

## THE HIGH COURT OF SINDH, KARACHI

**Present:**

Mr. Justice Adnan Iqbal Chaudhry

- Suit No.2970 of 2021 : Shujabad Agro Industries (Pvt.) Ltd. and others versus Federation of Pakistan and others.
- Suit No.3020 of 2021 : Shabbir Tiles & Ceramics Ltd. versus Federation of Pakistan and others.
- Suit No.2971 of 2021 : Toyo Packaging (Pvt.) Ltd. and another versus Federation of Pakistan and others.
- Suit No.3018 of 2021 : Glaxo Smith Kline Consumer Healthcare Pakistan Limited versus Federation of Pakistan and others.
- Suit No.2996 of 2021 : Olympia Power Generation (Pvt.) Ltd. versus Federation of Pakistan and others.
- Suit No.2966 of 2021 : Rainbow High Tech Engineering Company (Pvt.) Ltd. versus Federation of Pakistan and others.
- Suit No.3063 of 2021 : M/s. Aspin Pharma (Pvt.) Ltd., versus Federation of Pakistan and others.
- Suit No.3067 of 2021 : Pakistan International Packages (Pvt.) Ltd., and others versus Federation of Pakistan and others.
- Suit No.2995 of 2021 : M/s. Total Power Industries (Pvt.) Ltd., and others versus Federation of Pakistan and others.
- Suit No.3064 of 2021 : S.A. Auto Engineering (Pvt.) Ltd., versus Federation of Pakistan and others.
- Suit No.3047 of 2021 : M/s. Karachi Paper & Board Mills (Pvt.) Ltd., and others versus Federation of Pakistan and others.
- Suit No.3031 of 2021 : M/s. Abdullah (Pvt.) Ltd., and others versus Federation of Pakistan and others.

- Suit No.3039 of 2021 : Pakistan Oil Mills (Pvt.) Ltd., and others versus Federation of Pakistan and others.
- Suit No.2993 of 2021 : Bismillah Towel Industries Etc., and another versus Federation of Pakistan and others.
- Suit No.3046 of 2021 : M/s. H.S. Feeds and another versus Federation of Pakistan and others.
- Suit No.3026 of 2021 : Al-Masoom Products and another versus Federation of Pakistan and others.
- Suit No.3033 of 2021 : M/s. Shahzada Industries versus Federation of Pakistan and others.
- Suit No.3019 of 2021 : M/s. A.B. Steels versus Federation of Pakistan and others.
- Suit No.3082 of 2021 : M/s. Pakistan Services Ltd. and another versus Federation of Pakistan and others.
- Suit No.3062 of 2021 : M/s. SKF Collection and another versus Federation of Pakistan and others.
- Suit No.3016 of 2021 : M/s. Hamid Textile Industries versus Federation of Pakistan and others.
- Suit No.3017 of 2021 : M/s. Hamid Textiles Industries versus Federation of Pakistan and others.
- Suit No.3066 of 2021 : M/s. Popular Food Industries (Pvt.) Ltd., and others versus Federation of Pakistan and others.
- Suit No.3015 of 2021 : M/s. Natural Polymer Industries (Pvt.) Ltd., versus Federation of Pakistan and others.
- Suit No. [-] 3370 of 2021 : Magnacrete (Pvt.) Ltd., versus Federation of Pakistan and others.
- Suit No.3048 of 2021 : Standard Board (Pvt.) Ltd., versus Federation of Pakistan and others.

- Suit No.3029 of 2021 : Shangrila Foods (Pvt.) Ltd., and others versus Federation of Pakistan and others.
- Suit No.3006 of 2021 : M/s. Jeflex Industries versus Federation of Pakistan and others.
- Suit No.3093 of 2021 : M/s. Shan Foods (Pvt.) Ltd., versus Federation of Pakistan and others.
- Suit No.59 of 2022 : Anoud Power Generation Ltd., versus Federation of Pakistan and others.
- Suit No.02 of 2022 : Saima Packaging (Pvt.) Ltd., and another versus Federation of Pakistan and others.
- Suit No.54 of 2022 : Karam Ceramics Ltd., and others versus Federation of Pakistan and others.
- Suit No.53 of 2022 : M/s. Hussani Weaving versus Federation of Pakistan and others.
- Suit No.21 of 2022 : Macter International Ltd., versus Federation of Pakistan and others.
- Suit No. [-] 28 of 2022 : Ali Muhammad Oil Mills versus Federation of Pakistan and others.
- Suit No.77 of 2022 : M/s. Printech Packages (Pvt.) Ltd., versus Federation of Pakistan and others.
- Suit No.30 of 2022 : M/s. Tri-Pack Films Ltd., and others versus Federation of Pakistan and others.
- For the Plaintiffs** : M/s. Abid S. Zuberi, Ayan Mustafa Memon, Ali Abid Zuberi, Nabeel Kolachi, Soofia Saeed, Annas Makhdoom, Ahmed Farhaj, Ameen M. Bandukda, S. Mohsin Ali, Shahzad Afzal, Syed Mukhtar Shirazi, Liaquat Hussain Khan, Naeem Akhtar Qureshi, Syed Alamdar Hussain Naqvi, Muhammad Ali Bhutta, Junaid M. Siddiqui, Memoona Nasreen, Naveen Merchant, Salman Yousuf, Azain Nadeem Memon, Dervesh K. Mandhan, Hassan M. Mandiwala,

Taimoor Ahmed Qureshi, Zain A. Soomro, [Hanan Qamar and Muhammad Arif Ansari associates of Ayan M. Memon], Mukhtar Ahmed Kashar and [Asad Raees holds brief for Ms. Tahira Bano] Advocates.

**For the Defendants** : M/s. Kashif Hanif, Advocate, Kashif Sarwar Paracha, Acting Additional Attorney General, [Dr. Mir Aijaz Talpur, Joint Secretary, CCI-Secretariat, Islamabad and Mr. Bilal Farooq Alvi Legal Officer, SSGC].

Dates of hearing : 04-01-2022, 11-01-2022, 19-01-2022 & 21-01-2022

Date of decision : 04-03-2022

## **JUDGMENT**

**Adnan Iqbal Chaudhry J.** - For the purposes of supply of natural gas, the Plaintiffs are classified as 'General Industries'. They receive gas from the Defendant, Sui Southern Gas Company Ltd. [SSGC] for industrial purposes. Some of the Plaintiffs also use such gas for power-generation for self-consumption. The cause of action of these suits is SSGC's gas-closure notice dated 10-12-2021 which announced:

*"Gas supply to all General Industries (non-export) including their Captive Power Plants shall remain discontinued till further orders, however zero rated export industry including its CPPs along with the fertilizer sector will continue to get the gas."*

2. Since the aforesaid gas-closure was in furtherance of a priority order of gas-supply devised by the Federal Government, some of the Plaintiffs have also challenged that priority order as last revised by the Federal Government *vide* Ministry of Petroleum's notification dated 15-10-2018. The Plaintiffs therefore pray for declarations that SSGC's gas-closure notice dated 10-12-2021, and the Federal Government's notification dated 15-10-2018 are in violation of Fundamental Rights and Articles 154 and 158 of the Constitution of Pakistan; for a declaration that under Article 154(1) of the Constitution, it is the Council of Common Interests [CCI] that is competent to make a policy for gas, not the Federal Government;

declare that under Article 158 of the Constitution, the Plaintiffs are entitled to a precedence over the gas produced in Sindh; and for consequential injunctions in that regard.

3. The supply of natural gas is presently managed under the Natural Gas Allocation & Management Policy, 2005 [**Gas Policy**] made by the Federal Government. The salient features of the Gas Policy are as follows:

#### **“INTRODUCTION**

While the Federal Government is making concerted efforts to enhance natural gas supplies to meet growing demand, it is extremely important to establish a natural gas allocation and management plan to promote efficacious utilization of precious depleting natural resource particularly given the dominant role of natural gas in domestic energy landscape. Therefore, the Federal Government has set out these policy guidelines for the purpose in the paragraphs that follow.

#### **2.2. EXISTING DEMAND MANAGEMENT**

At present, natural gas demand on the system during peak winter load period or short supplies from E&P companies is met through following management programme:

- (a) Domestic and commercial consumers get continuous gas supply;
- (b) Fertilizer plants are supplied continuous gas;
- (c) Gas supply to industries having nine month contracts are curtailed or totally disconnected;
- (d) Power plants get gas supply after meeting the requirements of domestic, commercial, fertilizer and industrial sectors; and
- (e) Cement plants are supplied gas on “as and when available” basis.

#### **3. GAS ALLOCATION CRITERIA**

3.1 For provision of new gas connections to consumers from the network system, the Gas Utility Companies will market gas under the following guidelines:

- 3.1.1 Gas supply to consumer in the Domestic Sector will be as per yearly target determined by the Federal Government.
- 3.1.2 Gas supply to consumers in Commercial Sector will be encouraged.
- 3.1.3 Gas allocation for the Fertilizer Sector will be made by the Federal Government keeping in view the domestic needs and gas supply position.

3.1.4 Gas supply to the consumers in the General Industrial Sector will be based on the following criteria:

- (a) To the extent of process gas, the gas supply will be made on twelve months basis; and
- (b) Assured gas supply for all other usages will be for nine months basis and for the remaining period, gas supply will be on the best effort basis.

.....  
 3.1.6 Gas supply to all consumers in Captive Power Sector will be made after first meeting the requirement of Domestic, Fertilizer, Commercial, Industrial, and Power (both WAPDA/KESC and IPPs) Sectors on the following basis:

- (a) Those dual fired power plants with a capacity of upto 50 MW, which employ combined cycle or cogeneration technology, shall be encouraged for allocation of gas. In order to ensure the optimal gas use for power generation, industrial units collectively setting up merchant power plants for self-consumption only will also be included in this category.
- (b) Gas supply for self-power generation would be on "as and when available basis" at different locations.

.....  
 .....

**4. PROPOSED LOAD MANAGEMENT POLICY**

To ensure optimal utilization of natural gas for the best socio-economic development of the country, the merit gas dispatch order outlined in sub-sections below will be observed during high demand and/or short supply periods.

4.1 For the consumers connected to the system, following priority order will be observed by Gas Utility Companies:

Sr. No.	Category of Consumers	Priority Order
1	Domestic and Commercial Sectors	First
2	i) Fertilizer Sector; and ii) Industrial Sector to the extent of their process gas	Second
3	Independent Power Plants as well as WAPDA and KESC's Power Plants having firm gas supply Commitment under GSAs.	Third
4	General Industrial and CNG Sectors	Fourth
5	i) WAPDA's and KESC Power Plants other than those listed against Sr. No.3 above. ii) Captive Power Sector	Fifth
6	Cement Sector	Sixth

.....  
 .....

## 8. IMPLEMENTATION OF POLICY

A committee to be notified by the Federal Government will review/oversee the allocation and management policy set forth in this document on regular basis.”

4. It will be seen that clause 4.1 of the Gas Policy laid down a priority order for supply of gas to various categories of consumers. In the year 2013, the Economic Coordination Committee [ECC] of the Federal Cabinet revised that priority order as follows:

“No. NG(I)-7(158)/12-LS-Vol-IV  
Government of Pakistan  
Ministry of Petroleum and Natural Resources  
(Policy Wing)  
Directorate General Gas  
\*\*\*\*\*

*The Managing Director  
Sui Northern Gas Pipeline Limited  
Lahore.*

*Islamabad, the 1<sup>st</sup> March, 2013*

*The Managing Director  
Sui Southern Gas Company Limited  
Karachi.*

**Subject: NATURAL GAS LOAD MANAGEMENT.**

*Dear Sir(s),*

*I am directed to refer to this Ministry’s letter of even number dated 06.02.2012 and to state the Economic Coordination Committee of the Cabinet vide Case No. ECO-32/04/2013 dated 22<sup>nd</sup> February 2013, has revised sectoral priority as under:*

<b>S #</b>	<b>Category of Consumers</b>	<b>Priority Order</b>
1.	<i>Domestic and Commercial Sectors</i>	<i>First</i>
2.	<i>Power Sector</i>	<i>Second</i>
3.	<i>General Industrial, Fertilizer and Captive Power</i>	<i>Third</i>
4.	<i>Cement Sector including its Captive Power</i>	<i>Fourth</i>
5.	<i>CNG Sector</i>	<i>Fifth</i>

*Yours sincerely,  
-sd/-  
Director General (Gas)”*

5. The priority order of gas supply was again revised by the ECC of the Federal Cabinet vide notification dated 15-10-2018, impugned herein, which is as follows:

“No. NG(I)-7(158)/12-LS-Vol-IV  
Government of Pakistan  
Ministry of Petroleum and Natural Resources  
(Policy Wing)  
Directorate General Gas  
\*\*\*\*\*

Islamabad, the 15<sup>th</sup> October, 2018

01. The Managing Director  
Sui Northern Gas Pipeline Ltd.,  
Lahore.

02. The Managing Director  
Sui Southern Gas Company Ltd.,  
Karachi.

**Subject: GAS ALLOCATION AND MANAGEMENT POLICY  
2005 - REVISION IN PRIORITY ORDER.**

Dear Sir(s),

I am directed to inform that the ECC of the Cabinet in its meeting held on 17.09.2018 vide case No.ECC-86/17/2018 dated 17.09.2018 while considering a summary submitted by Petroleum Division regarding Natural Gas Sale Pricing inter-alia directed as under:

**(III) The priority of allocation of system gas will be revised to bring the five zero-rated sectors at second priority along with the power sector.**

2. In pursuance of the above ECC decision, the revised priority order under Natural Gas Allocation and Management Policy, 2005 will be as under:

S #	Category of Consumers	Priority Order
1.	Domestic and commercial Sectors	First
2.	Power Sector, *Zero-Rated General Industry	Second
3.	General Industrial, Fertilizer & Captive Power	Third
4.	Cement Sector including its Captive Power	Fourth
5.	CNG Sector	Fifth

\* Textile (Including jute) carpets, letter, sports and surgical goods

Yours truly,  
sd/-  
Deputy Director (Gas)”

6. With the onset of the winter season, and deriving mandate from the Gas Policy as revised by the impugned notification dated 15-10-2018, the SSGC, on 10-12-2021, issued the impugned gas-closure notice as follows:

“ASGM (Coord)/F-29/2021  
10<sup>th</sup> December, 2021

To,  
All Industries Associations

**Subject: 100% CLOSURE BY ALL GENERAL INDUSTRIES (NON-EXPORT) INCLUDING THEIR CAPTIVE POWER UNITS STARTING FROM 11<sup>TH</sup> DEC 2021 TILL FURTHER NOTICE.**



Dear Sir(s),

Further to our earlier notification reference No. ASGM (Coord)/F-29/2021 dated 26<sup>th</sup> Nov 2021 and in adherence to Ministry of Energy (Petroleum Division), Government of Pakistan's priority order for gas load management, where domestic sector tops the list and to serve the domestic customers with even more care and consideration, especially those in Balochistan already experiencing the winter season, therefore, gas supplies to **"TO ALL GENERAL INDUSTRIES (NON EXPORT) INCLUDING THEIR CAPTIVE POWER PLANTS"** across Sindh and Balochistan, are being discontinued from 11<sup>th</sup> Dec 2021.

The discontinuation of All General Industries (Non-Export) including their Captive Power Plants (CPPs) is being exercised under the Gas Sales Agreement (GSA) signed as the very agreement clearly states that "Gas supply will be provided by the Company on 'as and when available' basis only during the period from March to November each year. The Consumer will make dual firing arrangements to avoid loss of production as and when Gas is not available during March to November and also during December to February when the Company will keep the Consumer's Gas supply disconnected at his cost each year".

Gas supply to all General Industries (Non-Export) including their Captive Power Plants shall remain discontinued till further orders, however zero rated export industry including its CPPs along with the fertilizer sector will continue to get the gas.

The volume of gas curtailed from this arrangement would be diverted to domestic customers from them to cater their enhanced gas loads in context of the winter season.

It may be noted that in Balochistan, supply of additional gas is a must for the survival of human lives since gas serves as a LIFELINE to scores of populace needing to keep themselves warm through water and space heating gas appliances in the extremely low temperatures.

SSGC looks forward to all General Industries (Non-Export) for their understanding on the matter and expects their cooperation for serving the domestic customers through uninterrupted gas supplies.

With the advent of winter season, SSGC is facing severe shortage in the indigenous gas receipts from producers every passing day resultantly depleting line pack and simultaneously, SSGC is also experiencing increased gas consumption in the Domestic Sector that peak during winter seasons and ultimately causes Low Gas Pressure in the System. Catering to such eventually, as always done SSGC follow the guidelines, as circulated vide Load Management Policy of October 2018 to tackle such situations.

Foregoing in view, it is requested to please advise your members to including their henceforth cease 100% consumption of gas in all General Industries (Non-Export) Captive Power Units operative, which is essentially required to be done in the larger interest of the general public and the Closure of Gas to all above said all General Industries (Non-Export) including CPPs, however, shall remain effective till further orders.

We expect that in appreciation of emerging situation, needed cooperation and support shall be extended to SSGC to smoothly sail across this difficult period.

Yours sincerely,  
for Sui Southern Gas Company Limited  
-sd/-"

7. In the meantime, the Cabinet Committee on Energy [CCoE] approved the Gas Load Management Plan for Winter 2021-22, which

was ratified by the Cabinet on 30-11-2021 and was issued by the Ministry of Energy on 13.12.2021 as follows:

“No.NG(I)-7(158)/21-LS  
Government of Pakistan  
Ministry of Energy (Petroleum Division)  
Directorate General Gas  
First Floor, Petroleum House, G-5/2,  
\*\*\*\*\*

Islamabad, the 13<sup>th</sup> December, 2021

*The Managing Director,  
Sui Northern Gas Pipelines Ltd.,  
Lahore.*

*The Managing Director,  
Sui Southern Gas Company Ltd.,  
Karachi.*

**Subject: GAS LOAD MANAGEMENT PLAN FOR WINTER 2021-22**

*Dear Sir,*

*I am directed to refer to the subject cited above and to convey that the Cabinet Committee on Energy (CCoE) considered the summary dated 17<sup>th</sup> November, 2021, submitted by the Petroleum Division on the subject matter and vide Case No. CCE-112/30/2021 dated 18.11.2021 (ratified by the Federal Cabinet vide Case No. 1149/39/2021 dated 30.11.2021) has approved as under:*

- i) Gas/RLNG shall be supplied uninterrupted to export oriented industries including the top 50 exporters, in addition to zero rated industry, unless technical constraints in the system.*
  - ii) Supply of Gas/RLNG to export oriented captive power plants shall be monitored till 15<sup>th</sup> December, 2021. It will be readjusted in view of the supply/availability of the gas.*
  - iii) The CNG Sector will remain closed with effect from 01.12.2021 to 15.02.2022.*
  - iv) General Industry (non-export) shall be provided gas on weekly rotation basis, with one day off, for each sector or zone. Cement Industry will be treated at par with the non-export general industry.*
  - v) To boost agricultural productivity, uninterrupted gas supply shall be ensured to Fertilizer Sector.*
  - vi) Dedicated consumers of Power Sector shall get uninterrupted gas supply.*
  - vii) Power production based on LNG will get 5% extra supply during the winter, as compared to last year's actual consumption.*
  - viii) After meeting national requirement of the gas for the critical industries, maximum efforts will be made to accommodate the domestic consumers on priority as already decided by the ECC.*
- 2. In addition to above, the Federal Cabinet also directed to:*
- (i) Re-check and ascertain the gas reserves depletion rate so as to determine how much of it was due to theft, collusion and distribution losses.*

- (ii) *Formulate long, medium and short-term plans to face the challenge of fast depleting gas reserves.*
3. *In order to effectively manage the above Load Management Plan, both Sui Companies, being system operator, to take following measures:*
- i) *The above plan to be implemented while remaining within the contours of already ECC's approved gas supply priority order.*
- ii) *A dedicated complaint center (24x7) based on the concept of helpline accessible through mobile app be put in place to redress the complaints of low pressure / non-supply of gas for domestic sector.*
- iii) *Subject to improvement in supplies, the restoration of gas may be considered in order of approved priority, under intimation to this Division.*
- iv) *The retention of RLNG by SSGCL to be considered at 75 MMCFD and any volume beyond the said retention to be mutually decided by SNGPL and SSGCL considering operational flexibility.*
- v) *Any abrupt change in supply or demand to be reported along with mitigation plan to this Division.*

*Yours truly,  
Assistant Director (NG-1)"*

**Issues:**

8. It is in the above backdrop that these suits are before this Court. At the hearing on 11-01-2022, all learned counsel agreed that these suits can be heard for final determination on the basis of admitted documents already on the record and by deciding common questions of law. Therefore, the following issues were settled for determination of these suits:-

- (i) Whether SSGC's gas closure notice dated 10-12-2021 for General Industries (non-export), including their CPPs, is contrary to the Gas Load Management Plan for Winter 2021-2022 approved by the Federal Government on 13.12.2021 ? If so, to what effect ?
- (ii) Whether SSGC's gas closure notice dated 10-12-2021, and the priority order for gas allocation set by the Federal Government vide notification dated 15-10-2018, are in violation of Article 25 and/or Article 158 of the Constitution of the Pakistan, 1973 ?
- (iii) In view of the domain of the CCI under Article 154 of the Constitution of Pakistan, whether the Federal

Government was legally competent to make revision vide notification dated 15-10-2018 in the Gas Allocation & Management Policy, 2005 ? If so, to what effect ?

- (iv) What is the effect of the Gas Supply Agreements between the Plaintiffs and the SSGC ?
- (v) To what relief, if any, are the Plaintiffs entitled to, and what should the decree be ?

Arguments of counsel:

9. On behalf of the Plaintiffs, submissions were led by Mr. Abid S. Zuberi Advocate. He submitted that under clause 4.1 of the Gas Policy, the Plaintiffs, classified as the General Industrial sector, were placed at priority No.2(ii); that such priority order was revised by the Federal Government by the impugned notification dated 15.10.2018 to drop the General Industrial sector to priority No.3, and at the same time certain zero-rated export industries were retained at priority No.2, thus discriminating against the Plaintiffs. He submitted that if zero-rated export industries brought foreign exchange to the country, the non-exporting Plaintiffs saved foreign exchange for the country, and thus the separate classification of the two infringed Article 25 of the Constitution. Learned counsel then pointed to the Gas Load Management Plan for Winter 2021-22 and submitted that clause 1(iv) thereof clearly provided that gas would be provided to the General Industry (non-export) on a weekly rotation basis with only one day off; that such Gas Load Management Plan was issued by the Federal Government on being satisfied that sufficient gas was available in the system to cater to both domestic consumers and the General Industry; that said Gas Load Management Plan was being followed by the SNGPL in Punjab, and therefore SSGC's gas-closure notice dated 10.12.2021 was not only discriminatory but also contrary to the Gas Load Management Plan. Learned counsel then submitted that under Article 154(1) of the Constitution, read with Entry No.2, Part-II of the Federal Legislative List, the authority to make policy for gas vested exclusively in the CCI, as it did for electricity and as so held by the

Supreme Court in *Gadoon Textile Mills v. WAPDA* (1997 SCMR 641), and therefore, the Gas Policy and its revision by the Federal Government under notification dated 15.10.2018 was without lawful authority. Further, learned counsel relied on *Engro Fertilizers Ltd. v. Islamic Republic of Pakistan* (PLD 2012 Sindh 50) and *Lucky Cement Ltd. v. Federation* (PLD 2011 Peshawar 57) to submit that under Article 158 of the Constitution the Plaintiffs were entitled to uninterrupted supply of gas as a precedence over other Provinces inasmuch as Sindh was producing more than sufficient gas for its requirements.

Mr. Annas Makhdoom, learned counsel for the Plaintiffs emphasized that frequent disruptions in gas supply have caused a tremendous loss to the General Industrial sector which relies on gas as the primary source of energy; therefore, the Plaintiffs are compelled to seek the enforcement of Article 158 of the Constitution for uninterrupted supply of gas. In support of the argument that gas policy was the domain of the CCI and not the Federal Government, learned counsel also cited *Qurban Ali Shah v. Federation of Pakistan* (PLD 2020 Sindh 242).

Mr. Nabeel Kolachi, learned counsel for the Plaintiffs added that some of the Plaintiffs, though primarily engaged in local production, also made some exports, but the impugned notification dated 15-10-2018 did not clarify how such consumers are placed in the priority order of gas-supply; that the words 'non-export' have also not been defined in SSGC's gas-closure notice; thus, he submitted that the priority order in the impugned notification dated 15-10-2018 and SSGC's gas closure notice are not intelligent classification.

All other learned counsel for the Plaintiffs adopted the above arguments.

10. Mr. Kashif Hanif, learned counsel for the SSGC submitted that the Gas Policy has been made by the Federal Government in exercise of executive authority under Article 97 of the Constitution of Pakistan read with the Rules of Business, 1973 made under Article 99(3) of the Constitution. He submitted that the Gas Policy clearly stipulates: (a)

that gas supply to the General Industrial sector would only be for nine (09) months, excluding the winter months of December, January and February; (b) that in order to give priority to the domestic and commercial sector, gas supply to the General Industrial sector can be discontinued; and (c), that gas supply to industries for self-generation of power shall be on 'as and when available basis'. He pointed out that said provisions of the Gas Policy are incorporated in the General Supply Agreements [GSAs] between the SSGC and the Plaintiffs, and thus the Plaintiffs cannot set-up a case contrary to their contract; that though it would be more lucrative for the SSGC to give priority to the General Industrial sector given their higher tariff, the SSGC is bound by the Gas Policy and the GSAs; that none of the Plaintiffs pray that the Gas Policy or the GSAs be declared unlawful or contrary to Article 158 of the Constitution of Pakistan, rather they have only challenged the revision made in the priority order of gas-supply. He placed reliance on *Rashid Silk Mills v. Federation of Pakistan* (PLD 2019 Sindh 189) to submit that SSGC's gas closure notice dated 10-12-2021 did not violate Article 158 of the Constitution. Learned counsel emphasized that the SSGC was only a distributor of gas and can only supply the gas it receives from the source; that during the winter months, not only does the demand of gas increase, but also the supply from the well-heads decreases, thus the need to divert gas to the domestic sector which has been given priority under the Gas Policy, in particular to Balochistan which experiences harsh winters, and hence temporary gas-closure for the General Industry. He submitted that it is a misconception to argue that industries in Punjab are getting more gas than Sindh, for in Punjab the supply of indigenous gas is reinforced by a far greater input of RLNG which is a far more expensive fuel. As regards the reliance placed by the Plaintiffs on clause 1(iv) of the Gas Load Management Plan for Winter 2021-22, Mr. Kashif Hanif submitted that the same was being cited by the Plaintiffs out of context, as clause 3(i) thereof clearly stated that such Gas Load Management Plan was subject to the priority order already provided in the Gas Policy.

11. Mr. Kashif Sarwar Paracha, learned Additional Attorney General submitted that load management of natural gas is done every year by the Federal Government to manage the ever increasing demand of natural gas on depleting gas reserves; that the Federal Government is legally competent to frame policy with regards to allocation and management of natural gas; that the domain of the CCI to make policy with regards to gas pursuant to Article 154(1) of the Constitution is primarily to resolve an issue between Provinces, or a Province and the Federal Government, and not to make policy for frequent load management of natural gas. For that submission, the learned Additional Attorney General too relied upon *Gadoon Textile Mills v. WAPDA* (1997 SCMR 641), and he further cited *Khalid Mahmood v. Federation of Pakistan* (PLD 2003 Lahore 629), and *Amin Ahmed v. Ministry of Production* (PLD 1996 Kar 27). Regards the effect of Article 158 of the Constitution, he submitted that said Article cannot be read in isolation but has to be construed harmoniously with Article 172(3) of the Constitution. He submitted that for domestic consumers the supply of gas was a fundamental right to life, whereas the Plaintiffs can at best plead a fundamental right to business, which is always subject to qualifications prescribed by law; that the notification dated 15-10-2018 whereby certain zero-rated export industries are given priority over non-exporting industries, is a reasonable classification and not in violation of Article 25 of the Constitution; and that similar submissions as the ones now being advanced by the Plaintiffs have already been rejected by a learned single Judge of this Court in *Fimcotex Industries (Pvt.) Ltd. v. Pakistan* (PLD 2018 Sindh 641).

12. In rebuttal, Mr. Ayan Mustafa Memon, learned counsel for the Plaintiffs submitted that Article 172(3) of the Constitution deals only with the ownership of natural gas and has no bearing on Article 158 which clearly stipulates that the 'requirements' of the Province take precedence; that the GSAs between the SSGC and the Plaintiffs are subject to the Constitution; and that longer durations of gas closure

amount to shutting down the Plaintiffs and laying off hundreds of employees inasmuch as the K-Electric does not have capacity in the grid to supply such volume of electricity to the Plaintiffs.

13. Heard the learned counsel and perused the record.

14. The Natural Gas Allocation & Management Policy, 2005 [Gas Policy] was made by the Federal Government to manage the increasing demand of natural gas on depleting gas reserves. Consequently, clause 4.1 of the Gas Policy laid down a priority order for supplying gas to various categories of consumers. Clause 8 of the Gas Policy envisaged a committee by the Federal Government to review the Gas Policy on a regular basis. That mandate was given to the ECC of the Cabinet. Based on its recommendations, the Federal Government revised the priority order of gas supply (clause 4.1 of the Gas Policy) from time to time, but always keeping domestic and commercial consumers at priority No.1, the last such revision having been made by the impugned notification dated 15-10-2018. Citing a shortfall in gas-supply from the source, coupled with the increased demand of domestic consumers during the winter season, the SSGC issued a temporary gas-closure notice dated 10-12-2021 for the General Industrial (non-export) sector so as to divert gas to domestic consumers; hence these suits.

I take up Issue No. (iii) first since that pertains to the very competence of the Federal Government to revise the priority order of gas supply.

*Issue No.(iii) In view of the domain of the CCI under Article 154 of the Constitution of Pakistan, whether the Federal Government was legally competent to make revision vide notification dated 15-10-2018 in the Gas Allocation & Management Policy, 2005 ? If so, to what effect ?*

15. Mr. Kashif Hanif, learned counsel for the SSGC had pointed out that while the suits challenge the legal competence of the Federal Government to revise the priority order of gas supply (notification



dated 15-10-2018), none of them expressly challenge the Gas Policy itself which has also been issued by the Federal Government. Nevertheless, either way the question remains whether it is the CCI under Article 154(1) of the Constitution that is exclusively vested with the authority to make policy with regards to gas. Therefore, to answer Issue No. (iii), the authority of the CCI requires examination.

16. Article 154(1) of the Constitution reads:

“154. (1) The Council shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List and shall exercise supervision and control over related institutions.”

The subject of ‘natural gas’ then finds mention in Entry No.2, Part II of the Federal Legislative List; hence the argument of the Plaintiffs that it is the CCI and not the Federal Government that is competent to make and revise any policy with regards to natural gas. However, at the same time, Article 97 of the Constitution states that: “Subject to the Constitution, the executive authority of the Federation extends to matters with respect to which Majlis-e-Shoora (Parliament) has power to make laws .....”; and, Article 142(a) of the Constitution states that: “Subject to the Constitution – (a) Majlis-e-Shoora (Parliament) shall have exclusive power to make laws with respect to any matter in the Federal Legislative List”. Since the subject of ‘natural gas’ is included in Entry No.2, Part II of the Federal Legislative List, the competing argument is it that it is the Federal Government that is exclusively competent to make and revise any policy with regards to natural gas.

17. At first blush, the words “Subject to the Constitution” in Article 97 of the Constitution suggest that the executive authority of the Federation would not extend to policy-making for matters that come within the domain of the CCI under Article 154(1) of the Constitution. But then, the words “Subject to the Constitution”, which appear in *pari materia* in Articles 137 and 142 of the Constitution, were interpreted by the Supreme Court in *Lahore Development Authority v. Imrana Tiwana* (2015 SCMR 1739) to hold that those are not intended to make said Articles subservient to other provisions of the

Constitution, but only mean that where other provisions of the Constitution create a specific bar to the exercise of executive or legislative authority, or provide a different manner for such exercise, then that authority must either not be exercised at all, or exercised in such manner as the Constitution permits.

In *Pakistan Medical and Dental Council v. Muhammad Fahad Malik* (2018 SCMR 1956) one of the questions before the Supreme Court was to the legal competence of the Parliament to legislate on the subject of medical profession post Eighteenth Amendment when such subject was included in Part-II of the Federal Legislative List, raising the argument that thereafter such legislation required the prior approval of the CCI. After discussing the scheme of Articles 153 and 154 of the Constitution, the Supreme Court held that said Articles indicate that the CCI is subservient to the Parliament; that under Article 70 of the Constitution the Parliament has absolute authority to make laws with regards to matters enumerated in the Federal Legislative List, which power is not subject to any other provision of the Constitution; and therefore, since the CCI has no role in the legislative process, no legislation or delegated legislation can be struck down on the ground that the CCI was not involved in the process.

18. Taking forth the case of *Imrana Tiwana*, it will be seen that Article 154 of the Constitution does not specifically exclude the executive authority of the Federal Government to make policy in matters falling in Part-II of the Federal Legislative List. The case of *Fahad Malik* then settles that the authority of the CCI to make policy under Article 154(1) of the Constitution does not in any way impede the power of the Parliament to legislate for a matter falling in Part-II of the Federal Legislative List. Consequently, when the executive authority of the Federal Government extends to matters with respect to which Parliament has power to make laws, it follows that the power of the CCI to make policy under Article 154(1) of the Constitution is also no embargo to policy-making by the Federal Government in the exercise of its executive authority under Article 97

of the Constitution. In other words, notwithstanding Article 154(1) of the Constitution, the Federal Government retains the executive authority to make policy with regards to gas. That power of the Federal Government is also manifest in section 21 of the Oil and Gas Regulatory Authority Ordinance, 2002 as follows:

**“21. Powers of the Federal Government to issue policy guidelines.-**(1) The Federal Government may, as and when it considers necessary, issue policy guidelines to the Authority on matters of policy not inconsistent with the provisions of this Ordinance or the rules and the Authority shall comply with the policy guidelines in the exercise of its powers and functions and in making decisions.  
.....”

19. The above however does not completely answer the issue, for at the same time it cannot be the intent of the Constitution to leave the field of policy-making open to a clash between the Federal Government and the CCI. On a harmonious reading of Articles 97, 142 and 154(1) of the Constitution, the analysis *infra* goes to suggest that policy-making by the CCI under Article 154(1) is in a different sphere than policy-making by the Federal Government in the exercise of its executive authority under Article 97.

20. In *Amin Ahmad v. Ministry of Production, Government of Pakistan* (PLD 1996 Karachi 27) the privatization of a State Industry was questioned by contending that the Federal Government was not legally competent to take such a policy decision as the subject matter was within ‘development of industries’ in Entry No.3, Part-II of the Federal Legislative List for which only the CCI was empowered to make policy under Article 154(1) of the Constitution. Such argument was rejected by a Division Bench of this Court by holding that the subject matter was within the domain of the Federal Government under Article 173(1) of the Constitution. It was further held by the learned Division Bench that the object of the CCI is to safeguard the interest of Federating units and to establish good relations between the Government of the Federation and the Provinces; and that where the CCI was never called upon to perform such function by the

Federal or a Provincial Government, it was not within the competence of a private party to seek a direction to the CCI to perform its function under Article 154(1) of the Constitution.

21. In *Gadoon Textile Mills v. WAPDA* (1997 SCMR 641) one of the questions before the Supreme Court was that when Article 154(1) of the Constitution empowered the CCI to make policy with regards to electricity (prior to the Eighteenth Amendment), whether the power to determine electricity tariff also vested in the CCI and not in WAPDA under the WAPDA Act, 1958. After discussing the intent behind the CCI and Articles 153, 154 and 161 of the Constitution, the Supreme Court held that Article 154(1) of the Constitution did not entail that electricity tariff would be made by the CCI. The majority view, expressed by Justice Ajmal Mian, was that:

“28. .... In our view Articles 153, 154, 155, 160 and 161 of the Constitution provide an in-built self-adjudicatory and self-executory mechanism in the Constitutional set-up. The object seems to be to generate sense of participation among the Federating Units on sensitive issues of national importance referred to in the above Articles, and to ensure:--

- (i) resolving of any dispute arising between one or more Federating Units *inter se* or between the Federation and a Federating Unit;
- (ii) payment of the net proceeds of the Federal duty excise on natural gas levied at well-head and collected by the Federal Government to the Federating Units in which the well-heads of natural gas are situated;
- (iii) payment of net profits earned by the Federal Government or any undertaking established or administered by the Federal Government from the bulk-generation of power at a hydro-electric station to the Federating Unit in which the hydro-electric station is situated;
- (iv) carrying out direction issued by the Parliament in its joint session to C.C.I.;
- (v) equitable distribution of Federal taxes among the Federating Units and resolving other financial issues (Article 160 of the Constitution).”

29. We are inclined to hold that the matters referred to in Part-II of the Federal Legislative List and Item 34 of the Concurrent

Legislative List (Electricity) are to be brought before CCI for formulating and regulating policies. ....

30. .... Applying the above principle to the case in hand, we are of the opinion that C.C.I. is not required to make decision as to the day to day working of the Corporations mentioned in Part II of the Federal Legislative List and of the related institutions. It is supposed to formulate and regulate general policy matters as to their working, which may include general policy for the working of WAPDA. It may even include a guideline for fixation of tariff by WAPDA but such guideline cannot be inconsistent with subsection (2) of section 25 of the Act, which lays down statutory parameters for fixation of tariff. In our view, the C.C.I. is not required to determine tariff for the supply of electricity by WAPDA to the consumers and to vary the same from time to time as this comes within the ambit of day to day working. It may be pointed out that fixation of tariff of electricity depends on various factors, which regularly and frequently fluctuate warranting revision of tariff from time to time. It may further be observed that there are a number of other Corporations and related institutions under the administrative control of the Federal Government, which deal with manufacture and also of various goods/machinery. Can it be urged that it is mandatory that C.C.I. should fix the prices of the above items from time to time. The composition of C.C.I., which comprises Chief Ministers of the four Federating Units and four nominees of the Federal Government, which generally includes the Prime Minister as stated above, militates against taking of above exercise which if taken in respect of all the Corporations and related institutions referred to in Article 154(1), will be a full time job, the Prime Minister and the Chief Ministers instead of running the Federation and the Federating Units will mostly be busy in the above exercise. The requirement under rule 5 of the Rules of Procedure of C.C.I, to summon a meeting at least once in a year also lends support to the above view, which we are inclined to take.

31. .... Furthermore, admittedly C.C.I. had not laid down any guideline for determining electricity tariff for WAPDA, in the absence of any such guideline, it cannot be urged that the tariff in question is violative of Article 154(1) of the Constitution. Additionally, the aforesaid Articles including Article 154 were intended and designed for the protection of the Federating Units' interest. None of the Federating Units has come forward to contend that the determination of tariff in question for supply of electricity including surcharge and additional surcharge is arbitrary or that it has no nexus with the actual cost. On the contrary, the learned Advocates-General, Punjab and N.W.F.P., who appeared in response to the Court's notice, stated that the above Federating Units were satisfied with the present arrangement of supply of electricity by the WAPDA including the tariff which is in force. The appellants who have their factories in the above two Federating Units have no locus standi to urge that above Article 154(1) has been violated particularly in view of the fact that there is no Constitutional mandate that C.C.I.'s approval is to be obtained before enforcing any tariff. .....

22. In *Khalid Mehmood v. Federation of Pakistan* (PLD 2003 Lahore 629) the petition was brought in the public interest contending that assets of corporations owned or controlled by the Federation came under the supervisory domain of the CCI under Article 154(1) of the Constitution read with Entry No.3, Part-II of the Federal Legislative List, and therefore the prior approval of the CCI was mandatory before the privatization of such assets. A learned Full Bench of the Lahore High Court relied on *Gadoon Textile* and interpreted the scheme of Articles 153 and 154 of the Constitution as follows:

“Our Constitution contains different Chapters to deal different situations. The aforesaid Articles of the Constitution prescribe specific machinery to harmonize the system of different Governments i.e. to resolve the disputes between the Federation and Provinces or between the Provinces *inter se*. Meaning thereby the Constitution prescribes a specific mode for resolution of disputes *qua* the matters prescribed in the aforesaid Articles of the Constitution of Islamic Republic of Pakistan. The aforesaid Articles are Code in itself, therefore, Provinces or Federation only has the right to voice against the action taken in violation of the aforesaid Articles of the Constitution of Islamic Republic of Pakistan. In case an action has been initiated by any of the Government without adopting the procedure highlighted in the aforesaid Articles of Constitution of Pakistan then, either Government has only right to agitate the matter before the competent body or before the Honourable Supreme Court in view of aforesaid discussions coupled with the fact that none of the Provincial Governments has come forward to oppose privatization of the establishments/projects in question. In any case the petitioners lack *locus standi* to raise this controversy before this Court by invoking the extraordinary jurisdiction under Article 199 of the Constitution. Therefore, all the three writ petitions are hereby dismissed.”

23. It is to be noted that in all three cases, of *Amin Ahmed*, *Gadoon Textile* and *Khalid Mehmood*, the Court had categorically held that persons other than the concerned Government have no *locus standi* to urge that Article 154(1) of the Constitution has been violated.

24. Learned counsel for the Plaintiffs had also placed reliance on *Qurban Ali Shah v. Federation of Pakistan* (PLD 2020 Sindh 242). There, the High Court of Sindh was implementing the directive of the Supreme Court issued to the Federal Government to make arrangements for supplying gas to villages situated within a radius of

5 km of gas fields in the Province of Sindh in fulfillment of the social welfare obligation contained in the licenses of oil exploration and production companies. In a related meeting, the CCI had directed that the cost of such endeavor would be borne by the gas distribution companies i.e. the SSGC and SNGC. The distribution companies contested. They contended that the CCI could not pass-on the burden of the Federal Government to distribution companies who did not have the funds to meet such cost. One of the questions before the High Court was whether such direction of the CCI was lawful and enforceable. The learned Division Bench observed that though the CCI could formulate and regulate policies in respect of gas, it could not decide who pays for implementing those policies when such aspect was covered by legislation.

25. In *Gadoon Textile*, though it was held that matters in Part-II of the Federal Legislative List are to be brought before CCI for formulating and regulating policies, the majority judgment did not go on to hold that such policy making by the CCI overrides the executive authority of the Federation under Article 97 to make policy with regards to matters in the Federal Legislative List. Same goes for the case of *Qurban Ali Shah*. Whereas, in the cases of *Imrana Tiwana* and *Fahad Malik* discussed above, the Supreme Court has settled that the executive authority of the Federation under Article 97 of the Constitution to make policy with regards to matters in the Federal Legislative List are neither subject to nor subservient to the policy-making power of the CCI under Article 154(1). The question therefore is, how does the Constitution reconcile policy-making by the CCI and policy-making by the Federal Government in respect of matters in Part-II of the Federal Legislative List.

26. To answer the above question, I am guided again by the *ratio* of the cases of *Gadoon Textile*, *Amin Ahmad* and *Khalid Mehmood* where it has been held that given the composition of the CCI and the scheme of Articles 153 and 154 of the Constitution, the CCI is essentially a forum intended for the protection of the interest of the Federating

Units (Provinces); for preventing and/or resolving disputes that may arise between them, or between one or more of them and the Federation; and that the CCI is not intended to be a policy-making body for matters that require regular or frequent oversight in the running of affairs by the Federal Government. It therefore appears that policy-making by the CCI is in the realm of safeguarding the interest of one or more of its constituents, i.e. the Provinces, in relation to matters falling under Part-II of the Federal Legislative List, or to prevent or resolve issues between Provinces *inter se* or a Province and the Federation in relation to said matters. It is for this reason that in all the three cases of *Gadoon Textile*, *Amin Ahmad* and *Khalid Mehmood*, the Court had held that a person other than the concerned Government has no *locus standi* to urge that a matter requires policy-making by the CCI. In other words, the policy for gas envisaged under Article 154(1) of the Constitution is separate from the policy which the Federal Government may make in the exercise of its executive authority under Article 97 of the Constitution read with section 21 of the Oil and Gas Regulatory Authority Ordinance, 2002. The former may be made for the special purposes of maintaining relations between the Federating Units or the Federation and the Federating Units, while the latter is made as a strategy to allocate and manage gas-supply to various categories of consumers. Due to fluctuations in the demand and supply of gas year round and dwindling gas reserves, the latter policy needs to be revisited and adjusted frequently, and for that reason as well, as articulated in *Qadoon Textile*, such policy-making is not intended for the CCI. While it can be said that an overlap may occur between the two types of policies, that aspect can best be examined in a case that presents such an overlap. In the instant suits it is not the case of the Plaintiffs that the Gas Policy made by the Federal Government is in conflict with any gas policy made by the CCI.

27. Since the Natural Gas Allocation & Management Policy, 2005 [Gas Policy] was within the legal competence of the Federal



Government and not the CCI, the revision of such policy by the Federal Government by the impugned notification dated 15-10-2018, does not violate Article 154(1) of the Constitution of Pakistan. The first part of Issue No. (iii) is answered accordingly.

28. As regards the second part of Issue No. (iii), *viz.* the effect of the Gas Policy, it is settled law that a Court will not ordinarily interfere with a policy of the Government unless it can be demonstrated that such policy infringes a fundamental right of the plaintiff, which aspect is examined under Issue No. (ii) *infra*. Excepting that, the supply of gas to the Plaintiffs, the General Industrial sector, is subject to the Gas Policy which stipulates *inter alia* that:

(i) domestic and commercial consumers are entitled to gas supply at first priority [clause 2.2(a) and clause 4.1 as revised].

(ii) “Gas supply to the consumers in the General Industrial Sector will be based on the following criteria:

- (a) To the extent of process gas, the gas supply will be made on twelve months basis; and
- (b) Assured gas supply for all other usages will be for nine months basis and for the remaining period, gas supply will be on the best effort basis.” [clause 3.1.4]

‘Process gas’, as used in clause 3.1.4(b) above, is an industrial term for gas-use for which alternate fuels are not technically feasible, such as in applications requiring precise temperature controls and precise flame characteristics.<sup>1</sup>

(iii) to manage the demand of gas during the peak winter load period or during the period of short-fall, “Gas supply to industries having nine month contracts are curtailed or totally disconnected” [clause 2.2 (c)].

(iv) Gas-supply for self-power generation would be on “as and when available basis” [clause 3.1.6(b)].

---

<sup>1</sup> Natural gas glossary published by the American Gas Association ([www.aga.org/natural-gas/glossary](http://www.aga.org/natural-gas/glossary)).

*Issue No. (iv) What is the effect of the Gas Supply Agreements between the Plaintiffs and the SSGC ?*

29. The reason assigned by the SSGC in its gas-closure notice dated 10-12-2021 is to divert gas to meet the increased demand in the winter season of domestic consumers in Sindh and Balochistan. In addition to the priority order of gas supply, the other legal premise cited for such gas closure is the contract of gas-supply [GSA] between the SSGC and the Plaintiffs.

30. There are two sets of GSAs that have been placed on the record. The first are contracts of gas-supply specifically '*for power generation*', where under the Plaintiffs had agreed with the SSGC as follows:

*"1. Gas supply will be provided by the Company on 'as and when available' basis only during the period from March to November each year. The Consumer will make dual firing arrangements to avoid loss of production as and when gas is not available during March to November and also during December to February when the Company will keep the Consumer's gas supply disconnected at his cost each year."*

The other set of GSAs are generally for industrial use, where under the Plaintiffs agreed with SSGC as follows:

*"14 (iii). The Company shall have the right to curtail and/or to discontinue deliveries of natural gas to the Consumer whenever and to the extent necessary in its sole judgment for the protection of service to its other Consumers it may require. The Company shall be the sole judge with regard to such conditions and curtailment of deliveries.*

*(iv) The gas shall be supplied as per the Natural Gas Allocation Policy or any other relevant policy issued by the Government or any other Authority from time to time."*

Under the Supplemental contract it was further agreed:

*"1. It is condition precedent to the providing of Gas connection by the Company to the Consumer under the said Contract that gas supply to the above noted premises shall be subject to "as and when available basis" during the period from 1<sup>st</sup> March to 30<sup>th</sup> November of each year and during peak season i.e. 1<sup>st</sup> December to 28/29<sup>th</sup> February each year or such extended or any other period as may be considered necessary by the Company, gas supply may be discontinued to any class of consumer(s) in a region(s), under Company's Load Management Program.*

*2. The Consumer shall make dual firing arrangements during the period mentioned above entirely at his cost and risk to run its plant on*

*alternate fuel to avoid loss of production as and when gas is not provided by the Company during the period mentioned above."*

31. Thus, the contracts under which the Plaintiffs receive gas from the SSGC for 'power generation' explicitly state that during the months of December, January and February, the SSGC 'will keep the consumer's gas-supply disconnected'; and that for the months of March to November, gas will be supplied on 'as and when available basis'. Similarly, the contracts for gas-supply for other industrial use also state that gas-supply to the Plaintiffs shall be subject to 'as and when available basis', and that during the months of December, January and February the SSGC may discontinue the gas-supply to manage the load. In other words, while entering into the GSAs, the Plaintiffs had accepted the fact that natural gas as a depleting resource will be available for industrial use only sporadically; that for purposes of power generation it would certainly not be available from December to February each year; that for other industrial use, it was unlikely to be available from December to February; hence the acknowledgement by the Plaintiffs in the GSAs that they will 'make dual firing arrangements to avoid loss of production'. The Plaintiffs have no answer to said GSAs except the argument that such contracts cannot take away constitutional guarantees. That argument is examined under Issue No. (ii) *infra*.

32. Therefore, apart from the Gas Policy, even under the GSAs between the Plaintiffs and the SSGC, the Plaintiffs cannot assert a right to receive gas for industrial use during the months of December, January and February, and the SSGC as distributor of gas to the Plaintiffs was within its contractual right to issue the gas-closure notice dated 10-12-2021. Issue No. (iv) is answered accordingly.

**Issue No. (ii)**      ***Whether SSGC's gas closure notice dated 10-12-2021, and the priority order for gas allocation set by the Federal Government vide notification dated 15-10-2018, are in violation of Article 25 and/or Article 158 of the Constitution of the Pakistan, 1973 ?***

The 'discrimination' argument:

33. To clarify, the Plaintiffs do not take issue to the Gas Policy or to SSGC's gas-closure notice dated 10-12-2021 insofar as those give first priority to the domestic and commercial consumers. That has always been the scheme of the Gas Policy.

Taking up the first part of Issue No. (ii), i.e. the discrimination argument and its first limb, learned counsel for the Plaintiffs had submitted that the revision in the Gas Policy by notification dated 15-10-2018 had infringed the Plaintiffs' fundamental right in Article 25 of the Constitution by dropping the Plaintiffs, the General Industrial (non-export) sector, from priority No.2(ii) to priority No.3, and at the same time certain zero-rated export industries out of the same General Industrial category were retained at priority No.2 without any intelligent differentia. It was further submitted that SSGC's gas-closure notice dated 10-12-2021 too discriminated between non-export industries and export industries in closing gas for the former and not for the latter.

34. Under clause 4.1 of the Gas Policy (reproduced in para 3 above), the General Industrial sector was at priority No. 4, and it was only "Industrial sector to the extent of their process gas" that was at priority No. 2(ii). (As already clarified above, 'process gas' is an industrial term for gas-use for which alternate fuels are not technically feasible). The Ministry of Petroleum's notification dated 01-03-2013 (reproduced in para 4 above) shows that in 2013 the priority order of gas supply was revised by the Federal Government to bring the General Industrial sector and Captive Power at priority No.3. In 2018, when that priority order was again revised, then, as evident from the notification dated 15-10-2018 (reproduced in para 5 above), the priority order of the General Industrial sector and Captive Power was not disturbed and they were retained at priority No.3, whereas a few zero-rated export sectors of the General Industry, viz. textile, carpets, leather, sports and surgical goods, were raised to priority No. 2 alongside the Power sector. Therefore, and firstly, the

submission that the General Industrial sector was dropped in the priority order by way of the impugned notification dated 15-10-2018, is factually incorrect. The General Industrial sector has remained at priority No. 3 since 2013. Secondly, it cannot be said that there is no difference between an export oriented industry and a non-export industry. It is settled law that Article 25 of the Constitution allows for a reasonable classification which is based on intelligent differentia.<sup>2</sup> The classification of the General Industrial sector into zero-rated export industries on the one hand and non-export industries on the other for the purposes of prioritizing gas supply to the former, has obviously been done in the national interest of promoting exports and for accumulating foreign exchange for the country. The intelligent differentia of such classification is manifest in the very classification. Therefore, the argument that revision in the priority order of gas supply (notification dated 15-10-2018) and SSGC's gas closure (notice dated 10-12-2021) discriminates unreasonably between the Plaintiffs and the zero-rated export oriented industries, has no force.

35. The second limb of the Plaintiffs' discrimination argument was that the General Industrial (non-export) sector in Punjab, which is serviced by the SNGPL, was not subjected to a complete gas-closure in the winter months as done by the SSGC in Sindh. Assuming that to be the case, the projections/charts of demand and supply of gas relied upon by both sides go to show that though there is a far greater short-fall of gas in the area serviced by SNGPL as compared to SSGC, but for SNGPL that shortfall is being managed by injecting 950 MMCFD of RLNG (re-gasified liquid natural gas) to the supply of indigenous gas. On the other hand, in the Provinces serviced by SSGC, the input of RLNG to the indigenous gas-supply for the same period is kept only at 75 MMCFD, presumably to keep the price of gas low as RLNG is a far more expensive fuel. Be that as it may, the demand and supply of gas, which factors vary for the territories serviced by SNGPL and SSGC, and from the varying sources from

---

<sup>2</sup> *I.A. Sherwani v. Government of Pakistan* (1991 SCMR 1041).

which gas is received by SNGPL and SSGC for onward distribution, it would be unsafe to make a comparison between the two for determining the issue in hand. For the present purposes suffice to state that the comparison drawn by the Plaintiffs between the supply of gas by SNGPL and the SSGC to plead discrimination, is not a comparison in same circumstances, especially when the gas-supply contracts between the Plaintiffs and the SSGC unequivocally permit the SSGC to make a complete gas-closure during the winter months. Thus, the second limb of the discrimination argument also fails.

*Effect of Article 158 of the Constitution:*

36. I now advert to the second part of Issue No. (ii), i.e. the effect of Article 158 of the Constitution. The precise argument of the Plaintiffs on that is: that Sindh being a producer of natural gas, such gas cannot be supplied to the other Provinces until the requirements of Sindh are fulfilled; and hence the Plaintiffs submit that Article 158 entitles them to a precedence in the supply of gas. While SSGC receives more indigenous gas for its system than SNGPL (940 and 820 MMCFD respectively), it is not disputed by the Defendants that gas from Sindh is also supplied to the other Provinces. However, the learned Additional Attorney General submitted that Article 158 of the Constitution cannot be read in isolation, but has to be construed harmoniously with Article 172(3). Articles 158 and 172(3) of the Constitution read as under:

*“158. Priority of requirements of natural gas.- The Province in which a well-head of natural gas is situated shall have precedence over other parts of Pakistan in meeting the requirements from the well-head, subject to the commitments and obligations as on the commencing day.*

172(3). Subject to the existing commitments and obligations, mineral oil and natural gas within the Province or the territorial waters adjacent thereto shall vest jointly and equally in that Province and the Federal Government.<sup>3</sup>”

---

<sup>3</sup> Inserted in the Constitution by the Eighteenth Amendment Act, 2010.

37. To invoke Article 158 of the Constitution, the Plaintiffs rely primarily on *Engro Fertilizers Ltd. v. Islamic Republic of Pakistan* (PLD 2012 Sindh 50). There, the facts were that the petitioner had been given a sovereign guarantee by the Federal Government guaranteeing uninterrupted supply of 100 MMCFD gas for 20 years for setting-up a fertilizer plant in Sindh. In furtherance of such guarantee, the Ministry of Petroleum had allocated 100 MMCFD gas to the petitioner from the Qadirpur gas field in Sindh through the distribution network of the SNGPL, with any shortfall to be met from the system of the SNGPL. Such terms were then incorporated in the gas-supply contract between the SNGPL and the petitioner. The petition was filed when the SNGPL failed to supply the committed gas. The petitioner invoked the sovereign guarantee of the Federal Government. On the other hand, the SNGPL contended that the Federal Government had also committed at the same time to enhance the production capacity of the Qadirpur gas field and supply additional gas to SNGPL, which was not done, leading to a shortfall in its system to meet the demand of other consumers, and hence the SNGPL was not obligated to supply gas to the petitioner. Article 158 of the Constitution was raised by the petitioner as an additional argument to contend that since the Qadirpur gas field in Sindh was producing more than the committed gas of 100 MMCFD, the petitioner's fertilizer plant in Sindh was entitled to a precedence. While considering Article 172(3) alongside Article 158 of the Constitution, the learned Division Bench observed that even in that case the share of the Federal Government in the gas from the Qadirpur gas field would be 50% of what was produced, which was still more than the 100 MMCFD gas committed to the petitioner, and thus there was no justification for not supplying the same. Though an observation was made that consumers of gas in Sindh have a precedence over gas-supply in terms of Article 158 of the Constitution, the writ of the Court to supply the committed gas to the petitioner was not issued on the basis of Article 158, but on the basis of SNGPL's gas-supply contract and the Federal Government's

sovereign guarantee, with the observation that the latter had to be enforced above all. The case of the petitioner was categorically distinguished from other consumers whose gas-supply contracts did not make a firm commitment to supply uninterrupted gas. The last para of the judgment manifests that the matter of Article 158 of the Constitution was not adjudged and the disposal of the petition was made without prejudice to the petitioner's claim in terms of Article 158.

38. Thus, the case of *Engro Fertilizers* is not for the proposition that no gas from Sindh can be provided to other Provinces until the requirements of Sindh have been fulfilled in terms of Article 158 of the Constitution. In fact, what is reinforced by that case is that Article 158 of the Constitution cannot be read in isolation of other provisions of the Constitution, in that, when read with Article 172(3) of the Constitution, one view could be that the precedence of a Province to receive gas from a well head within that Province was to the extent of its ownership over 50% of the gas generated from that well head. Same goes for the case of *Lucky Cement Ltd. v. Federation* (PLD 2011 Peshawar 57). There, the other distinguishing feature was that the gas policy in vogue had categorically stipulated that gas supply in the Provinces producing gas would remain uninterrupted. Therefore, *Engro Fertilizers* and *Lucky Cement* do not advance the precise argument taken by the Plaintiffs.

39. Both *Engro Fertilizers* and *Lucky Cement* were similarly distinguished by a learned single Judge of this Court in *Fimcotex Industries (Pvt.) Ltd. v. Pakistan* (PLD 2018 Sindh 641) to hold that given the scheme of Chapter 3 of the Constitution, which sets out special provisions as to relations between the Federation and the Provinces, Article 158 cannot of itself be agitated as an actionable ground by a consumer, and it is the prerogative of the Province to agitate the issue of its rights thereunder before the CCI. A somewhat similar approach appears in *Rashid Silk Mills v. Federation of Pakistan*



(PLD 2019 Sindh 189) where the plaintiff had challenged, on the touchstone of Article 158 of the Constitution, a Sunday gas-closure notice issued by the SSGC. A learned single Judge of this Court while denying temporary injunction to the plaintiff held that such gas-closure notice did not violate Article 158 of the Constitution, nor did it deny the Province of its right under said Article in circumstances where the gas closure was due to low gas pressure and to avoid line-pack in the system, a circumstance beyond the control of the SSGC.

40. Article 158 of the Constitution, amongst Articles 153 to 159, is set in Chapter 3 of the Constitution titled "Special Provisions", which Chapter in turn is set in Part V of the Constitution titled "Relations between Federation and Provinces". In those Special Provisions, the CCI is established under Article 153 comprising *inter alia* of the Prime Minister and the Chief Ministers of the Provinces, with the CCI being responsible only to the Parliament. Functions and procedure of the CCI are dealt with by Article 154; and if the Federal Government or a Provincial Government is dissatisfied with a decision of the CCI, it may refer the matter to the Parliament. Article 155 designates the CCI to deal with complaints by the Federal Government or a Provincial Government with regards to any act in the use, distribution and control of water from any natural source or reservoir that causes prejudice to a Province or the Federal Capital or any of its inhabitants. Article 156 is to constitute a National Economic Council consisting *inter alia* of the Prime Minister and the Chief Ministers of the Provinces for the purposes of reviewing the overall economic condition of the country and for formulating plans accordingly. Article 157 deals with the rights of a Province where the Federal Government decides to construct hydro-electric or thermal power installations or grid stations in that Province, and where electricity is supplied to a Province from the national grid. Any dispute arising in that regard between the Federal Government and a Provincial Government is to be resolved by the CCI. Then comes Article 158,

which gives a Province in which a well-head of natural gas is situated, precedence over other parts of Pakistan in meeting the requirements from the well-head. Article 159 deals with the rights of a Provincial Government vis-à-vis the Federal Government in respect of construction and use of broadcasting and telecasting transmitters in a Province and its regulation.

41. The common thread that runs through Articles 153 to 159 is that these deal with matters in which the Federal Government and the Provinces may have overlapping interests and stakes, and then the providing of a mechanism to address such overlap so as to maintain smooth relations between the Federal Government and the Provinces. Article 158 of the Constitution has to be read in that scheme of things. While Article 158 was not under consideration in *Gadoon Textile*, in my humble view, the observation there that Articles 153, 154 and 161 provide an in-built, self-adjudicatory and self-executory mechanism for resolving disputes *inter se* Federating Units or between the Federation and a Federating Unit, will apply also to Article 158. Therefore, when Article 158 gives a Province precedence in meeting requirements from a gas well-head situated in that Province, it is with the aim of addressing an issue, should one arise, between that Province and the Federal Government over the use of gas from a well-head. To put it differently, Article 158 of the Constitution exists as a prerogative of a Provincial Government, and therefore it does not give actionable cause to a person other than the concerned Provincial Government to invoke the same. It may well be that a Provincial Government decides not to invoke that prerogative for political considerations or to maintain unity of the Federation, or barter that prerogative with another Province or the Federation for another resource keeping in view the over-all requirements of the Province. Since the Province of Sindh is not a party to these suits to state otherwise, I do not delve in to examine the effect of Article 172(3) of the Constitution.

42. For the foregoing reasons, the second part of Issue No. (ii) is answered by holding that Article 158 of the Constitution does not provide the Plaintiffs with a cause of action to challenge SSGC's gas closure notice dated 10-12-2021 and the Federal Government's notification dated 15-10-2018.

*Issue No.(i) Whether SSGC's gas closure notice dated 10-12-2021 for General Industries (non-export), including their CPPs, is contrary to the Gas Load Management Plan for Winter 2021-2022 approved by the Federal Government on 13.12.2021 ? If so, to what effect ?*

43. The above issue has been raised by the Plaintiffs on the basis of clause 1(iv) of the Gas Load Management Plan for Winter 2021-22, which was ratified by the Federal Cabinet on 30-11-2021 and circulated on 13-12-2021 to state *inter alia* that:

*"1(iv) General Industry (non-export) shall be provided gas on weekly rotation basis, with one day off, for each sector or zone. Cement Industry will be treated at par with the non-export general industry."*

The Plaintiffs therefore submit that a complete gas closure vide SSGC's gas closure notice dated 10-12-2021 was contrary to said Gas Load Management Plan. But then, the same Gas Load Management Plan also states:

*"3(i) The above plan to be implemented while remaining within the contours of already ECC's approved gas supply priority order.  
3(iii) Subject to improvement in supplies, the restoration of gas may be considered in order of approved priority, under intimation to this Division."*

Therefore, even if clause 1(iv) of the Gas Load Management Plan for Winter 2021-22 was to relax the condition in the Gas Policy that no gas would be supplied to the General Industrial sector from December to February, that clause 1(iv) is nonetheless subject to the priority order of gas-supply laid down in the Gas Policy and as last revised under the Ministry of Petroleum's notification dated 15-10-2018. Admittedly, under that priority order, the General Industrial

sector (non-export) is at priority No. 3, and domestic and commercial consumers are at priority No.1. SSGC's gas-closure notice dated 10-12-2021 clearly states that gas closure for the General Industrial (non-export) sector during that winter season is necessitated to divert gas to domestic consumers who are at priority No.1, and whose demand increases during the winter season, especially those in Balochistan. The relevant part of that gas closure notice reads:

*"The volume of gas curtailed from this arrangement would be diverted to domestic customers from them to cater their enhanced gas loads in context of the winter season.*

*It may be noted that in Balochistan, supply of additional gas is a must for the survival of human lives since gas serves as a LIFELINE to scores of populace needing to keep themselves warm through water and space heating gas appliances in the extremely low temperatures.*

.....

*With the advent of winter season, SSGC is facing severe shortage in the indigenous gas receipts from producers every passing day resultantly depleting line pack and simultaneously, SSGC is also experiencing increased gas consumption in the Domestic Sector that peak during winter seasons and ultimately causes Low Gas Pressure in the System. Catering to such eventually, as always done SSGC follow the guidelines, as circulated vide Load Management Policy of October 2018 to tackle such situations."*

44. The chart of demand and supply of gas filed with the plaint shows that the short-fall of gas in the system of SSGC for the months of December 2021 and January 2022 was 246 and 276 MMFCD respectively. Therefore, the argument of the Plaintiffs that there is sufficient gas in SSGC's system to satisfy the demand of domestic consumers and then that of other consumers down to the Plaintiffs at priority No. 3, that is contradicted by the data of demand and supply shown to the Court. As also pointed out by Mr. Kashif Hanif Advocate, if there was sufficient gas in the system, there was no reason for the SSGC to withhold the same from the General Industrial (non-export) sector, who, given their higher tariff, are a far more lucrative category of consumers than domestic consumers.

45. For the foregoing reasons, SSGC's gas closure notice dated 10-12-2021 does not violate the Federal Government's Gas Load Management Plan for Winter 2021-22. Issue No. (i) is answered in the negative.

*Issue No. (v) To what relief, if any, are the Plaintiffs entitled to, and what should the decree be ?*

46. Having answered all issues against the Plaintiffs, the suits are dismissed. There are no orders as to costs.

**JUDGE**

Karachi:

Dated: 04-03-2022