensured that prices and any escalations therein, were determined based on cost (and any rise therein) in accordance with WAPDA’s prescribed formula/specifications; that prices were otherwise maintained; and that all manufacturers were bound by any lower rate quoted by any manufacturer to any DISCO in any tender.

WAPDA has a transparent pricing and escalation formula for transformers, based on the cost of oil, copper, steel, labor and overheads/profit margin. Manufacturers quote based on this formula. DISCOS then negotiate to try to obtain the lowest possible price. We had previously submitted to the Commission the various WAPDA notices on approved rates for distribution transformers, rate/cost analysis and price adjustment formula, and notices of meetings by DISCOS to PEMA for “rate analysis”.

In Utility, different Distribution companies (DISCOs) float tenders based on their annual requirement as per WAPDA purchase procedures and PEPPRA rules. Prequalified local manufacturers can participate in these tenders. However international manufacturers can participate but will not get any local preference. All commercial bids are opened in presence of all participants on the date and time of opening, and a comparative statement is prepared on the basis of individual read-out prices and quantities.

Distribution companies normally invite the lowest and second lowest bidder for the negotiation purpose at their convenience. On occasions, they have also asked manufacturers to meet even the lowest minimum price in any DISCO or forced them to give discount on the current price of that specific product. The process ends after reaching same minimum price for one or more bidder.

The transformer cost is based on material cost and labor/overhead cost. The material cost is basically coming from (a) Electric Steel; (b) Copper; (c) Oil; and (d) HRC steel.

The price of above materials is set globally and it is same for all manufacturers. Based on the above material and foreign currency exchange rates, Wapda has a general formula for price estimation and escalation. On occasions, PEPCP D&S department as well as DISCOs also invites manufacturer(s) to reach a price level with consensus. However, as an example, from 2008 till 2010, no price change was allowed by DISCOs even though there was a price increase far in excess of 5% in main commodities.

Transformer technology is quite conventional and it is more or less common locally and globally with a varying cost among manufacturers due to process efficiency and economy of scale. However material prices slightly differ due to economies of scale. Historically Wapda/Distribution companies never gave any price advantage to any manufacturer based on better quality of process, material and overall product. The prices are the same for small as well as large quantities. Additionally, in PEPCO specification, there is a clause for better quality in terms of lower losses since decades but it was not followed in practice.

With the introduction of low loss transformers, the prices were estimated based on the same engineer's formula. However, the orders were placed at lower than the bid price and engineer's estimate. Price of transformers has come down mainly because of major changes in LME rates, reduced factory loads or manufacturers and their vendors and the settlement of new product price level.

In short the practices of Wapda/ Distribution companies result in bringing prices to a uniform level among manufacturers. While new manufacturers have entered the market, others have exited in the last decade due to tough market condition and the practices of the single largest purchaser of the country.

c. Regulatory Framework

WAPDA/DISCOS are subject to the Public Procurement Rules 2004. In addition, in case of tenders funded by multi-national development banks (like World Bank or Asian Development Bank), the procurement rules of the relevant bank apply. There is, otherwise, no regulatory framework in the sense that the manufacture and sale of transformers and switchgear is not a regulated activity.

Contracts

The successful bidder receives a letter of intent followed by a purchase order- several of these have previously been submitted to the Commission.

Supply of Products

Products are supplied as per tender terms, WAPDA Purchase Procedure, WAPDA's General Conditions of Contract for Purchases and WAPDA Specifications. Factory loading and WAPDA's desire to prevent dependency on a single manufacturer affect orders.

d. Bargaining Power of Parties

As explained in the Application, both prices and quantities (particularly of transformers) were largely determined by WAPDA/DISCOS, whose dominant position is evident from the fact that utilities account for 90% of the sales of transformers and 70% of the sales of switchgear , and that they are able to compel even the larger manufacturers such as Siemens to offer further discounts after submission of the bid and award them partial quantity rather than the full quantity solicited and successfully bid for.

e. Industry Participants

In transformers, there are 12 local manufacturers, namely, Siemens, Transfopower, PEL, Elmetech, Transfab, Hammad, AB Ampere, ACE Indigo, Syed Bhais, Power Tech, Pan Power and JF Industries. All of them are mentioned in the paragraph 43 of the Commission's Enquiry Report except for JF Industries, who recently entered the market.

In switchgear, the local manufacturers are Siemens, Areva (Schneider Electric), PEL, FICO, Siddiqsons, Tariq Electric, PEMPAK, Bilal Switchgear, Johnsons & Phillips and ZTL. All of them are also mentioned in paragraph 43 of the Commission's Enquiry Report except for Johnsons & Phillips and ZTL. Johnsons & Phillips are not active in the WAPDA market. ZTL recently entered the market.

f. Description and Timeframe of Collusion

This is explained in Annex "B" of the Application.

While it is difficult to specify exactly when the prohibited activities commenced, it is clear that in the case transformers and switchgear, such activities have been going on for at least

the period covered by the Commission's Enquiry Report (namely, 2007 onwards).

g. Barriers to entry

There are no barriers to entry. On the contrary, WAPDA has historically encouraged new entrants in both transformers and switchgears by issuing educational orders to them and then by allocating quantities among the various manufacturers such that all manufacturers have a sufficient and stable workload. Thus, several new manufacturers have entered the market in past decade.

h. Whether other manufacturers continued collusion after show-cause notices

Siemens has no knowledge whether other PEMA members carried on collusive activity after the Commission issued show cause notices. In one case after the issuance of the show cause notices, Siemens employees reported that they were approached by [X] employees. However, Siemens did not enter into anti-competitive conduct.

i. Assurance by Siemens that it ceased to participate in collusion

Siemens had assured the Commission in paragraph 7 (c) of its Application that it would refrain from further participation in the prohibited activity. Siemens confirms that it has complied with such undertaking.

j. Measures by PEMA members to hide conduct

Attempts to hide their conduct included the use of code initials, meetings in neutral venues such as hotels, exchanging unsigned agreements and avoiding sending emails and fax messages and warning the person to whom they were addressed in advance in order to prevent the faxes from falling into wrong hands. However, the participants did not always strictly hide their arrangements.

k. Effect of cartel on the market

Given that, as explained in the Application, prices were largely determined by WAPDA/DISCOS (particularly in the case of transformers), it is difficult to establish that the cartel arrangement had any significant price impact.

However, the practice of WAPDA/DISCOS of allocating quantities (with PEMA members then agreeing among themselves as to who would "win" a particular order and

strategizing accordingly so as to implement the shares that had been allocated by WAPDA/DISCOS) resulted in distortion of the market insofar as supplies were concerned. In Siemens' view, this favored the smaller manufacturers (who were assured a stable workload) and WAPDA (who wished to prevent dependency on a single manufacturer and to ensure timely deliveries of electrical equipment).

I. Status and details of PEMA

Siemens confirms the existence of PEMA. Siemen's internal has not found information as to PEMA's status (i.e. whether it is a registered trade organization, company, etc.), address or constituent documents. However, PEMA is, at least, an informal association of domestic manufacturers of transformers and switchgear (the two products which Siemens makes).

There is no formal membership but Siemens, Transfopower, PEL, Elmetech, Transfab, Hammad, AB Ampere, ACE Indigo, Syed Bhais Power Tech, Pan Power are the transformer manufacturers, and Siemens, Areva (Schneider Electric), PEL, FICO, Siddiqsons, Tariq Electric, PEMPAK are the switchgear manufacturers who are PEMA members in that they have participated in PEMA meetings.

PEMA is mentioned on page 87 of the WAPDA Purchase Procedure (the document numbered 1 in the bundle of evidence submitted by Siemens to the Commission with Leniency Application) which minutes the decision taken by WAPDA in its meeting with PEMA and sets out the basis of calculation of prices; and the 1979 office order at page 106 of the WAPDA Purchase Procedures (which summarizes the special terms and conditions which WAPDA and PEMA had agreed to incorporate in orders placed on PEMA members) and Annexure "A" thereto (on page 107) which lists PEMA members.

Also within PEMA, there is a forum of transformers manufacturers and a separate forum of switchgear manufacturers. According to Siemen's internal investigation, Mr. [-----] of [X] was the coordinator of the switchgear forum. He has signed, as "Coordinator PEMA Switchgear Business", the documents numbered 145, 177, 180, 188 and 204 in the bundle of evidence submitted by Siemens to the Commission with its Leniency Application and his signature was identified by Siemens to the Commission.

Mr. [-----] was appointed unanimously chairman on 22nd December 2008 with immediate effect. According to Siemens' internal investigation, his predecessor was Mr. [-----] of [Y]. At least until 2006, Mr [-----] of [X] was the chairman. The titles

*“coordinator” and “chairman” were apparently used interchangeably in the case of the switchgear forum.
Mr. [-----] (who runs his own trading company and works as a consultant) was the coordinator of the transformers forum.*

15. During the course of hearing the Bench referred to the written submissions made by the Applicant on the aspect of pricing (refer to b above) of transformers to be procured and the bargaining power between supplier and buyer, wherein it was stated that “prices are largely determined by WAPDA/PEPCO/DISCOs”. The Bench asked the counsel of the Applicant to clarify this statement with respect to price mechanism and the role of procurement agencies and the bidders in price setting. The counsel of the Applicant explained that the price indicated by the procuring agencies is in effect the estimated price based on the in-house evaluation done by the procuring agencies. It was admitted that such estimated price is not binding on the participating bidders as even the documents relied upon show that the quoted price by the bidders agreed inter se is above the bench mark/estimate price shared by procurement agencies/DISCOs with the manufacturers. Subsequently, the above was also confirmed in writing. However, it was stated that in few cases manufacturers were invited by DISCOs after the opening of the tender to further negotiate the price.

16. The counsel for the Applicant also stated that the reason that bidders did not quote below the estimate price is because they viewed the clause in the purchase order regarding ‘price reduction to other DISCOs as a dis-incentive (i.e. if the bid price is higher than the price quoted in a tender invited by another DISCO, the bidder would match it with such reduced price) , as lowering the price for anyone DISCO could entail the obligation of offering similar rate to all other DISCOs- making it more onerous in terms of profit margin. We have been informed that inclusion of such provision in the purchase orders has been

discontinued since 2010. However, whether all DISCOs have practically discontinued this practice is difficult to confirm.

17. The fact that as such there was/is no bar for the bidders to compete on a lower price as against the estimated price was acceded to by the counsel who also acknowledged that the collaboration among the bidders was more focused to ensure by deciding as to who would win by quoting the lowest bid.

18. Based on the statements of the Applicant made during the hearing and later confirmed in writing, we are given to understand that the time period in which the subject collusive practices have been persistent is more than a decade in particular, in respect of ‘transformer’ and ‘switchgear’ have been in existence for at least over a decade. However, we have been assured that Applicant has ceased to participate in the alleged prohibited activity and we have also been informed regarding the likelihood of continuation of such practices by the other cartel member, particularly, in respect of switchgear.

ORIGIN AND EVOLUTION

19. This Application is the first Leniency Application since the Commission has been established. Though the Section 39 of the Act provides for the grant of immunity or reduction in penalty which is further elaborated in the Leniency Regulations. However, the Commission has not yet put across its formal view on leniency. We take this opportunity through this order to emphasize on the need and the effectiveness of leniency.

20. Leniency or lenience is a “Lenient” act which derives its origin from Latin in mid 17th century. Archaic meanings of word lenient are

“softening”, soothing, or alleviative”. Shift in its historical meaning was recorded in 1770 as sense of "mild, merciful"¹ or as “the fact or quality of being more merciful or tolerant than expected; clemency.

21. The use of leniency treatment to a cartel member is not an innovation by the competition agencies. In fact leniency has its historical background and this discretion has been exercised under different scenarios in different areas of law. In the eighteenth century, Cesare Beccaria proposed revolutionary concepts on criminology when he argued for mildness of punishment. In his own words, “in order for a penalty to achieve its objective all that is required is that the harm of punishment should exceed the benefits resulting from a crime. Further, the inevitability of the punishment and the loss of the anticipated advantage of crime should enter into calculation of the excess of harm.”²
22. However, contrary to the literary concept of leniency, in competition law policy, leniency has acquired a stricter meaning. It is a concession granted to a cartel member who admits the contravention and also provides critical evidence of the alleged or otherwise cartel conduct of the accomplices and commits to abandon such behaviour
23. According to International Competition Network, “Leniency” is a generic term to describe a system of partial or total exoneration from the penalties that would otherwise be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency.³

¹ <http://dictionary.reference.com/browse/leniency>

² Baccaria (1986 [1764] p. 46)

³ “Drafting and Implementing an Effective Leniency Program”, Anti-Cartel Enforcement Manual, Cartel Working Group- Subgroup 2: Enforcement Techniques, ICN (2006), p2. The

24. As repeatedly said, cartel is the most egregious offence in competition law. According to an OECD report, “*Cartels are a major ... drain on the world’s economy*”. Calculation of global impact of all cartels would be an impossible task; however, according to an estimate of OECD, impact of cartel on prices varies from 10% to 20%. OECD reported in 2000 that ten condemned international cartels in the US were responsible for overcharging and economic waste of over US\$ 2 billion.⁴

25. Competition agencies all over the world face a common problem in detecting cartels and collecting evidence to establish its existence and the harms done. Leniency seems to be the single most important tool to be used by the competition agencies to improve cartel detection and to strengthen their proceedings against the cartel members. For that purpose, we think it is important to understand how this concept has evolved all over the world.

26. Leniency Regime was introduced in the US as early as 1978, however, it was not successful as no leniency applications were received. Effective leniency framework was however put in place in early 1990s in US. Antitrust Division of the U.S. Department of Justice, when it introduced a carrot and stick policy as enforcement strategy of which Corporate Leniency Program was an important element. Since the mid-1990s, the Antitrust Division has uncovered and prosecuted dozens of international cartels, secured convictions and obtained hefty corporate fines.

terms immunity, leniency and amnesty are used in various jurisdictions to describe partial or total exoneration from penalties but are not synonymous in all jurisdictions. A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process.

⁴ OECD, (2000, P. 7)

27. In August 1993, the Antitrust Division revised its Corporate Leniency Program to make it easier and more attractive for companies to come forward and cooperate. These revisions made the program more transparent and raised the incentives for companies to report criminal activity and cooperate with the Antitrust Division. Resultantly, the Leniency Program has become the Antitrust Division's most effective investigative tool.
28. After U.S., Canada had its leniency program in place in 1991 and the European Commission's first leniency notice was adopted in 1996. The European Commission issued its revised Leniency Notice in 2002 which faced the same problems like the Antitrust Division's pre-1993 leniency program and lacked sufficient transparency and predictability to effectively induce self-reporting. In 2006 the European Commission issued a much improved version of Leniency Notice in 2006 clarifying the conditions regarding immunity and leniency. Following the success of US anti-trust policy, in last two decades, other competition enforcers around the world intensified their cartel enforcement efforts and achieved similar results. Today more than 50 competition agencies have their own leniency policies as reported by the US Department of Justice in 2010.
29. Generally, it is viewed that a leniency policy has four basic benefits⁵; (i) deterrence – making cartel membership less attractive, (ii) detection – promoting the discovery of cartels, (iii) desistence – causing cartels to cease operation, and (iv) sanctioning – making punishment of co-conspirators more likely. These objectives are achieved through the incentives of grant of immunity or reduction in financial penalty.

⁵ ICN Anti-Cartel Enforcement Manual.

30. This is the reason that proliferation of effective leniency programs is the single most significant development in cartel enforcement all over the world. Leniency programs have led to the detection and dismantling of the largest global cartels ever prosecuted and resulted in record-breaking fines in Australia, Brazil, Canada, the European Union, Japan, Korea, Poland, the United Kingdom, the United States, and other jurisdictions.

31. We would also like to put on record here that this Commission has adopted a more comprehensive leniency policy, which is developed on the basis of international and regional experiences on one hand and on the other hand takes into consideration factors relevant to the conduct of business in Pakistan.. The Commission may grant **total immunity** if the undertaking is the first to provide evidence and the Commission does not already have sufficient information to establish the alleged violation. Reduction in penalties may be granted upto **100%** if undertaking meets the conditions and provides information before/after the issuance of a Show Cause Notice. Leniency may even be invoked after a decision has been recorded by the Commission but prior to recourse to the courts.

DISTINGUISHING REGULATION 3 &4

32. Reverting to the case in hand, the Applicant claims leniency under Regulation 3 or 4(1) of the Leniency Regulations. Regulation 3 of the Leniency Regulations empowers the Commission to grant total immunity from financial penalties whereas under Regulation 4(1) the Commission may grant reduction in the amount of penalty up to 100%.

33. Before we evaluate the leniency claim of the Applicant under the given circumstances it would be pertinent to reproduce both relevant provisions as under:

3. Grant of immunity from financial penalties

(1) The Commission may grant an undertaking the benefit of total immunity from financial penalties if the following conditions are satisfied:

(i) The undertaking is the first to provide the Commission with evidence of prohibited activity under the Ordinance;

Provided that the Commission does not already have sufficient information to establish the existence of the alleged activity.

(ii) The undertaking:

(a) provides the Commission with all the information, documents and evidence available to it regarding the prohibited activity;

(b) maintains continuous and complete cooperation throughout the proceedings and until the conclusion of any action by the Commission arising as a result of the proceedings;

(c) refrains from further participation in the alleged activity from the time of its disclosure to the Commission;

(d) must not have taken any steps to coerce another undertaking to take part in any of the activities prohibited under the Ordinance.

(2) If an undertaking does not qualify for total immunity under this regulation, it may still be entitled to the benefit from a reduction in the financial penalty under regulation 4.

4. Grant of reduction in the amount of penalty

(1) An undertaking may benefit from a reduction in the financial penalty of up to 100% if –

(a) the undertaking seeking reduction is the first to provide the Commission with independent, additional or corroborating or contemporaneous evidence of any of the activities prohibited under Chapter II of the Ordinance; and

(b) *this information is given to the Commission:*

- (i) *prior to issuance of a show cause notice under section 30 of the Ordinance; or*
- (ii) *after initiation of proceedings under Section 30 of the Ordinance but before the Commission has passed any Order under Section 31 of the Ordinance confirming infringement and violation under Chapter-II;*

34. We consider it appropriate to distinguish Regulation 3 and 4(1) - to draw a line between total immunity from financial penalty and reduction in penalty up to 100% under respective provision. We are of the opinion that there is a distinct rationale to exercise discretion in terms of each of the above Regulations..

35. Regulation 3(1)(i) lays down the basis to grant total immunity. Total immunity is available if the undertaking is the first to provide the Commission with “evidence of prohibited activity” (*emphasis laid*). This condition is further qualified with a proviso which states that “provided that the Commission does not already have sufficient information to establish the existence of the alleged activity” (*emphasis laid*).

36. In our considered view, Regulation 3(1)(i) read with its proviso makes it categorically clear that an undertaking qualifies for immunity/exemption from penalty only if it provides with evidence of prohibited activity that the Commission does not already have in its possession. Stipulation laid down in this Regulation is that the undertaking is the first to uncover the prohibited activity. It is our understanding that in such cases the Commission would not have sufficient evidence even to make out a, *prima facie*, hence no Show

Cause Notice has been issued with respect to the prohibited activity. Hence, once immunity from penalty is granted it would also exempt the subject undertaking from initiation of any proceedings in future to the extent of the contravention revealed.

37. Regulation 4(1(a) provides that an undertaking may benefit from a reduction in the financial penalty up to 100% if the undertaking seeking reduction is “the first to provide the Commission with independent, additional or corroborating or contemporaneous evidence of any of the activities prohibited”(emphasis laid). Regulation 4(4) further qualifies the reduction in the level of penalty in the following words:

(4) Any reduction in the level of the financial penalty under these circumstances is discretionary. In exercising this discretion, the Commission will take into account:

a. The stage at which the undertaking comes forward;

b. the evidence already in the Commission's possession; and/or relied upon by the Commission; and

c. the quality and nature of the information provided by the undertaking.,

Provided further that the undertaking cooperates genuinely, fully and on a continuous basis from time it submits its application throughout the Commission's administrative procedure.

Regulation 4(1) manifests that reduction in penalty is available to an undertaking which comes forward before or after the issuance of show cause notice and submits corroborative evidence to strengthen the enquiry or proceedings undertaken by the Commission. However, the

level of reduction in penalty will be determined based on the stage at which the undertaking comes forward and the quality of evidence provided.

38. While the objective of both provisions (Regulation 3 and 4) is to give incentive to a cartel participant for busting the cartel, their application is different in terms of enforcement of competition law. Regulation 3 operates as an effective tool to investigate by offering incentives to uncover the conspiracy and come forward to admit and implicate co-conspirators and collect evidence more quickly and at a lower cost. Regulation 4 operates as an encouragement for parties to break ranks with the cartel members even after the relation is found out or established. Corroborative evidence provided under Regulation 4 substantiates and strengthens the cartel proceedings initiated by the Commission leading to an efficacious resolution of case.

39. To facilitate a fuller appreciation of the Leniency Program in Pakistan, we refer to a few leniency policies under different jurisdictions. First, we summarize the applicable regimes in Singapore, Turkey and the European Union for the simple reason that they have civil jurisdiction for the purpose of enforcement of competition law. Then we refer to Australia and UK where criminal sanctions are also provided and immunity and leniency differ depending on the nature of the proceedings.

40. Competition Commission of Singapore (CCS) grants immunity only to the undertaking which uncovers the conspiracy and is the first to come forward before an investigation has started under CCS Guidelines (2009), on “Lenient Treatment for Undertakings Coming Forward with Information on Cartel Activity Cases ”. Guideline 2.2 states that the

total immunity will be granted if “*the undertaking is the first to provide the CCS with evidence of the cartel activity before an investigation has commenced provided that CCS does not already have sufficiency information to establish the existence of alleged cartel activity*”.

41. Under the Guideline 2.3 & 3, the undertaking which does not qualify for the total immunity may still get benefit for the reduction of financial penalty of up to 100% if it is the first to provide the evidence of cartel after an investigation has commenced but before the CCS has issued a written notice to initiate civil proceedings.

42. Turkish Competition Authority has issued Regulation on Active Cooperation for Detecting Cartels (Active Cooperation/Leniency Regulations). Article 4(2) enumerates that “*the first undertaking which submits the information and evidence, and meets the requirements laid down in Article 6 of this Regulation, independently from its competitors, before the Board decides to carry out a preliminary inquiry until the notification of investigation report, shall be granted immunity from fines on condition that the Authority does not have, at the time of the submission, sufficient evidence to find the violation of Article 4 of the Act*”. On the other hand, Article 5 is about the reduction of fines. Article 5(1) clearly mentions that “*the undertakings information and evidence, and meets the requirements laid down in Article 6 of this Regulation, independently from its competitors, before the Board decides to carry out a preliminary inquiry until the notification of investigation report, but which are not covered by the provision related to immunity from fine in Article 4 shall benefit from reduction of fine.....”*

43. European Commission issued revised Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases in 2006. Part II Clause A(8) of the Commission's Notice on leniency grants total immunity from any fine if *"that undertaking is the first to submit information and evidence which in the Commission's view will enable it (a) to carry out a targeted inspection in connection with the alleged cartel or (b) find an infringement of Article 81 EC."* The Part III (A)(23) of the Commission's Notice on leniency provides for reduction in fine if *"Undertakings disclosing their participation in an alleged cartel..... may be eligible to benefit from a reduction of any fine that would otherwise have been imposed.....undertaking must provide the Commission with evidence of the alleged infringement which represents significant added value with respect to the evidence already in the Commission's possession."*

44. In Australia, the Australian Competition and Consumer Commission (ACCC) revised Immunity Policy for Cartel Conduct in July 2009. The ACCC will grant civil immunity in accordance with this policy and the Director of Public Prosecutions will grant immunity from criminal prosecution. The ACCC has power to grant Corporate Immunity as well as Individual Immunity. In terms of Immunity Policy for Cartel Conduct, 2009, a Corporation or an Individual will be eligible for conditional immunity from ACCC-imitated civil proceedings where *"the undertaking is the first to provide to apply for immunity..... at the time the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the Competition & Consumer Act arising from the conduct in respect of the cartel."*

45. In the UK, Leniency and No-action OFT's Guidance Note on the Handling of Applications, 2008 provides for the immunity from civil as well as criminal proceedings and reduction in fine. OFT grants total immunity from financial penalties to a participant in cartel provided that the applicant must be the first one to report the cartel and OFT should not have already begun an investigation in the cartel and OFT should not already have sufficient information to establish the existence of the alleged cartel activity. Alternatively, the OFT may offer a reduction of up to 100% from fine is the undertaking who is the first to come forward, after an investigation is already initiated by the OFT, but before statement of objections has been issued.

46. The Applicant in the instant case has approached the Commission when the proceedings under 30 had already been initiated by the Commission against electric power manufacturers and their association for their, *prima facie*, involvement in bid rigging in tenders called by different DISCOs for procurement of certain electric power equipments. It is pertinent to mention here that the Commission initiated the proceedings under Section 30 after a painstaking exercise of conducting search and inspection of premises of three undertakings involved, examining and scrutinizing voluminous document/information impounded during search and inspection, collecting data and other relevant information from the undertakings involved, analyzing the evidence and based on the substantial evidence available preparing a comprehensive Enquiry Report, issuance of show cause notices and also conducting two hearings in the matter. Whether the Applicant is entitled to total immunity from penalty under Regulation 3 or qualifies for reduction in penalty up to 100% has to be assessed based on the stage of the proceedings, nature and quality of evidence that the Commission already has in possession and further provided by the Applicant and the peculiar facts and circumstances of the case.

EVALUATION – DELIBERATIONS FOR IMMUNITY OR REDUCTION IN PENALTY

47. Major arguments given by the Applicant in support of immunity claim under Regulation 3 are reproduced again for ease of reference:

- i. Applicant is the first one to provide evidence;
- ii. The applicant has filed the Leniency Application soon after the issuance of Show Cause Notice;
- iii. The Commission does not already have sufficient information to establish the existence of the alleged activity, particularly in the case of switchgear;.
- iv. Applicant has made full and true disclosure and provided the Commission with all the information, evidence and document available to it regarding the prohibited activity;
- v. Applicant assures the Commission that it will maintain, genuine, continuous and complete cooperation with the Commission throughout the proceedings and until the conclusion of any action by the Commission arising as a result of the proceedings;
- vi. Applicant assures the Commission that it will refrain from further participation in the alleged activity;

48. The Applicant claims 100% leniency under Regulation 4 (1) of the Leniency Regulations and the major arguments given in supports of its claim are:

- i. The Applicant is the first to take plunge;

- ii. There is tremendous enhancement of quality of evidence after the Leniency application, in particular, in respect of switchgear if compared with the evidence already in possession of the Commission;
- iii. Grant of 100% leniency to the Applicant will give a positive signal to business community and as well as to lawyers;
- iv. Fine is fine. If Applicant is slapped even with a minor amount of fine, it will still bear the stigma of being penalized; and
- v. Right at this time the Applicant stands alone to co-operate with the Commission while many of the respondent in this case have sought stay orders from the High Court against show cause notices issued to them in the matter.

49. Before we proceed to determine the quantum of leniency under the Leniency Regulations, we would like to reiterate our appreciation for the co-operation extended and professionalism demonstrated by the Applicant and its counsel to dispose off this Leniency Application and also the commitment that such co-operation will continue till the conclusion of the proceedings by the Commission and also till the final adjudication of the matter, if required, even before the highest judicial forum.

50. Importantly, we also note here that the Applicant has admitted unconditionally the infringement of the offence as alleged against it in the show Cause Notice No. 27/2011 issued to it and has given the undertaking and commitment that it has abandoned its participation in the prohibited activity. Further the Applicant assures to have made full

and true disclosure and as per the statement on record the Applicant has not coerced any undertaking to take part in any activity prohibited under the Act; therefore, all the conditions required to entertain the claim under the Regulations have been satisfied.

51. The Applicant has submitted 233 documents. Documents provide information in relation to two products i.e. switchgear and transformer to show collusive activities among manufacturers to win a particular tender and strategize accordingly. Primarily, the Applicant has relied upon document nos. 75, 109, 112, 113, 142, 143, 145, 146, 147, 161, 165, 166, 172, 173, 174, 175, 177, 178, 179, 180, 181, 188, 189, 192, 196, 204, 207, 208, 212, 213 & 214 in respect of switchgear and document nos. 14, 52, 71, 72, 73, 74, 82, 91, 110 & 191 in respect of transformer. All documents directly or indirectly relate to establishing the alleged contraventions in the Show Cause Notice issued to the Applicant for cartelization in the relevant markets of switchgear and transformer. We, have referred below only a few of these document which highlight the nature and quality of evidence submitted by the Applicant to illustrate the addition and corroboration to the evidence for the purpose of evaluation and grant of leniency under the Leniency Regulations.

Annex A:

52. Before explaining the relevance of the document, it is noted that Enquiry Report reveals that Pakistan Electrical Equipment Manufacturers Association, *prima facie*, provides different fora including the switchgear forum. In terms of Enquiry Report, switchgear forum members appear to hold meetings regularly at the platform of their association to discuss the tenders floated by DISCOs and formulate a common strategy in respect of tenders. Discussions at the PEMA forum include deliberation on fixing the allocation of quantities of electric power equipment required under the tenders.

53. Annex A is a circular dated 22-12-2008 provided by the Applicant is a signed document by the participating members and is a copy of fax sent to Siemens Lahore which gives substantive evidence regarding the existence of switchgear forum as alleged in the Enquiry Report. Circular informs the member of the said forum that “the current Chairman of the forum has expressed his limitation due to certain personal reasons and has apprised that he cannot continue to work as Chairman. It has been decided unanimously that from now onwards, the forum will be headed by Mr. [-----] of SGP” who also in the following document appears to act as the coordinator of the switchgear forum. It is also confirmed by the Applicant that chairman/coordinator mentioned in these document is the employee of [X].

Annex A1 & Annex A2

54. Annex A1 & A2 substantiates the evidence given in the Enquiry Report that switchgear forum is used by its members to make ‘strategy’ for upcoming tenders for procurement of switchgear. As is evident from the contents of Annex A1 & A2, the ‘coordinator’ of ‘PEMA Switchgear Business’ sent a fax to its members with a caption of “GEPCO and IESCO tenders for supply of 11kV switchgear panels due on 29-01-2010 and 10-02-2011”. Purpose of fax is to inform that “PEMA meeting has been arranged to discuss the strategy on the subject tenders 23-01-2010 at 10:30 hours sharp at [.....] Lahore.” This is clearly indicative of collaborative/collusive behaviour adopted by the forum’s participants as otherwise tender strategy being an economic decision needed to be jealously guarded and had the parties been competing fairly on individual basis.

Annex B

55. Evidence enclosed with the Enquiry Report documents details of 93 tenders floated by WAPDA/DISCOs in the years 2007-08, 2008-09 and 2009-10 which, *prima facie*, shows share allocations of switchgear

made and the actual achievement against the allocation of companies represented by codes above and identified in the Report.

56. Annex B is document signed by all the participants of switchgear forum wherein decisions have been taken on the quantities to be allocated in upcoming *procurement* tenders. This document bears the signatures of the representatives of bidders/manufacturers which have been identified and verified by names of the employees of the undertakings involved by the Applicant during the proceedings of the Leniency Application. Further, above scanned documents show that bidders/participating undertakings have been referred by code numbers such as SSS 006, SGA001, SGP004, SGS003, SGF002, SPP005. These code numbers were identified in the Enquiry Report along with the names of respective bidders/manufacturers and have also been verified and endorsed by the Applicant as follows:

SGA001: Areva T&D Pakistan (Pvt.) Limited
SGF002: FICO Industries (Pvt.) Limited
SGS003: Siemens Pakistan Engineering Company Limited
SGP004: Pak Elektron Limited
SPP005: Perfect Electro Mek Pakistan (Pvt.) Limited
SSS006: Siddique Sons Engineering (Pvt.) Limited

57. Therefore, the evidence provided by the Applicant along with the Leniency Application provides critical and significant evidence to substantiate the evidence on share allocation and cartelization among the participants of the switchgear forum.

Annex B1, B2 & B3

58. Where the evidence provided by the Applicant along with the Leniency Application substantiates share allocation among the switchgear manufacturers, it also provides a new evidence regarding decisions taken on price and dispels any doubt regarding the existence of an agreement between the switchgear manufacturers to divide tender

quantity and fix the price in the tenders invited by DISCOs for procurement of switchgear.

59. Annex **B1** shows decisions and hand written notes on prices to be quoted for IESCO tender for 28× O/G Panels due on 12-01-2009 and for HESCO tender for 26× 1/C 60 ×O/G Panels due on 14-01-2009. Annex **B2** shows decisions and hand written notes on prices to be quoted in FESCO tender no. 84 for Nos. 17 11 kVA 1/C panels due on 28-06-2010, IESCO tender no. 124 due on 30-06-2010, NTDC tender due on 29-06-2010. Annex **B3** shows decision and hand written notes on PEMPAK's letter head regarding the prices to be quoted in LESCO switchgear tender due on 21-09-2010 (15 Nos. 11kV 1-C/Panels and 140 Nos. 11kV O/G Panels).

Annex C, C1& C2

60. Enquiry Report indicates that transformer manufacturers who actively participate in WAPDA/DISCOs tenders appear to have formed a cartel to devise a strategy to rig the bids. These transformer manufacturers also refer to each other with their code names while deciding on the share allocation and price of transformers to be quoted in bids and their designated representatives sign the documents wherein decision have been taken on price and share allocation. Signatures of these designated representatives and the code names of the undertakings involved have been verified by the applicant during the course of hearing as follows:

- T-02 M/s Elmetec (Pvt.) Limited
- T-04 M/s Pak Elektron Limited
- T-05 M/s Siemens Pakistan Engineering company Limited
- T-06 M/s Transfab
- T-07 M/s Transfopower Industries (Pvt.) Limited
- T-08 M/s AB Ampere Private Limited
- T-09 M/s Ace Indigo Industries (Pvt.) Limited
- T-10 M/s Hammad Engineering Company (Pvt.) Limited
- T-11 M/s Pan Power International Private Limited
- T-12 M/s Powertech Electrical Industries (Pvt.) Limited
- T-13 M/s Syed Bhais (Pvt.) Limited

61. In terms of Enquiry Report, transformers manufacturers appear to have formed a transformer forum. This forum is used to discuss and make strategy for tenders invited by the DISCOs for procurement of different categories of transformers including power, distribution and pad mounted transformers. Enquiry Report also, *prima facie*, shows that regular meetings are held among the forum members to decide the price and share allocation of the members for different categories of transformers to be supplied to DISCOs. Members strictly adhere to prices and conditions agreed at the transformer forum. Share allocation decided at forum remains unchanged and members cooperate with each other on such decisions and also refrain from any activity damaging the interest of the forum.

62. The documents submitted by the Applicant and referred above e.g. **Annex C** is decision on allocation of tenders regarding PESCO tender for transformers due on 22-10-2008 and QESCO tender due on 23-10-2008. **Annex C1** is decisions and hand written notes on price and share allocation concerning transformers tenders GEPCO due on 16-04-2009, MEPCO due on 21-04-2009 and QESCO due on 25-04-2009. **Annex C2** is a summary by the coordinator of PEMA on 12-11-2010 re: HESCO ADB tender Lot-II transformers due 07-12-2010.

63. In our considered view, these documents explicitly corroborate the evidence given in the Enquiry Report regarding the existence of a transformer forum and the decision on price and share allocation taken by the transformer manufacturers for upcoming tenders of different DISCOs during the alleged time period. Further, the above mentioned documents strengthen and substantiate the evidence given in the Enquiry Report that in the meetings called to discuss the tenders, members are required to bring along their tender documents. Tender

forms duly filled and signed are shared by members before submitting their bids. To show a competitive bidding, supporting bidders submit cover bids, and the price to be quoted by such supporting bidders is decided in the forum meetings.

64. Before we proceed further to give finding on the quantum of leniency based on the criteria discussed above and the discretion granted to the Commission under the Leniency Regulations, we would like to review relevant market conditions and the economic impact of the collusive activities alleged in the Show Cause. Notice.

ECONOMIC IMPACT OF COLLUSION

65. In Pakistan, there are 12 local manufacturers of distribution transformers and the only demand for transformers comes from DISCOs which is around 90%. Remaining 10% pertains to industry. Procurement of Distribution Transformers and 132KV Power Transformers is directly made by DISCOs for their respective regions. They are installed for electrification of villages, housing societies and supplying power to the tube well pumps. Total orders issued by DISCOs during the period of 2008-2011 are for the value of PKR [.....] billion. Further, as stated by the Applicant, it holds [...%], PEL holds [....%] market share while the rest of manufacturers occupy [...%] of total market. On the other hand there are 10 local manufacturers of medium voltage switchgears. It is estimated that overall market for Air-insulated Switchgears in Pakistan for the 2008-2011 was Rs. [....] billion, out of this volume 60-65% approximately comprises of DISCOs and the remaining [... to ...%] pertains to different industries.

66. The facts and figures given with respect to the industry are being taken on its face value. However, with respect to the submission of the

Applicant that “it is difficult to establish that the cartel arrangement had any significant price impact” it must be borne in mind that ‘difficulty in calculating/evaluating the economic impact’ is because the market was never allowed to work and function as a ‘free market’ and not because there is actually no price impact. By now it is well established that cartel invariably impacts on price, quality and innovation. In fact, it is akin to a termite, which is eating up our economy. They often don’t get detected until it is too late- by which time they would have done significant damage to the structure. It may take a long time before the structure collapses, or is so weakened; leaving little or no resilience to recuperate.

67. In this regard, we refer to EC Competition Commission’s Guidelines on the applicability of Article 81 (which deals with the prohibited Agreements) of the EC Treaty to horizontal cooperation agreements in paragraph-25 which reads as under:

“25. Another category of agreements can be assessed from the outset as normally falling under Article 81(1). This concerns cooperation agreements that have the object to restrict competition by means of the price fixing, output limitation or sharing of markets or customers. These restrictions are considered to be the most harmful, because they directly interfere with the outcome of the competitive process. Price fixing and output limitation directly lead to customers paying higher prices or not receiving the desired quantities. The sharing of markets or customers reduces the choice available to customers and therefore also leads to higher prices or reduced output. It can therefore be presumed that these restrictions have negative market effects. They are therefore almost always prohibited.” (emphasis added)

68. Also, we can not agree with the Applicant’s submission that collective allocation of shares has favored the smaller manufacturers (who were

assured a stable workload) and WAPDA (who wished to prevent dependency on a single manufacturer and to ensure timely deliveries of electrical equipment).

69. To the contrary, we are of the considered view that it has not only killed free and fair competition in the market amongst the players, but curtailed their respective efficiencies. Conduct of business with an over pronounced sense of camaraderie and ensuring quotas to smaller manufacturers or ensuring quotas without considering efficiencies or any amalgam of such considerations erodes the spirit of the free market. Having observed so, we do not wish to undermine the relevance of the point that a procuring agency cannot remain dependant on a single supplier, but the point that we wish to emphasize is that all involved in the procurement need to remain cognizant of the competition laws in vogue and thus must put in place a more transparent mechanism, which does not promote or in any other way encourage anti-competitive practices.

FINDINGS

70. The Applicant confirms that PEMA is an informal association of domestic manufacturers of electric power equipment. Siemens, Transpower, PEL, Elmetech, Transfab, Hammad, AB Ampere, ACE Indigo, Syed Bhais Power Tech, Pan Power are the transformer manufacturers, and Siemens, Areva (Schneider Electric), PEL, FICO, Siddiqsons, Tariq Electric, PEMPAK are the switchgear manufacturers who are PEMA members. Within PEMA, there is a forum of transformers manufacturers and a separate forum of switchgear manufacturers. Mr. [-----] of [X] was the coordinator of the switchgear

forum. Mr. [-----] (who runs his own trading company and works as a consultant) was the coordinator of the transformers forum.

71. It has been put on record by the Applicant that these fora were used by the manufacturers/bidders to collude and collaborate on the price and quantities quoted and supplied to DISCOs in their procurement tenders. Timeframe of collusive practices in respect of transformer and switchgear has been stated to exist for at least over a decade. There is also likelihood that switchgear manufacturers, in particular, still continue to collude in procurement tenders.
72. We have scrutinized the documents relevant to this Leniency Application and have come to this conclusion that these documents explicitly provide additional evidence regarding existence of a switchgear and transformer forum, role played by the co-coordinator decisions on price and share allocation bearing codes and signatures of participating bidders, meetings to be held to discuss tenders, faxes sent to by one party to other competitors regarding price to be quoted by it and also include charts showing share allocation among manufacturers.
73. Since price fixing has not been alleged in the Show Cause Notice issued to the Applicant and other respondents in switchgear market. Therefore, in our view an independent contravention of Section 4 of the Act has been brought to the Commission's notice which in terms of paras 36 & 38 above entitles the Applicant for immunity from future proceedings that would be initiated in respect this new prohibited activity. We, therefore, grant immunity to the Applicant from penalty with respect to price fixing in the switchgear market subject to compliance with the Regulations 3 (a) to (d) of the Leniency Regulations. Failure to comply with these conditions may result in revocation of the immunity.

74. With respect to quota allocation in switchgear market, we find merit in counsel's arguments that not only the Applicant has assisted the Commission in establishing the existence of switchgear forum, identifying its co-coordinator but has also offered signed documents to establish that participants of the said forum have been engaged in prohibited activities under Section 4 of the Act.
75. With respect transformer market, we note that the Commission already had sufficient evidence regarding alleged collusive activities of transformer manufacturers in terms of price fixing and share allocation and this has also been acknowledged by the Applicant's counsel himself during the hearing. However, we are of the considered view that the Applicant has submitted evidence in terms of Regulation 4 of the Leniency Regulations which is additional valuable evidence. Though the contravention and nature of the evidence was previously known to the Commission but it represents significant added value by further substantiating the infringement under the Act through independent documents and in this respect we have also given due consideration to the fact that it is the case of first instance for leniency.
76. In view of foregoing and subject to the commitments of the Applicant i.e having made full and true disclosure, continuous cooperation and undertaking to refrain from participation in any prohibited activity along with the conditions laid down under Section 39 of the Act read with the Regulations 4(3) of the Leniency Regulations, we hereby grant the Applicant 100% reduction in penalty with respect to contravention alleged in the Show Cause Notice No. 27 in the relevant markets of switchgear and transformer, in terms of Regulation 4(1) of the Leniency Regulations and as against the Applicant the proceedings are to be disposed of in terms of this Order. Breach of any commitment or

violation of the condition laid down in the law would entitle the Commission to revoke such grant of reduction in penalty.

CONCLUSION

77. Taking the above into account and given the fact that this application is the first ever Leniency Application, as well for the grounds detailed here under, we are of the view that this decision is most likely to be pivotal in shaping the landscape as to how cartel players may react. In our considered view, immunity in terms of para 73 above or up to 100% reduction in penalty in terms of para 76 above would serve as an incentive to all participants of a cartel to come forward.
78. Such reduction may also heighten the uncertainty amongst the participant undertakings in other cartels; spurring them to compete for leniency. Thus acting as an effective deterrent, such participants may be encouraged not to withhold any such information and avail leniency at the earliest.
79. Importantly, the co-operation extended by the Applicant also needs to be applauded. With the exception of a few, we are generally in agreement with grounds taken by the counsel. Apart from being desirous of giving a positive signal to the business community and the lawyers to come forward for co-operation in unveiling the cartel, the vulnerability of a cartel participant in being the first to take the plunge is a factor that must not be undermined and given considerable value. Equally important, we believe is enhancement of quality and value of evidence which also stands established after scrutiny at our end.
80. In our considered view, leniency program is of even greater significance in the developing regimes where competition laws are in

their formative phase or where competition authorities may still be struggling to establish their writ. Notwithstanding, that cartelization is increasingly been found as the norm in Pakistan, recognition of this ‘supreme evil’ under competition law appears to be the biggest challenge to counter. It was for this reason that CCP had amended its leniency program and is perhaps so far the only agency out of approximately 110 competition agencies, which envisages an undertaking to invoke leniency provision even after the decision and the findings of the Commission on cartelization (albeit prior to initiation of proceedings before the court).

81. It needs to be appreciated why the *ante* Show Cause stage and even prior to the affirmation of infringement stage was viewed less likely to create any deterrence. This was done keeping in view the nascent stage of the law and the general business psyche in our country. Also, such restriction precluded any possibility for undertakings to approach the Commission at subsequent stages of the proceedings - even if the involved/participant undertaking so desired and was genuinely keen to cooperate being in a better position to evaluate its risks.

82. One must remember the objectives of leniency which is primarily to: a) give incentive to a cartel participant to disclose cartel evidence, b) encourage a cartel member to confess/admit and implicate his co-conspirators with hard insider evidence about their collusive agreement c) break the cartel with the objective to increase the level of compliance with antitrust or competition laws along with creating deterrence and above all, in our view d) bring about behavioral change through voluntary compliance and decartelization. Not to forget that sanctioning/punishment of the co-conspirators becomes more likely, hence adding to the deterrence and desistence aspect. Therefore, all

such measures are legitimate which do not compromise on the objectives of leniency and add to the effectiveness of enforcement.

83. We strongly believe that it is only sensible to encourage insiders to bring evidence which not only makes the evidence more decisive but also gives an insight into the sector/industry/relevant market, thereby giving more data, useful information and most importantly the cartels' working and operating practices.

84. It is indeed true that *'the better cartels are understood the more effective we can be in designing policy against them.'* One must recognize that apart from creating deterrence for cartels and anticompetitive practices, the role of competition law enforcement agency is to bring about corrective behavior. A cartel involves numerous questions to be addressed. How prices are agreed upon? How market quotas are decided? What modalities are adopted in reaching such agreements? What business practices exist as norms? Is there any front runner or party coercing other undertakings to take part in the prohibited activities? What role (if any) the procurement agencies play? What legal loops and lacunae exist in the system? – are all questions that can be answered and discovered in the process of leniency.

85. Keeping in view the legal framework and the repercussions and consequences that may follow for the applicant invoking leniency on account of nondisclosure and any concealment hearing it all from an insider i.e. a cartel participant itself is of significant value. His proximity with the background, his participation in the game all lends credence to the information and hence a better understanding of the problem before offering any solution or taking any remedial measures. It is for these reasons it becomes pertinent that a leniency program must

hold within itself the requisite flexibility and optimal incentives for a cartel member to break out.

86. The mandate of the Commission is to ‘enhance economic efficiency and to protect consumers from anti-competitive behaviour’. As an arm of the Government, public good is perhaps the ultimate goal for which all regulators are striving. Protection to the consumers from such anticompetitive practices in real terms perhaps can only be achieved when businesses, rectify their behaviour. Leniency, therefore, emerges as an effective tool; while encouraging compliance; it works towards building acceptability and helps in recognition and implementation of competition principles.

87. We must not, however, undermine the value of enhanced deterrence for other cartel participants that would result from grant of leniency which is equally important to keep businesses compliant with law.

88. Not only does leniency strengthen the adjudicatory authorities in terms of evidentiary value; it is also time and cost effective. Considering the time spent and involved in the detection prosecution and penalization of cartels and the costs incurred in pursuing the same - leniency as a tool indeed is valuable in curtailment of time and cost thus enhancing effectiveness of enforcement. Furthermore, in our view it also serves the public interest by not only unveiling but establishing the existence of a cartel, and also, pre-empting any possible abuse of process through technical objections to thwart the interest of justice.

89. In conclusion, we must state that invoking of leniency provision by the Applicant is to be viewed as a stepping-stone and endorsement of Commission’s hard core labour for the daunting tasks undertaken and

accomplished against powerful lobbies and vested interests - to deter, rectify and eliminate the anticompetitive practices in Pakistan.

90. Application for leniency by the Applicant is disposed of accordingly.

(RAHAT KAUNAIN HASSAN)

(ABDUL GHAFFAR)

CHAIRPERSON

MEMBER

Islamabad the April 03, 2012