BEFORE THE
COMPETITION COMMISSION OF PAKISTAN

IN THE MATTER OF

PROCEEDINGS UNDER SECTION 30 OF THE COMPETITION ACT, 2010 PURSUANT TO THE ORDER DATED 21-02-2013 OF THE HONORABLE SUPREME COURT OF PAKISTAN IN C.P.L.A. NO. 102-L/2013

File No. 5(114)/REG/ADG-SCP/LHC/CCP/13

Dates of hearings:	April 1, 11, 12 & 18, 2013
Present:	Ms. Rahat Kaunain Hassan **Chairperson**
	Dr. Joseph Wilson **Member**
	Dr. Shahzad Ansar **Member**

On behalf of:	
Ministry of Information Technology	Mr. Ali Raza, Advocate Supreme Court Ms. Sophia Khan, Advocate
Pakistan Telecommunication Authority	Dr. M. Saleem, Director General (Commercial Affairs) Mr. Sajjad Awan Director General (Eng) Mr. Ahmad Shamim Pirzada, Director Commercial Affairs Mr. Khurram Siddique, Deputy Director (CA) Mr. Aadil Umar Khalil, Deputy Director (CA) Mr. Fawad Riaz, Assistant Director (CA)
M/s. Brain Telecommunication (Pvt) Limited	Barrister Ch. Muhammad Umar Ch. Muhammad Atiq, Advocate Ms. Nida Usman Ch.
M/s. Pakistan Telecommunication Company Ltd	Mr. Shahryar Kasuri, Barrister-at-Law Mr. Naveed Mr. Raza Imtiaz
M/s. Wise Communications Systems (Pvt) Limited	Mr. Shafiq A. Abbasi, Vice Chairman
M/s. Multinet Pakistan M/s. Circlenet Communications (Pvt) Limited M/s. wi-tribe Pakistan Limited	Mr. M. Wajahat Zeeshan, CEO
M/s. 4B Gentel International (Pvt.) Limited M/s. Dancom Pakistan (Pvt.) Limited M/s. Worldcall Telecom Limited M/s. ADG LDI (Pvt.) Limited M/s. Telecard Limited	Mr. Arshad Tayebaly, Advocate Supreme Court Mr. Taimur A. Mirza on behalf of 13 LDI Operators
M/s. Wateen Telecom Limited Ms Telenor LDI Communications (Pvt.) Limited	Mr. Afnan H. Khan
M/s. Redtone Communications Pakistan (Pvt.) Limited M/s. LinkdotNet Telecom Limited	Mr. Tariq Sultan
M/s. Nayatel (Pvt.) Limited	Mr. Babar Sattar, Barrister Ms. Sarah Rehman Mr. Masood Raza

ORDER

1. This order disposes of the proceedings under Section 30 of the Competition Act, 2010 (the "Competition Act") vide Show Cause Notice Nos. 1 to 14/2013 to Long Distance & International (LDI) telecommunication service operators ("**LDI Operators**") namely;

    a. Pakistan Telecommunication Company Limited (PTCL)
    b. Multinet Pakistan (Private) Limited
    c. 4B Gentel International (Private) Limited
    d. Wi-tribe Pakistan Limited
    e. Dancom Pakistan (Private) Limited
    f. Wise Communication System (Private) Limited
    g. Worldcall Telecom Limited
    h. ADG (Private) Limited
    i. LinkdotNet Telecom Limited
    j. Telecard Limited
    k. Circle Net Communications Pakistan (Private) Limited
    l. Wateen Telecom Limited
    m. Redtone Telecommunications Pakistan (Private) Limited
    n. Telenor LDI Communications (Private) Limited

    In pursuance of the Order passed by the Hon'ble Supreme Court of Pakistan on 21-02-13 in C.P.L.A. NO. 102-l/2013 titled ***M/s ADG LDI Private Limited Vs. M/s Brain Telecommunication Limited etc.*** in the matter of International Clearing House (**ICH**) established for incoming international telecommunication traffic in Pakistan.

2. In the said Order, the Hon'ble Supreme Court of Pakistan directed the Competition Commission of Pakistan (the "**Commission**") to treat the Writ Petition (WP No. 26636/2012), filed by the M/s Brain Telecommunication Limited (**BTL**) before the Hon'ble Lahore High Court, Lahore as representation under the Competition Act and to decide the same within

fifteen (15) days of the receipt of the said Order, by issuing notices and after hearing all the undertakings concerned and attending to the issues raised in the Representation. The relevant part of the Order dated 21-02-13 passed by the Hon'ble Supreme Court is reproduced as under:

> *.....both the learned counsel for petitioners and respondents on court query concur that a copy of the writ petition be sent to the Competition Commission which should treat it as a representation filed by the respondent – writ petitioner and under the Competition Act, 2010 decide the same within 15 days of the receipt of this order after hearing all the parties concerned and attending to the issues raised.*

3. All the LDI Operators are engaged in the provision of LDI telecommunication services being terminated in Pakistan which is the relevant market[1] in this instant case. Hence, LDI Operators are undertakings in terms of the provisions of clause (q) of subsection (1) of Section 2 of the Competition Act.

4. The Writ Petition referred to the Commission under the direction of the Hon'ble Supreme Court of Pakistan as a representation (the "**Representation**") filed by BTL before the Commission states, *inter alia*:

    i. There are 14 companies licensed by Pakistan Telecommunication Authority (PTA) to operate as Long Distance & International (LDI) telecommunication service operators;
    ii. The LDI Operators, had earlier applied vide application dated 09-09-2011 for an exemption under Section 5 of the Competition Act from the application of Section 4 of the Competition Act for their then proposed International Clearing House Agreement;

[1] Section 2(1)(k) of the Act.

iii. While hearings were being conducted before the Commission in exemption application, a request after 05 months was filed by the applicants/LDI Operators to withdraw the exemption application. The Commission while allowing the withdrawal applications, disposed off the matter vide Order dated 08-02-2012 with a condition that in future such arrangements are subject to clearance from the Commission;

iv. The Ministry of Information Technology (MOIT), after unanimous agreement of all the LDI operators issued a policy directive dated 13-08-2012 to PTA for establishment of International Clearing House Exchange for international incoming calls for long distance international, fixed-line local loops, wireless local loops and mobile operators (the '**Policy Directive**');

v. On 23-08-2012 a letter was issued by PTA (the '**Implementation Letter**') to direct all the LDI Operators to conclude the International Clearing House Agreement (the "**ICH Agreement**") in light of the Directive;

vi. On 28-08-2012 the Commission issued a policy note (the '**Policy Note**') and apprised the MOIT and PTA about the factual background of the ICH Agreement and also observed that the proposed ICH Exchange under the Directive directly violates Section 4(2)(a) and 4 (2)(b) of the Competition Act;

vii. On 30-08-2012 the Commission through its special order (the '**Special Order**') directed PTA to confirm whether the LDI operators were in fact entering into an agreement to establish the proposed ICH Exchange under the Directive and stated its stance on the subject in light of its Policy Note;

viii. PTA in furtherance of its Implementation Letter issued a letter dated 30-08-12 **("PTA's Applicable Rates Letter")** to fix, *inter alia*, the Approved Accounting Rate (AAR), Approved Settlement Rate (ASR), Access Promotion Contribution (APC);

ix. PTA notified all Loop Operators vide letter dated 25-09-12 (the "**Suspension Letter**") to suspend international circuits for international incoming traffic with all LDIs except Pakistan Telecommunication Company Limited (PTCL) with effect from 01-10-12 in order to ensure the termination of international incoming traffic only on PTCL's network;

x. Filing of exemption application for ICH Agreement and pursuing it for 05 months establishes beyond doubt that all LDI operators were fully aware that ICH Agreement is in violation of Section 4 of the Competition Act;[2]

xi. No policy made by any Ministry can undermine the express provision of law, in this case the Competition Act. Establishment of International Clearing House is violation of Commission's Order dated 08-02-12;[3]

xii. The ICH Agreement essentially permits and allows the LDI Operators to fix the prices and allocate quota amongst themselves of incoming international calls in Pakistan in contravention of clauses (a) & (b) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Competition Act;[4]

xiii. The ICH Agreement has been designed and implemented as a typical 'Cartel' where there would be no incentive for any

[2] Para ii of Grounds, Representation before the Competition Commission of Pakistan
[3] Para v of Grounds, Representation before the Competition Commission of Pakistan
[4] Para vii & viii of Grounds, Representation before the Competition Commission of Pakistan

LDI operator to improve sales or enhance quality of service or for that matter to invest in improving its network. Further with fixed quota there would be far less incentive for any LDI Operator to bring in additional traffic from overseas operators;[5]

xiv. Having representatives of MOIT and PTA on the ICH Board curtails the free market commercial decision making of the LDI operators and clearly impinges upon the regulatory role of PTA;[6]

xv. The price for making calls to Pakistan has increased significantly which shall definitely decrease the volume of international incoming calls per month. This decrease would have devastating long term implications for the telecom sector in the country.[7]

xvi. Under the ICH regime, PTCL has become the sole LDI Operator with the exclusive rights to terminate all incoming traffic to Pakistan. M/s Brain Telecommunications Limited has been constrained to suspend all international circuits for international incoming traffic with all LDI Operators except PTCL. Whereas circuits provided by PTCL are not working properly/facing down time. Instead of rectifying the situation PTCL has unilaterally suspended the telecom services of Brain Telecommunication Limited causing it business loss and irreparable loss and damage to reputation.[8]

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[5] Para ix of Grounds, Representation before the Competition Commission of Pakistan
[6] Para x of Grounds, Representation before the Competition Commission of Pakistan
[7] Para xix of Grounds, Representation before the Competition Commission of Pakistan
[8] Para xi, xiii & xv of Grounds, Representation before the Competition Commission of Pakistan

5. The Commission after examining the facts mentioned and grounds taken in the Representation and also the arrangement among the LDI Operators under the ICH Agreement proceeded to issue the Show Cause Notices to all the LDI Operators under Section 30 of the Competition Act in compliance with the Order of the Hon'ble Supreme Court. The Show Cause Notices state, *inter alia*:

> ***AND WHEREAS**, in terms of the Representation and in particular clause 2 of the ICH Agreement, LDI Operators have agreed to terminate all the incoming international traffic exclusively on M/s Pakistan Telecommunication Company Limited's (the '**PTCL**') network and to suspend all interconnection capacities of other LDI Operators, thereby preventing, restricting and reducing competition in the Relevant Market, which is in prima facie violation of subsection (1) of Section 4 of the Competition Act;*
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> ***AND WHEREAS**, in terms of the Representation and in particular clause 3 and 4 & Annexure A to the ICH Agreement, it appears that LDI Operators have agreed to fix the rates of incoming international calls including AAR, ASR, APC and LDI Share, which is tantamount to price fixing, prima facie violation of clause (a) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Competition Act;*
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> ***AND WHEREAS**, in terms of the Representation and in particular clause 4 & Annexure-A to the ICH Agreement, it appears that LDI Operators have agreed to fix the quota of incoming international calls to share the customer base/revenues collected as per the fixed percentages, prima facie, in violation of clause (b) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Competition Act;*
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> ***AND WHEREAS**, in terms of the Representation and in particular clause 9.1 & 11.2 of the ICH Agreement, it appears that ICH Agreement leaves no incentive for any LDI Operator to improve sales, enhance quality of service or invest in improving its network and that with fixed quota LDI Operators would have less incentive to bring additional international traffic, which would create entry barriers and thereby limiting the technical development or investment in the Relevant Market, prima facie, in violation of clause (d) of subsection (2) of Section 4 read with subsection (1) of Section 4 of the Competition Act;*

***AND WHEREAS**, in terms of Representation, the ICH Agreement grants a monopoly to PTCL to terminate all incoming international traffic which apparently has been abused by PTCL by unilaterally suspending telecom services of M/s Brain Telecommunication Limited, prima facie, in violation of Section 3 in general read with clause (a), g &(h) of subsection (3) of Section 3 of the Competition Act;*

***AND WHEREAS**, in terms of the Representation, prima facie the LDI Operators have violated the provisions of clause (b) & (e) of subsection (1) of Section 38 of the Competition Act by entering into the ICH Agreement without seeking prior clearance of the Commission in terms of the Order dated 08-02-2012 passed by the Commission;*

6. BTL, PTA and MoIT being the *concerned parties* were also sent notices to attend the hearing in the matter which was scheduled for 12 March 2013.

7. In response to Show Cause Notices, Wateen Telecom Limited, Redtone Telecommunications Pakistan Private Limited, Multinet Pakistan Private Limited and Telecard Limited filed a suit (CS No. 271/2013) before the Hon'ble Sind High Court at Karachi. In the said suit, the plaintiffs mainly agitated that they were not party before the Supreme Court, and that only PTA has the jurisdiction to adjudicate on this issue. Consequently, the Hon'ble Sind High Court, vide its Order dared 09-03-13 directed the parties to maintain Status Quo till the next date of hearing.

8. The Commission filed a contempt petition (Criminal Original No. 8-L/2013) against the aforementioned four plaintiffs before the Hon'ble Supreme Court of Pakistan. Through the said contempt petition, it was submitted before the Supreme Court of Pakistan that in presence of the Order of Hon'ble Sind High Court, the direction of the Hon'ble Supreme Court cannot be complied with. Moreover, it was also submitted in the said contempt petition that the plaintiffs were in fact party before the Hon'ble Supreme Court and have obtained the Status Quo Order by misrepresenting the facts.

9. The Hon'ble Supreme Court vide its Order dated 20-03-13 suspended the status Quo Order of the Hon'ble Sind High Court and issued notices to the respondents. Further, in its Order dated 29-03-13 the Hon'ble Supreme Court accepted the apology tendered by the respondents for contempt of the earlier Order passed by the Hon'ble Supreme Court and directed the parties to appear before the Commission for disposal of the matter.

10. The Commission in pursuance of the Order dated 29-03-13 passed by the Hon'ble Supreme Court again issued notices to all the LDI Operators and concerned parties to attend the hearing on 01-04-13 at 3:00 p.m.

11. All the LDI Operators except Pakistan Telecommunication Company Limited (**PTCL**) submitted their joint preliminary reply on 29-03-13 through their joint legal representative, which state *inter alia*:

    i. The Commission does not have any jurisdiction in matters concerning to regulation of competition in the telecom sector as the same is exclusive jurisdiction of PTA. Therefore, Commission cannot allege violations of the Act against the LDIs for having followed the policy of MoIT enforced by PTA. Also, there is no applicability of Section 4 of the Act concerning to the ICH Agreement and its implementation as the PTA Act being a special law overrides the Competition Act, which is a general law. The ICH Agreement falls squarely within the parameters of Section 4(1) (a), (i) and (m) of the PTA Act and the implementation of the ICH Agreement amongst the LDIs has been done by the PTA in exercise of its powers under Section 4 and 5 of PTA Act.[9]

    ii. MOIT has powers under Section 8 of the PTA Act to issue policy directives to PTA which PTA is bound to follow. Section 55 of the PTA Act provides that PTA Act overrides all laws. Therefore, Commission has no jurisdiction to

[9] Para a, b & c of Preliminary Objections, also Para 23 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

interfere in the domain which the exclusive jurisdiction is of the MoIT and PTA.[10]

iii. The Commission could not have by any stretch of imagination or interpretation issued Show Cause Notices to the LDIs as issued. Only after concluding that, *prima facie,* violations of the Competition Act had occurred subsequent to the completion of the preliminary inquiry, could the Commission have issued show cause notices under Section 30 of the Competition Act.[11]

iv. The commission cannot assume jurisdiction simply by virtue of a consent order of a court when statutory law has not conferred jurisdiction upon it. PTA Act has in fact ousted the Commission's jurisdiction and even otherwise the LDIs have never consented to confer jurisdiction upon the Commission. [12]

v. Notices disclose the pre-determined mind of the Commission. This act of the Commission is in itself in gross violation of the August Supreme Court's order, which clearly directed the Commission to hear all concerned parties and all issues and therefore, arriving at a conclusion without hearing the parties represents pre-determination of issues by the Commission.[13]

vi. Further, the Commission does not possess any jurisdiction over calls originating from foreign countries and terminating in Pakistan. These calls are free of cost to the local participants and do not relate to services provided within Pakistan to local consumers. Reliance is placed on the fact that SBP under its mandate to control foreign exchange flows treats remittances earned by the LDIs for

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[10] Paragraph d of Preliminary Objections, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[11] Para e & f of Preliminary Objections, also Para 2,3 & 4 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[12] Paragraph g of Preliminary Objections, also Para5 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[13] Para h of Preliminary Objections, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

termination of international incoming minutes as "income from export service".[14]

vii. MOIT & PTA on the one hand and the Commission on the other hand have taken irreconcilable and contradictory positions on ICH. PTA directed to LDIs to enter into the ICH Agreement and in the event they did not they would have been penalized. On the other hand Commission has threatened to impose fine for having entered into the ICH Agreement. LDIs cannot be penalized on account of regulatory conflict.[15]

viii. Reliance cannot be placed on earlier exemption application filed by LDIs before the Commission. The said application was withdrawn and the Commission issued the order of its own motion the same not being on the merits. Furthermore, the said exemption application was withdrawn by the LDIs on the advice that the jurisdiction in such matters vested in the PTA and not the Commission.[16]

ix. It is denied that the Policy directive was a result of any "unanimous agreement of all LDI operators". The MOIT chose not to withdraw its Policy directive and remained in force and binding upon all LDIs. Therefore, LDIs have to follow the same and enter into ICH Agreement in compliance with their licensed obligations.[17]

x. It was PTA which had fixed the AAR, ASR & APC for the purposes of the ICH Agreement and has been doing the same in past several years under the Access promotion Rules 2004 & regulations 2005. LDIs are bound to follow the directives of PTA.[18]

xi. Service of incoming international call termination does not possess any ingredients to fall within the definition of 'relevant market' as defined under the Competition Act. A

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[14] Paragraph & I of Preliminary Objections, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[15] Para j &k of Preliminary Objections, also Para 13 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[16] Para 7 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[17] Paragraph 8 & 10 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[18] Paragraph 12,13 & 24 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

person who receives foreign call within Pakistan is not affected by this International incoming call termination. Also the agreements under which outgoing international calls are priced and terminated do not affect the incoming international calls. [19]

xii. No reliance can be placed on the application dated 9-9-2011 and the Commission's order dated 8-2-2012. Current ICH Agreement has been executed in compliance of directives of PTA and hence no nexus with the proposed agreement placed before the Commission. Therefore, no violation of Section 38 of the Competition Act has been committed by the LDIs.[20]

12. A rejoinder was submitted by all the LDI Operators except PTCL on 09-04-13 which is a repetition of submissions made by LDI Operators in their preliminary reply, summary of which has been given in preceding paragraph. However, followings are some submissions found in addition to Preliminary reply/submissions:

i. There has been no collusion among the LDI's and MoIT. Further, the ICH does not create any monopoly as it only pertains to a mechanism of routing international incoming calls through a single gateway. The ICH allows PTA to determine which international incoming call has been terminated within Pakistan illegally. BTL has been engaged in terminating grey traffic and knows that if the ICH is allowed to function, its illegal call termination will vanish and its survival become impossible;[21]

ii. Further PTA has been given mandate of regulating the establishment, operation and maintenance of telecommunication systems and the provision of telecommunication services in Pakistan by virtue of Section

[19] Paragraph 16,17,18 & 19 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[20] Paragraph 28 & 29 of Para-wise Response to Notices, Preliminary Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[21] Para e & f of Para wise Reply to the Representation, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

4(1)(a) and of regulating arrangements amongst telecommunication service providers of sharing their revenues derived from provision of telecommunication services by virtue of Section 4(1) (i). The ICH Agreement falls under Section 4(1)(a) (i) and (m);[22]

iii. The ICH Agreement is not a cartel and has been sanctioned by MoIT and PTA through exercise of powers vested in them under PTA Act. LDIs do not drive the increase or decrease in international incoming voice traffic and it depends on demand for calls to be made to Pakistan and other factors. Therefore, BTL's claim again shows its ignorance of these matters, or attempt to mislead. Further, BTL does not have any locus standi to assert that LDI operator's decision making curtails by presence of the representatives of MoIT and PTA on the board of the ICH;[23]

iv. It is submitted that the media reports are misleading and based on incorrect understanding of the pricing regime of international incoming traffic. PTA has only fixed the ASR which it has been fixing since the implementation of the APC Rules, 2004 and Regulations, 2005. It is needless to say that mere media reports ca not form basis of striking down the ICH Agreement. ICH will divert balance of foreign exchange payments and will have positive impact on economy which is estimated to be USD 37.5 Million per month;[24]

v. It is further submitted that the key ingredients of price fixing and control of production are missing in the ICH Agreement. There is no price fixing by LDIs under the ICH Agreement. It is clear that PTA is determining the ASR, AAR and APC as it has done in the past. In fact no question of the existence of a relevant market can even arise. Commission needs to understand the distinction between Incoming International Traffic termination business and the

[22] Para q of Seriatim Reply to the so called Grounds of the Representation, also Para 27, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[23] Para z & aa, Seriatim Reply to the so called Grounds of the Representation, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

[24] Para ee of Seriatim Reply to the so called Grounds of the Representation, also Para 41, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.

Outgoing International Traffic termination. A person who receives a foreign call within Pakistan is not affected in any manner by this international incoming call. Further, the price of calls originating from Pakistan and terminating in other countries is also not in any manner affected by international incoming traffic;[25]

vi. ICH Agreement was entered into on the basis of the policy directives of the MoIT and Implementation Letter issued by PTA. Therefore, LDIs cannot be held to have violated Competition Act. MoIT and PTA can always direct new entrants to become part of the ICH Agreement. Therefore, the Commission's allegation that the ICH agreement creates barriers of entry is misconceived[26].

13. PTCL also filed a preliminary reply on 29-03-13 through their legal representative, which states *inter alia*:

i. The Commission was required to treat the Representation as a complaint under Section 37 (2) of the Act. Only upon carrying out an enquiry and upon reaching a conclusion, that *prima facie* a contravention had occurred, could the Commission issue a Notice under the Section 30 of the Act. The issuance of the instant SCN by itself represents an act in excess of what the Commission was directed by the August Supreme Court of Pakistan to do and what the Commission is empowered to do in law;[27]

ii. That the Commission has no jurisdiction in matters pertaining to telecommunication, which are by special statued placed under the exclusive purview and authority of the PTA. It is established law that when there exists a special law and general law having possible conflict in terms of its jurisdiction, then the special law shall prevail. The PTA Act being a special law shall prevail. Under Section 4(1) (m) read with Section 4 (1) (a) and Section 55 of the PTA Act, the PTA has sole and exclusive jurisdiction over matters pertaining to competition in the

[25] Para 17, 19, 20,21,23& 26, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[26] Para 31, 32, 34, 35 & 36, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[27] Para 1 (i), (ii), (iii) & (iv) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.

telecommunication industry. That the actions of the Commission create a dispute that pits one regulatory authority against another. The only victims are PTCL and the LDI's;[28]

iii. That telecommunication is a subject, which is exclusively within the purview of the Federal Government in view of Item 7 in the Federal Legislative List ("FLL") contained in Schedule II to the Constitution of Islamic Republic of Pakistan, 1973. Furthermore the Act of 1996 legislated under Item 7 of the FLL also falls under Item 6 of Part II of the FLL that relates to Regulatory Authorities. The PTA is as a result of this legislation the sole Regulatory Authority competent to regulate the Telecommunication Sector[29]. The Commission has absolutely no authority to regulate the Federal Government which it is in effect doing through its present actions;[30]

iv. That the Policy Directives by the MoIT is binding upon the PTA and all LDI Licensees. Hence, PTCL while acting under the directives of the GoP and the industry specific regulator PTA cannot be said to have acted in contravention of any law including the Act. It was in fact acting on the basis of a Directive issued under a valid law[31]. The Commission in terms of assuming jurisdiction over such business is in essence presuming that the right of the GoP and PTA to license and regulate LDI business in itself is unlawful;[32]

v. There exists no Relevant Market as is required to exist under the Competition Act 2010. The Incoming International Traffic termination business is a service provided to foreign telecommunication operators who want to enable their foreign customers to make telephone calls in Pakistan. Such services neither represent any Relevant Market in Pakistan as defined under Competition Act, 2010 nor do they have any bearing whatsoever on consumers within Pakistan. Further, the Outgoing International Traffic price is not affected by the Incoming International Traffic as the same is terminated under relevant agreements

[28] Para 2 (i), (ii), (iii) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[29] Para 2 (v) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[30] Para 2 (vii) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[31] Para 3 (ii) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[32] Para 3 (iii) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.

between operators whereas the floor price of services to terminate Incoming International Traffic is regulated by PTA;[33]

vi. That PTCL in essence is exporting their terminating services to foreign operators who seek to terminate their calls into Pakistan. The Commission has no authority or jurisdiction in matters pertaining to export of services as the same cannot fall under the definition of Relevant Market and furthermore, export of any services results in income for the GoP in terms of foreign currency which is at all times sought to be maximized;[34]

vii. No cartelization exists in a market which is licensed and regulated and wherein the floor price is fixed by the regulator[35]. That Clause 3 very clearly states that ASR will be fixed by PTA. Clause 4 on the other hand deals with the mode and manner of Collection and Distribution of Revenues. Absolutely no price fixing is done or even referred to in this Clause[36]. The ICH is not an agreement to divide or share a market by territory, volume of sales or purchases or by any other means, but to pass through all international incoming traffic through a centralized monitoring switch.[37]

14. MoIT submitted its preliminary response on 08-03-13 which states *inter alia*:

i. The Commission is restricted to carrying out a preliminary inquiry as to whether the actions complained of by BTL infact fall within the purview of the Commission and if so then whether a contravention of the Act, *prima facie,* exists. Only upon coming to such conclusion the Commission is entitled to issue Show Cause Notice under Section 30 of the Act;[38]

ii. The complained acts essentially result from the Directive issued by MoIT. Without having responded to the reply of MoIT of dated 15-09-12 to the earlier Policy Note dated 28-08-12 issued by the

[33] Para 4 (i), (ii) & (iii) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.

[34] Para 4 (iv) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[35] Para 4 (v) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[36] Para 5 (ii), On Merits of Preliminary Comments/Reply of PTCL to Show Cause Notice.
[37] Para 5 (ii of On Merits, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[38] Para 2, Preliminary reply to Hearing Notice issued to MoIT.

Commission or having heard MoIT it appears that the said notices under Section 30 of the Act have been issued in haste and represent a pre determination of the Commission;[39]

iii. MoIT being Federal Government under Section 8 of Pakistan Telecommunication Act, 1996 (the "PTA Act") issues policy directives to PTA which are binding on it to comply with. Directive issued by MoIT to PTA on 13-08-12 is also a directive under the said Section;[40]

iv. ICH arrangement is in line with the De-regulation Policy 2003, Access Promotion Rules 2004 and Regulations 2005 and Schedule 2 of Pakistan Telecommunication Rules, 2000;[41]

v. PTA is mandated to regulate competition in telecommunication sector under Section 4(1)(m) of the PTA Act;[42]

vi. MoIT has exclusive jurisdiction on planning, policy making and legislation covering all aspects of telecommunication in accordance with clause 17(A)(6) of Rules of Business, 1973, Schedule II, Distribution of business among the Divisions, Section 8 of the PTA Act. The instant Directive purely relates to the technical aspects of transmission of international telephony traffic which is exclusive domain of MoIT;[43]

vii. Telecom sector is not a free economy, this sector is being regulated through implementation of policies and directives issued by the Federal Government;[44]

viii. Bangladesh has also issued similar ICH policy to cater the problem of grey traffic;[45]

ix. LDI Operators in respect of international incoming traffic do not represent a relevant market for the purposes of Competition Act as the said business essentially represents a foreign telecom operators' requirement to deliver calls by their customers in Pakistan, for which the recipients in Pakistan are not charged at all. Consequently, neither can it be termed as a relevant market nor can it be considered that any consumer in Pakistan is affected;[46]

x. BTL itself is an Local Loop Operator and hence is a beneficiary of the Directive issued by MoIT;[47]

xi. Directive was issued to restrict illegal channels for grey traffic in the country.[48]

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[39] Para 2, Preliminary reply to Hearing Notice issued to MoIT.
[40] Para 4, Preliminary reply to Hearing Notice issued to MoIT.
[41] Para 5, Preliminary reply to Hearing Notice issued to MoIT
[42] Para 7, Preliminary reply to Hearing Notice issued to MoIT
[43] Para 8, Preliminary reply to Hearing Notice issued to MoIT
[44] Para 9, Preliminary reply to Hearing Notice issued to MoIT
[45] Para 10, Preliminary reply to Hearing Notice issued to MoIT
[46] Para 11, Preliminary reply to Hearing Notice issued to MoIT
[47] Para 12, Preliminary reply to Hearing Notice issued to MoIT
[48] Para 13, Preliminary reply to Hearing Notice issued to MoIT

15. A rejoinder was submitted by MoIT in two parts on 09-03-13 which entails submissions in response to Representation by BTL and additional submissions pertaining to issues of maintainability and jurisdiction. We have gone through these submission and are of the opinion that most of them are repetition of submissions made by MoIT in its preliminary reply, summary of which has been given in preceding paragraph. However, followings are some submissions found in addition to Preliminary reply/submissions:

i. Policy by no stretch of imagination can have effect of increasing or decreasing the tariffs of telephone calls as charged by international telecom operators to its subscribers in foreign countries. The only effect is potentially a change in the profit margins of international operators who seek to terminate calls into Pakistan as compared to previous windfall profits. The Commission has incorrectly assumed that Directive has any connection or effect upon the charges for calls originating out of Pakistan or for such services rendered in Pakistan ;[49]

ii. Outgoing calls are not regulated and LDI licensees are encouraged to deliver calls originating from Pakistan to foreign operators at the lowest possible rates to benefit the Pakistani consumers;[50]

iii. There is no case for cartelisation when the price of services is fixed and regulated by the Federal Government;[51]

iv. BTL has been in the past found guilty of grey trafficking and has recently been found to indulge in this criminal activity;[52]

v. Access Promotion Contribution (APC) is revenue for development of telecommunication infrastructure and facilities in far flung areas of Pakistan. APC and Universal Service are both concepts globally implemented in most countries where there are in existence areas not commercially viable for telecommunication infrastructure investment and hence resulting in either no telecommunication service or resulting in low quality and low tele-density. APC and

[49] Para 1 &5 of Preliminary Objections, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.
[50] Para 2 of Preliminary Objections, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.
[51] Para 3 of Preliminary Objections, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.
[52] Para 4 of Preliminary Objections, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

Universal Fund both are mandated under as a function of PTA under the PTA Act;[53]

vi. The following steps are mandated to be followed by the PTA in determining and implementing the APC regime:[54]

- PTA approves the Total Accounting Rate after consideration of the report from the LDI Operators on best negotiated rate quotations obtained by them from foreign operators. This is referred to as the Approved Accounting Rate (AAR).
- Half the value of AAR is designated as the Approved Settlement Rate (ASR). The ASR is the settlement rate at which the LDI Operators is mandated to charge corresponding operator for providing of services of international incoming termination. LDI Operators are provided discretion to offer discount to the corresponding operators upto a maximum of 5% of the fixed ASR.
- PTA is mandated to determine the fixed components of the ASR, which are to be strictly adhered to by the LDI Operators. The fixed components are (i) APCL payable to Local Loop Operators and (ii) LDI Share.
- PTA in addition fix the charges of local loop operators. APCL includes such local termination charges of the Local Loop Operators.
- In the event an international call is routed to a cellular mobile operator, PTA determines as the APC Rules the APC for USF after deducting from the ASR the LDI Share.

vii. PTA is further required under the APC Rules to approve all agreements executed between LDI Operators and corresponding foreign operators. In addition all traffic terminated and revenue raised are to be reported to PTA;[55]

viii. The ASR as fixed by the PTA essentially determines a floor price which an LDI Operator can offer to an international telecom operator. The ASR is fixed for the very purpose that no LDI Operator may try to offer rates lower than what is the value commanded by the Pakistan market internationally. Had the said restriction not imposed, LDI Operators solely for their own enhanced profits would offer services at a much lower rate resulting in a loss to the exchequer in terms of potential inflow of foreign exchange against such services;[56]

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[53] Para 1, 2, 3 & 4 of The Access Promotion Contribution Regime, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

[54] Para 6 (a), (b), (c), (d) & (e) of The Access Promotion Contribution Regime, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

[55] Para 7 of The Access Promotion Contribution Regime, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

[56] Para 7 of The Policy Directive. Background. of Preliminary Objections, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

ix. The said Directive was issued after consulting with industry, regulator and finally approval of the Prime Minister of Pakistan. In addition thereto the Government of Pakistan was also confronted with the issue of national security where due to grey traffic channels the incoming international calls were untraceable causing immense security issues;[57]

x. Initially PTA attempted to curb grey traffic by reducing ASR in the presumption that this would detract grey traffickers due to reduced margins as against the official rates, however, it did not succeed the grey traffickers were at all times earning the value of APC which they did not have to pay;[58]

xi. For that purpose the Directive in essence mandated that a central monitoring switch be imposed where all incoming traffic is routed by the LDI Operators through this final stage switch prior to termination into local loop network;[59]

xii. Purpose and need of the ICH Agreement is to solely implement the Directive. The LDI Operators are mandated to integrate the networks so as to route all incoming traffic into the central monitoring switch. This necessitates commercial issues which require to be handled including but not limited to managing the division of revenues corresponding to each LDI's existing customers and business so as to ensure that while the traffic is routed to a central monitoring switch without incurring additional local interconnect and operating costs by the LDI Operators.[60]

Intervener's Application

16. M/s Nayatel Private Limited (**Nayatel**) filed an intervener application on 11-04-2013 in accordance with the Regulation 27 of the Commission's (General Enforcement) Regulations, 2007 (the "Enforcement Regulations") in the matter of SCNs issued to LDI Operators.

[57] Para 8,of The Policy Directive- Background. Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.
[58] Para 9 of The Policy Directive-Background, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.
[59] Para 14 of The Policy Directive-Background, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.
[60] Para 16 of The Policy Directive-Background, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

17. Nayatel is a private limited company which provides telecommunication, internet and cable television services to corporate and home users through the medium of *fiber to the home and fiber to the user*, for which it holds a valid license form PTA to provide such services.

18. In its application Nayatel apprised the Commission that it ought to be permitted to intervene and participate in the proceedings in order to enable the Bench to effectually and completely adjudicate upon and settle all questions at issue in the instant Representation. It was further stated that the controversy at hand is not a private dispute between BTL and respondents but affects the interests of other telecom service providers, users of telecom services and a matter of public interest as it involves:

    i. Regulatory efficacy of MoIT& PTA and their ability to protect public interest served by enforcement of the provisions of the Act, Rules and Regulations and licenses promulgated and issued there under;
    ii. The financial detriment caused to the public exchequer due to institution of ill received policies;
    iii. The injury caused to public interest due to creation of monopolies within the telecom sector and unavailability of cost efficient quality services due to termination of free and fair competition;
    iv. The interests of telecom licensees contingent on the provision of level playing field in the telecom sector through consistent application of uniform conditions to all service providers; and
    v. The interest of users of telecom services intrinsically connected with and dependent upon ensuring free and fair competition within the sector.

19. Nayatel in its application also submitted that if the instant Representation is decided without giving Nayatel an opportunity to be heard, the rights and interest of the Nayatel as licensees of PTA and telecom service provider will be adversely affected for the following reasons:

    i. It is PTA's authority to protect rights of licensees and ensure fair competition in the telecom sector and to safeguard the interests of the users of telecommunication services. Any neglect to do so

would amount to regulatory negligence and a breach of PTA's statutory duty to the detriment of Nayatel and other licensees under PTA Act;

ii. Should the Policy Directive is upheld, it would have the direct result of denying Nayatel its constitutional right to a level playing field;

iii. A consequence of upholding the legality of impugned actions of respondents would be that telecom sector would no longer be competitive and PTCL will be able to abuse its monopoly position with impunity to the detriment of Nayatel and other telecom service providers.

20. Later on, Nayatel also submitted additional documents and case laws to assist the Bench on important aspects of the subject matter.

21. Hearings in the matter were conducted on 1, 11, 12 and 18 April 2013 and all the parties were given ample opportunity to present their case. Nayatel also presented arguments in support of its application to intervene the instant proceedings which were rebutted by the other parties. We would also like to go through briefly the main submission made by the other parties against the intervener's application. Following is the summary of submissions made by MoIT, LDI Operators and PTCL with respect to application to intervene by Nayatel:

i. MoIT objects that ICH does not have any bearing or nexus upon Nayatel directly or otherwise except the Nayatel benefiting from the receipt of APCL to a Local Loop Operator in either event;

ii. MoIT maintains that Nayatel was neither party before the Hon'ble Supreme Court and nor a party to BTL's petition before the Hon'ble Lahore High Court. The pendency or filing of intervener application before the Lahore High Court in BTL's petition has no bearing whatsoever to the aforementioned proceedings nor does it give rise to any right in favour of Nayatel;

iii. LDI Operators object that Supreme Court's Order dated 21-02-13 speaks for itself and no one other than those persons which are already parties to the instant proceedings before the Commission can be heard. BTL's writ petition was disposed of by the Hon'ble Supreme Court and with that all pending

applications related to the proceedings were also disposed of. If Nayatel feels it should be heard it should first approach Supreme Court in this regard;

iv. LDI Operators further maintain that in any event the Applicant has failed to bring anything on record which shows its rights will be affected or why it has a personal interest in the instant proceedings. Further, it is open for Nayatel to file its own complaint before the Commission; and

v. PTCL also maintains that Nayatel has failed to show that it will be affected by the outcome of these proceedings and that it was not a party to BTL's writ petition before the Hon'ble Lahore High Court.

22. Mainly, two objections were raised on admissibility of Nayatel as an intervener that it is not one of the concerned parties which are to be heard by the Commission under the direction of Supreme Court and that it does not have sufficient interest in the outcome of these proceedings.

23. To comply with the direction of the Hon'ble Supreme Court, the Commission proceeded under its mandate given in the Competition Act, 2010 and the Enforcement Regulations.

24. We are of the view that Order of the Hon'ble Supreme Court should be read in its plain meaning. Nowhere Order restricts the parties concerned to LDI Operators, PTA and MoIT. It directed the Commission to *decide after hearing all the parties concerned and attending to issues raised.* Importantly, considering the presence of Nayatel before Lahore High Court and at the time of passing of the Order by Hon'ble Supreme Court we deem it only appropriate to look into the fact whether Nayatel satisfies the requirement of 'sufficient interest' under the Regulation 27 of the Enforcement Regulations. For this purpose we consider it relevant to take note of the certain aspects. These include, Nayatel is a license holder for Local Loop services and represents a segment of telecom industry who are customers of LDI Operators and are completely dependent on their services/infrastructure to carry on business. Many of LDI Operators are vertically integrated and are providing

services of Local Loop, hence are also competing with Local Loop Operators/the applicant. An arrangement/agreement among the LDI Operators which is impugned in these proceedings before the Commission is intrinsically connected to interests of other telecom service providers including Local Loop operators etc. Therefore, Nayatel has direct and sufficient interest to be heard in resolving the issue that has direct legal and commercial implications for telecom service providers as customers and competitors of LDI Operators. Nayatel also claims to be a potential LDI licensee.

25. In one of the recently decided cases Re: Urea Manufacturers, reliance was placed on the judgment given in the case of Ardeshir Cowasjee Vs. Karachi Building Control Authority (1995 SCMR 2883) wherein it was held:

> *"The sufficient interest has to receive a generous interpretation. It has to be treated as a broad and flexible test.*
> *If the applicant has a special expertise in the subject matter of the application that will be a factor establishing sufficient interest. This applies whether the applicant is an individual or association. The fact that the applicant's responsibility in relation to the subject of the application is recognized by statute is a strong indication of sufficient interest.*
> *A variety of factors are capable of qualifying as sufficient interest. They are not confined to property, financial, other legal interest. They can include civic (community) environmental and cultural interest. The interest can be future or contingent."*
> *The gravity of issue which is the subject of the application is a factor taken into account in determining the outcome of question of standing. The more serious the issue at stake the less significance will be attached to arguments based on the applicant's alleged lack of standing.*

26. Nayatel has also relied on the above quoted judgment and another judgment relied upon by the legal counsel for Nayatel is the case of Muhammad Arif V

District and Session Judge Sialkot (2011 SCMR 1591). Wherein the Hon'ble Supreme Court observed that:

> *To pass an effective and binding decree, all questions/issues/matters arising from the suit will need to be adjudicated upon; for which presence of certain other persons before the Court is essential. They have been classed as the proper parties; whose interest in or against the relief of the subject matter of the suit may be marginal, nominal, limited or none. The presence of proper parties before the Court is also to prevent frustration or embarrassment of the suit by containing investigations/inquiries on the same controversies in more than one trial.*

27. Nayatel also asserted itself as proper party before the Commission in light of its concerns intertwined with the subject matter of the case and maintained that its presence will only further facilitate the understanding of issues involved and the concerns are overlapping therefore, filing a separate complaint will result in multiplicity of proceedings before the Commission.

28. We have no cavil in holding that in view of foregoing, Nayatel qualifies to establish its sufficient interest in the outcome of the proceedings and hence in the interest of justice the Bench allowed it to be impleaded as an intervener And to take its submissions into account while determining the issues in the subject proceedings;.

29. We now proceed to decide the following key issues :

    i. Whether the Commission can determine the scope of its own jurisdiction? If so, whether the Commission has jurisdiction in the subject matters?

    ii. Whether condition of enquiry is a pre-requisite for initiating proceedings under Section 30 of the Competition Act?

    iii. Whether the impugned ICH Agreement violates any provision of Competition Act, 2010 as alleged in the show cause notices?

iv. Whether the Policy Directive of the MoIT accords immunity from liability to the respondents under the Competition Act?

Issue I - Jurisdictional issues and aspects determinable by the Commission

30. The LDI Operators have raised several objections as to the jurisdiction of the Commission. They have primarily argued that:

a. The Commission cannot decide jurisdictional issue, in particular, cannot determine the scope of its own jurisdiction.

b. Even if Commission could determine the scope of its jurisdiction, the Commission does not have any jurisdiction in relation to the subject matter *inter alia* on the following grounds:

i. the regulation of competition in the telecommunication sector is under the exclusive jurisdiction of PTA under Section 4(1) m of PTA Act;
ii. the provisions of PTA Act being the special law for the telecommunication sector overrides the provisions of the Competition Act which is a general law;
iii. the application of the provisions of Competition Act will create a regulatory conflict between PTA and the Commission which will put LDI operators in an awkward situation; and
iv. section 8 of PTA Act expressly empowers MOIT to issue policy directives to PTA and the ICH agreement has been implemented in pursuance of the directive issued by MOIT and PTA;
v. the matter at hand concerns incoming international telephony traffic which originates outside Pakistan, constituting a relevant market which is beyond the territorial jurisdiction of the Commission.

31. Regarding the contention that the Commission cannot determine its own jurisdiction, we would refer to the judgment of the full bench of the Hon'ble Supreme Court of Pakistan in *Pir Sabir Shah v. Shad Muhammad Khan,*

Member Provincial Assembly N.W.F.P. case,[61] where the Court discussed the case of *Akhtar Ali Parvez v. Altafur Rehman* (PLD 1963 (W.P.) Lahore 390) where a full bench of the erstwhile High Court of West Pakistan, headed by Manzur Qadir, CJ dealt with the question of jurisdiction of Special Tribunal in detail. The Court reproduced the following observation from the opinion of Manzur Qadir, C J in *Akhtar Ali Case:*

> *A distinction exists between an issue as to the very existence of the authority to adjudicate, and those other issues which arise as between the parties and which are to be determined by the authority that has the power to resolve them. An issue concerning the very existence of the power to decide, is not an issue between the parties, though the existence of that power may be asserted by one party and denied by the other. It is, in reality, an issue between the Court itself and the party over whom the Court is asked to exercise power. The issue as to the rights or liabilities of the parties, on the other hand, affect only the parties and arise only as between them. They leave the Court unaffected. This point may be put in another way. Objections raised 'to' the proceedings must be distinguished from objections raised 'in' the proceedings.*
>
> *An objection to the jurisdiction of a Tribunal may take one of the following general forms-*
>
> *(i) that the law under which that Tribunal is created is defective or invalid;*
>
> *(ii) that the Tribunal is not constituted or appointed validly under the law;*
>
> *(iii) that a party or parties is or are not amenable to the jurisdiction of the Tribunal; and*
>
> *(iv) that the subject matter is outside the field in which particular court is competent to act.*
>
> It was held that:
>
> *If a plea falling in the first or the second category is raised before a Special Tribunal, the answer of the Special Tribunal, which is a creature of the special law and is constituted or appointed under that law, must be simply and shortly that these matters are not for*

[61] P.L.D 1995 Supreme Court 66.

the Special Tribunal to decide. If a party needs a decision on those points, it will have to apply to the Courts of general jurisdiction in appropriate proceedings for that purpose...

While, with respect to objections falling in the third or fourth category mentioned above, it was observed that a tribunal can ascertain and settle these grounds one way or the other.

32. The Superior Courts, with respect to objections on legitimacy of forum or law, have made it categorically clear that the forum must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. On the other hand, with respect to the objections as to the scope and ambit of jurisdiction, in relation to the parties and subject matter; it has been held that the Tribunal/forum is competent to adjudicate upon the same.

33. In this regard the objection of the counsel for LDI Operators and his reliance on Pakistan Banking Association Case is that, the Commission having observed that it cannot decide jurisdictional objections, cannot now proceed to decide the same contrary to the principle laid down in the said case. We are of the view that it would be helpful to reproduce the relevant part of the referred order to clarify its context:

> I must first address the preliminary objection that the Ordinance has lapsed and, therefore, the proceedings, hearings and notices issued or commenced are of no legal effect and without jurisdiction. It is settled law that the Commission is not the appropriate forum to raise this issue. It was settled in Akhtar Ali vs Altaf-ur-Rahman, PLD 1963 Lah 390, that where there is an objection to the jurisdiction of a tribunal or that the law under which that tribunal is created is defective or invalid, such issue is not for the tribunal to decide. The tribunal must proceed on the assumption that its existence is legal and valid until a court of competent jurisdiction decides or directs to the contrary. This view has been consistently relied upon and upheld by the Superior Courts of Pakistan.

In view of the above, it is clear that since the objection in Banking case pertained to the validity of the law, the same could not have been addressed and decided by the Commission. In the present case, none of the parties during the course of hearing have taken any objection on the legitimacy/existence of the Commission which in any case the Commission could not have adjudicated upon. We therefore proceed to address the objections whether the subject matter including the parties fall within the purview/jurisdiction of the Commission.

34. The arguments of the LDI Operators on the jurisdiction of the Commission, which have been summarized above, can broadly be classified as challenges to the ambit and territorial jurisdiction of the Commission under the Competition Act.

The Relevant Applicable Law or Special Law Vs. General Law

35. The respondents strongly contend that in presence of Section 4(1) (m) of the Pakistan Telecommunication Re-organisation Act, 1996 (the "Telecommunication Act") which empowers PTA to 'regulate competition in the telecommunication sector and protect consumer rights', the Commission cannot intervene in the telecom sector.

36. Prior to addressing this issue it is important to refer to cases where the similar issues have been dealt with by the Commission. In this regard, we would like to refer to LPG case where it was argued by the parties that in view of Section 43 of the OGRA Ordinance that Commission had no jurisdiction to deal with the matter keeping in view the well settled proposition of law that where a special law applies the operation of general law is excluded. In this regard the Bench held:

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

37. The above discussion made in the LPG case is quite relevant to the issue at hand. No provision in the Telecommunication Act, Rules and Regulations covers anti-competitive practices such as, inter alia, abuse of dominant position and cartelization/prohibited agreements by and among undertakings

operating in the telecom sector. More pertinently, the legislative scheme under which PTA operates, contain no provisions that envisage/provide for *an enforcement mechanism to remedy anti-competitive practices*. Section 23 of the Telecommunication Act relied upon by the counsel of PTCL does not provide any specific remedy with regard to anti-competitive behaviour of the nature alleged in the Show Cause Notices.

38. Even if it is assumed that the Telecommunication Act is also a special law as argued by the parties, we must remember to take into account that the same cannot be determined without reference to both aspects; the parties/entities involved as well as the subject activity under scrutiny. While generally for telecom operators, Telecommunication Act may appear to be a special law when it comes to regulating their licensed activities, for alleged anti-competitive practices we have no doubt in holding that the competition law is the special law for such purposes. All LDI Operators are 'undertakings' in terms of Section 2(1)(q) of the Competition Act. This fact has not been disputed by the parties at all. As for the alleged activity i.e. the ICH Agreement and its consequences and impact on competition in Pakistan as discussed above fairly fall within the purview of the Commission.

39. Importantly, we would like to add that in our considered view a sector specific regulator owing to its limitations and restrictions in exercise of powers to 'a sector alone' would not be able to regulate or enforce competition principles effectively. To illustrate, it is important to appreciate that any entity reverting to any anti-competitive practice e.g. through offering cross sector subsidy resulting into predation would escape from the sector specific regulator's purview. It is for this reason that our preamble envisages "*to provide for competition in all spheres of commercial and economic activity"* rather than exempting or restricting the scope of the Competition Act to any specific sector. This view finds support from judgment in R V. Hoffman La Roche at p.191 [28 O.R. (2d)], p.32 [109D.L.R. (3d)]:

> *It is part of a legislative scheme aimed at deterring a wide range of unfair competitive practices that affect trade and commerce generally across Canada, and is not limited to a single industry, commodity or area. The conflict being prohibited is generally of national and of international scope. The presence or absence of healthy competition may affect the welfare of the economy of the entire nation. It is, therefore, within the sphere of the federal Parliament to seek to regulate such competition in the interest of all Canadians.*

40. The reliance on Section 4(1)(m) of the Telecommunication Act appears to be based on misunderstanding of the roles of sector regulators and competition authorities vis-à-vis competition. Section 4(1) (m) of Telecommunication Act enables PTA to regulate competition in the telecommunication sector. The regulation of competition in context of sector regulators refers to devising appropriate *ex ante* policies, standards, regulations and licensing conditions that foster or encourage competition among the licensees and provide for a level playing field. This necessitates, for example, the need for regulations and standards on collocation and interconnection. The need for empowering sector regulators on *ex ante* competition arose as Pakistan chose to liberalize, privatize, and regulate certain sectors of its economy starting in the 1990s and continuing till the latter part of 2000s, signalling a departure from the centrally-planned nationalized economy inherited from the 1970s and 1980s. The telecom industry was one such sector among many. That Section 6 (e) of Telecommunication Act imposes on PTA the responsibility of ensuring that 'fair competition in the telecommunication sector exists and is maintained' while discharge of its functions simply reinforces the *ex ante* scope of PTA's competition related mandate. The lack of any rules or regulations on a broader scope gives further credence to this position.

41. On the other hand, Section 28 of the Competition Act gives the Commission a broad ranging mandate to take enforcement actions against anti-competitive behaviour, undertake research to understand competition gaps in various

sectors, and conduct advocacy to promote competition in all areas of the economy. We are of the considered view that Article 18 of the Constitution also distinguishes regulation of any trade and profession through licensing system (Article 18(a)) which role in the telecom sector has been entrusted to PTA whereas the regulation of trade, commerce or industry in the interest of free competition (Article 18(b)) is a mandate that is entrusted to the commission under the Competition Act. The primary and main purpose of the law is to 'provide for competition in all spheres of commercial and economic activity', to 'enhance economic efficiency' and to 'protect consumers from anti-competitive behaviour'.

42. In this regard, it would be useful to cite another observation from the LPG and KSE case. In relation to determining the applicability of a statute even where both are said to operate in the same field and contain non-obstante provisions. Reliance was placed on ***Sarwan Singh and another v. Kasturi Lal AIR 1977 SC 267 wherein*** *it was held that*:

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

43. Also, for the argument of parties pertaining to presence of non-obstante clause in both enactment even assuming where both are special, we refer to (AIR 2000 SC 1535). The Division Bench of the Honourable Peshawar High Court in **Muhammad Saleem vs. The State and another, 2002 P Cr. L J 216,** at Para 12 of the judgment held that:

> *"The general principle of interpretation of statute is that special law shall have precedence over the general law and when there are two special laws and they are inconsistent on*

any provision/situation, then one which is later, shall prevail over the earlier one."

44. Coming to the argument of parties that the application of the provisions of Competition Act will create a regulatory conflict between PTA and the Commission which will put LDI operators in an awkward situation. In this regard we would like to reiterate that there is no conflict between the Telecommunication Act and Competition Act. Even if such conflict is assumed, in view of the above discussion it is abundantly that the provisions of the Competition Act had to prevail over the Telecommunication Act in the instant case.

45. As for the ground that section 8 of Telecommunication Act expressly empowers MoIT to issue policy directives to PTA and the ICH agreement has been implemented in pursuance of the directive issued by MoIT and PTA. This amounts to taking a regulatory defence and this requires determination on the violation of the alleged behaviour. The regulatory defence will be dealt later in the order.

46. While arguing on the aspect of jurisdiction, MoIT relied upon the following case laws:

    2012 CLD 846 [Lahore]
    1996 SCMR 826
    PLD 2010 SC 993

47. We have gone through these judgments which deal with general and special law and in case of conflict/inconsistency the special law prevails. Further, every provision contained in special law has to be strictly construed and meticulously adhered to. We have discussed above in detail that Competition Act is a special law and gives exclusive jurisdiction to the Commission to ensure competition in all spheres of commercial and economic activity.

48. MoIT also referred to 2010 SCMR 1254 wherein the Court has clarified the intent of law maker while enacting a particular statute. We find it relevant to mention here the principle laid down in this judgment rather supports our finding on the scope and scheme of the Competition Act. The Court in this judgment has settled that

> *While interpreting an Act, the intent of the Legislature is of supreme importance..... Law makers may have several purposes in mind when they enact a given law. The fact which can be taken into account in ascertaining the intention of the Legislature is the history of the Act, the reason which led to the passing of the Act, the mischief which had to be cured as well as the cure proposed and also other provisions of the Statute.*

49. Reference has also been made to case of D.G. Khan Cement Companies Limited V Monopoly Control Authority (PLD 2007 Lahore 1) with regard to jurisdiction and functions of the Commission and PTA vis-à-vis regulation of competition and consumer protection. We do not see any relevance of DG Khan Cement case in this particular case as the applicable law in that case was Monopolies and Restrictive Trade Practices Control Ordinance, 1970 which had much limited scope and was repealed by the Competition Act. In fact even certain exemptions conferred under the previous law have been withdrawn under the existing legal framework.

50. Another judgment relied upon by MoIT in support of its objection on the jurisdiction of the Commission is PLD 2003 Lahore 310. This judgment refers to the principle of 'repeal by implications' which is not favoured by the Courts for in the absence of express repeal clause it is to be presumed that Legislature did not intend so.

51. Our discussion regarding the exclusive jurisdiction of the Commission to look into the matter pertaining to competition does not by any stretch of

imagination means repeal of PTA by implications rather it clarifies the scope of jurisdiction of both the Authorities in their respective domains.

52. We must add that the matter of Commission's jurisdiction over the telecom sector is not novel. In the case of M/s China Mobile Pak Limited and M/s Pakistan Telecom Mobile Limited, both telecom service providers offered commitments for compliance. Further, jurisdiction of the Commission has been recognized by PTA in practice and the two bodies have enjoyed cordial working relationships in the past. In the Wind Telecoms' acquisition of Vimplecom merger review case before the Commission, PTA extended its cooperation to the Commission in reviewing the impugned transaction. The Commission states in its order:

> *The Bench has also noted that the Pakistan Telecommunication Authority (PTA) has given its No Objection to the transaction, and also wishes to place on record its appreciation for the cooperation extended by PTA to the Commission in reviewing this transaction.*

Territorial Jurisdiction of the Commission under the Competition Act

53. Coming to the objection that the scope of activity is beyond the territorial jurisdiction of the Commission because the matter at hand concerns incoming international telephony traffic which originates outside Pakistan, constituting a relevant market which is beyond the Commission's jurisdiction. The scope and extent of the Commission's jurisdiction are laid out in Section 1 of Competition Act and should be read along with the preamble. These are reproduced for ease of reference:

> ***Preamble****: An act to provide for competition in all spheres of commercial and economic activity to enhance economic efficiency and to protect consumers from anti-competitive behaviour.*
>
> ***Section 1****: (1) This Act maybe called the Competition Act, 2010*

(2) It extends to the whole of Pakistan
(3) It shall apply to all undertakings and all actions or matters which take place in Pakistan and distort competition in Pakistan.

54. Applying the above, we note that an arrangement such as ICH apart from LDIs Market which includes 14 licensed players in Pakistan has direct impact in the markets of (1) international bandwidth market which is a medium to bring traffic into Pakistan and take it out and its use is indispensable for any entity in the business of bringing in and taking out international traffic both voice and data. It is worth mentioning that initially in the exemption application proceedings before the Commission, it was the only competitor in bandwidth market (Transworld Associates (Pvt.) Limited) which vehemently opposed such arrangement among the LDI Operators at that stage. ICH arrangement also has impact in ancillary markets of other telecom operators such as Local loop operators who finally terminates the incoming call to the end user. It is also an important fact that the Representation as well as the application of intervener have been filed by the Local Loop Operators.

55. When the respondents argue that the pertinent market for incoming telephony traffic is beyond the territorial jurisdiction of the Pakistan, it leaves out the above pertinent facts along with other aspects that international incoming telephony traffic passes through networks that physically exist in Pakistan and that end consumer of such traffic is located within Pakistan.

56. Moreover, the cumulative effect of all the facts necessitates the viewing of international incoming telephony service not as a unidirectional but a bidirectional market. Telecommunication by its nature is a network industry which relies on the connection between two points. On its own, no point or element in the network has any significance. It is only the inter-point connection that accords the network its relevance. The attempt to describe incoming international traffic as constituting a unidirectional market at best

presents an incomplete picture. International incoming telephony services can be better classified as a platform market where multiple sets of agents interact through an intermediary and where the decisions of one set of agents affects the outcomes of the other set of agents.

57. In the complete scheme of affairs, the respondents play a very important role in the international incoming telephony market. An international telephony operator abroad has to deal with an international telephony operator in Pakistan to route its traffic to customers in Pakistan. Within the network, the respondents ensure that calls comings from outside are routed through their switches to the local\mobile loops where such calls are to be terminated.

58. As such, the respondents compete with each other to attract international traffic to their network in order to gain more business. This business rivalry, which takes place within Pakistan, clearly put the respondents and their actions vis-à-vis the ICH Agreement, purportedly affecting competition in the incoming international telephony market within the territorial jurisdiction of Competition Act and the Commission.

59. Accordingly, the provisions cited above clearly extend the jurisdiction of the Commission to all actions and matters which take place in Pakistan and allegedly distort competition in Pakistan not only amongst LDI Operators but other related/ancillary markets. The execution of ICH Agreement has taken place in Pakistan. The alleged activity (price fixing and revenue sharing) is being implemented in Pakistan. The ICH Agreement involves all the LDI Operators who are offering services pursuant to their licenses issued in Pakistan. Hence the relevant geographical market is Pakistan and matter falls within the purview of the Commission's jurisdiction.

Conduct of LDIs

60. While we recognise that parties by consent cannot confer jurisdiction, nonetheless we consider it appropriate to place it on record the conduct of the LDI Operators vis-à-vis the Commission's jurisdiction before various *fora* including the Hon;ble Supreme Court in this matter. Briefly;

- LDI operators filed an application before the Commission in September 2011, to seek exemption of the then proposed ICH Agreement. Later on, this exemption application was withdrawn stating the reasons that matter is 'not a live case'.

- Before the Hon'ble Supreme Court the petitioners (two of the LDI Operators) while seeking vacation of stay granted by Hon'ble Lahore High Court that suspended the implementation of the ICH arrangement, took the position that:

> *Petitioners have sought leave to appeal against the order inter alia, on the ground that the assumption of jurisdiction by the learned High Court is not warranted as the issue raised in the writ petition is in the domain of the Competition commission of Pakistan; that the order passed by the learned Court has the effect of suspending the lawful business of the petitioner and that amounts to granting the main relief sought in the writ petition.*

The Hon'ble Supreme Court in its order dated 21-02-13 observed

> *Having argued the case at some length, both the learned counsel for petitioners and respondents on court query concur that let a copy of the writ petition be sent to the Competition Commission which should treat it as representation filed by the respondent-writ petitioner and under the competition Act, 2010 decide the same within 15 days of the receipt of this order after hearing all the parties concerned and attending to issues raised.*

- Pursuant to the above Order when the Commission issued Show Cause Notices to LDI Operators, other than the two LDI Operators who challenged the stay order before the Supreme Court, the

remaining LDIs challenged the Show Cause Notices before Sind High Court in Karachi on the grounds (in terms of the Order dated 19-03-13 passed by the Sind High Court):

> *[T]hat in such petition present plaintiffs were not party to the proceedings. Learned counsel further submits that an order was passed by the Hon'ble Supreme Court of Pakistan with consent of the parties to the proceedings, whereby interim order passed by the Lahore High Court was set aside and constitution petition was dismissed and the matter was remanded to the Competition Commission to decision by it. .....he further submits that neither present plaintiffs were party to the proceedings before the Hon'ble Supreme Court of Pakistan nor they gave any consent for remanding the matter to the Competition commission. He further submits that LDIs are regulated by PTA and Competition Commission has no jurisdiction in the matter.*

- Lastly, in contempt petition filed by the Commission against such conduct of the LDI Operators, it was submitted on their part (in terms of the Order dated 29-03-13 passed by the Supreme Court):

> *However, adds that although this Court has not specifically referred to any section of the Competition Commission Act under which the Competition Commission was to proceed but the latter proceeded under Section 30 of the Act which according to the respondents was not tenable as the said provision envisages a prior inquiry and formation of prima facie view to proceed, which in the instant case was not done by the Competition Commission. The said notice, he added, issued by the Commission was therefore challenged in the civil suit before the High Court of Sindh……..*

Based on the submissions of the parties the Hon'ble Supreme Court observed that:

> *In view of the fair stand taken by learned counsel for the parties and in view of the submissions made by learned counsel for the respondents, the explanation*

and tendering of unqualified apology is accepted and this petition and CMA No. 120-L/2013 are disposed of with a direction that the parties shall appear before the Commission……and the Commission shall decide the issues raised within 30 days…….

61. The above amply demonstrates the conduct of LDI Operators in this regard. During the hearing we were informed that the reason for withdrawal of exemption application filed earlier prior to implementing the ICH agreement was that LDIs were advised by MoIT that the Commission is not the competent forum. However, despite such advice by the MoIT, we note that for the vacation of stay granted by the Hon'ble High Court, the LDI Operators (at least 2 of them) asserted before the Honourable Supreme Court that since the matter falls within the domain of the Commission, therefore, the assumption of jurisdiction of High Court is not warranted – yet again before the Sind High Court the remaining LDI Operators before the Sind High Court maintain that neither the plaintiff's concerned were party nor they gave their consent for remanding the matter to the Commission and finally, in the Contempt Petition 102-L 2013 filed by the Commission, the LDI Operators submit before the Honourable Supreme Court that they had objection to the issuance of show cause notice by the Commission; without initiating any enquiry. In our view, any enquiry on Commission's part presupposes its jurisdiction on the matter. Nonetheless, we are at a loss to comprehend such conduct and to say the least, such objection only appears to be tactical and unwarranted.

ISSUE II - Enquiry as Condition Precedent

62. The thrust of respondent's arguments on this issue is that based on representation of the petitioner, proceedings could not have been initiated under section 30 without conducting an enquiry under section 37 of the Act.

63. The contention of the respondents is based on misunderstanding of the Commission's powers and functions under Competition Act. The power to initiate proceedings under Section 30 is distinct from the power to initiate enquiries under Section 37 of Competition Act. Section 28 of Competition Act enumerates functions and powers as reproduced below:

> ***Functions and powers of the Commission. —*** *(1) The functions and powers of the Commission shall be —*
> *(a) to initiate proceedings in accordance with the procedures of this Act and make orders in cases of contravention of the provisions of the said Act;*
>
> *(b) to conduct studies for promoting competition in all sectors of commercial economic activity;*
>
> *(c) to conduct enquiries into the affairs of any undertaking as may be necessary for the purposes of this Act;*
>
> *(d) to give advice to undertakings asking for the same as to whether any action proposed to be taken by such undertakings is consistent with the provisions of this Act, rules or orders made thereunder;*
>
> *(e) to engage in competition advocacy; and*
>
> *(f) to take all other actions as may be necessary for carrying out the purposes of this Act.*

64. Section 37 of Competition Act lays out the power of the Commission to conduct an enquiry and places it in a two stage framework. Section 37(1) and 37 (2) lay out when an enquiry may be initiated. Three separate scenarios are recorded. Upon a reference of the Federal Government the Commission has to initiate an enquiry. On filing of a complaint by an undertaking, the Commission shall hold an enquiry unless it appears to be frivolous, vexatious, or unsupported by *prima facie* facts. Moreover, the Commission may initiate an enquiry on its own. Section 37(4) states that upon conclusion of an enquiry,

if it is in the public interest to do so, the Commission may initiate proceedings under Section 30 of the Competition Act.

65. On the other hand, Section 30 of Competition Act has been designed to provide the Commission authority to issue an appropriate order against undertakings where the Commission is satisfied that a violation of the provisions of Competition Act has taken place or is likely to take place. However, before making such order the Commission has to give the undertakings an opportunity to present their views. A show cause is therefore issued under Section 30(2) of Competition Act. It must be appreciated that the requirement that 'the Commission is satisfied' is not for issuance of show cause notice as pleaded by the counsel for the LDI Operators. Such satisfaction refers to requirement for issuing order under Section 31 of the Competition Act after giving notice in terms of Section 30(2) of the Competition Act which has been duly complied with. Regulation 22(2) of the Enforcement Regulations further supports and clarifies that enquiry is not a pre requisite for issuance of show cause notice.

66. While Section 37(4) does provide a route towards Section 30, it is not the only route available to the Commission. To argue otherwise would amount to reading a condition precedent in Section 30 when the legislature in its wisdom has placed no such requirement. Even otherwise, in the scheme of the Act Section 30 precedes Section 37, hence their scope has to be kept distinct and separate unless expressly provided by the statute.

67. An enquiry under Section 37 is initiated to assist the Commission in determining whether a *prima facie* case exists that a violation of Competition Act has taken place. Consequently, an enquiry is not required where it is sufficiently clear, *prima facie*, that a violation of any provision of Competition Act has taken place. In the matter before us, the respondents had earlier applied to the Commission for obtaining an exemption for the ICH Agreement

from the application of Section 4 of Competition Act which prohibits anti-competitive agreements. The Commission was well aware of the background, the alleged contraventions in the representation included *per se* violations of Section 4 and the other contravention were *prima facie* made out, therefore, the enquiry was not warranted.

68. Allowing the withdrawal of the application for exemption, as desired by the respondents back then, the Commission had clearly stated in its order dated 08-02-12 that the ICH Agreement raised serious anti-competitive concerns. Similarly, the Commission was also aware of the Policy Directive issued by the MOIT. Even the Hon'ble Supreme Court in its order dated 21-02-13 had specifically given a direction to attend to all issues raised after hearing all the concerned parties and to decide the same within 15 days and did not require the Commission to conduct an enquiry. Since under Section 37(2) jurisdiction of the Commission is limited to the extent that either it can proceed to conduct enquiry or decide whether the complaint is frivolous or vexatious or not based on sufficient facts. The Commission could not have proceeded under Section 37(2) to decide the issues as directed by the Hon'ble Supreme Court. Also, when the subsequent Order of the Hon'ble Supreme Court which was passed on 29-03-13 this objection was specifically raised before the Court, the Court only directed the parties to raise all objections before the Commission.

69. In view of foregoing, there is nothing unlawful to proceed under Section 30 of the Competition Act and to issue notices to the LDI Operators to show cause as to why an appropriate order should not be passed against them. We, therefore, hold that the issuance of the show cause notices to the respondents without holding an enquiry was in accordance with the provisions of Competition Act.

ISSUE III- Violation of Substantive Provisions of the Competition Act

70. Before we delve into this issue, it is pertinent to give an overview of telecom sector, in particular, its segment of LDI services.

Telecom Sector

71. Telecommunication de-regulation policy was implemented in 2003, in line with Government's objective to de-regulate and liberalize various sectors of the economy. Pakistan followed a gradual approach to liberalize its telecom market. The policy was mainly designed to achieve following main objectives:

    i. Increase service choice for customers of telecommunication services at competitive and affordable rates;
    ii. Promote infrastructure development, especially infrastructure that will increase teledensity and the spread of telecommunication services in all market segments;
    iii. Increase private investment in the telecommunication sector and encourage local telecom manufacturing / service industry;
    iv. Accelerate expansion of telecommunication infrastructure to extend telecommunication services to un-served and under-served areas;
    v. Liberalize the telecommunication sector by encouraging fair competition amongst service providers;
    vi. Maintain an effective and well defined regulatory regime that is consistent with international best practices; etc.

72. In 2003, telecom market was opened for Long distance International and local loop fixed and wire local loop. PTA awarded LDI category licenses to 14 operators. With the issuance of new licenses the market became open for full competition in this segment of telecom sector.

73. A service provided by an LDI Operator aids the transmission of international calls originating in foreign country for termination in a local network in Pakistan and represents an extended service licensed to the LDI Operator.

74. An LDI Operator does not directly provide services to customers rather it is an infrastructure and service provider to telecom licensees and operators. LDI Operator using its network of switches and interconnect facilities coupled with leased bandwidth provides the highway connecting two independent locations. The LDI Operator receives call traffic from a Local Loop Operator or Cellular Telecom Operator in Pakistan and transmits the same through its network to relevant foreign telecom operators in whose operational jurisdiction the recipient of such call is located. Similarly, the LDI Operator also receives call traffic from the foreign telecom operator and transmits the same to Pakistan terminating it to the network of a Local Loop or Cellular Mobile Operator who in turn delivers the call to the recipient.

75. The LDI Operators under the license are also required to provide, at their own cost suitable equipment at premises designated by PTA in order to measure and record traffic, billing and quality of service in a manner specified by PTA.[62]

76. More importantly, free competition was ensured to give a level playing field to all of them. It is envisaged in the terms and condition of the LDI License that there will be no regulation of price. The Licensees are free to set prices for the Licensed Services as it may deem fit.[63] If PTA determines that the Licensee's prices for any Licensed Services are unfair and unreasonable to individual customers, PTA may regulate Licensee's prices, terms and conditions for those Licensed Services.[64]

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[62] Clause 6.3.1 of LDI License
[63] Clause 8.1.1 of LDI License
[64] Clause 8.1.2 of LDI License

77. It would also be relevant here to give an introduction to the concept of Access Promotion Contribution. The Telecom Deregulation Policy, 2003 states that at present, net incoming international traffic generates a financial premium over the cost of conveying and terminating the traffic into Pakistan. Although historically this premium has been large, it has been steadily reducing in-line with global trends. As long as the premium continues to exist, a reasonable portion of the premium will be used to promote infrastructure expansion. The portion of the premium applied to promoting infrastructure expansion is referred to as the 'Access Promotion Contribution'.[65]

ICH Regime- Background

78. In order to analyse and understand the scheme and spirit of ICH Agreement it is important to highlight its background by way of chronological events.

79. In September 2011, all the LDI Operators approached on their own the Commission to grant exemption under Section 5 of the Competition Act to their then proposed ICH Agreement. The Commission held detailed hearings to analyze whether the proposed ICH Agreement can be exempted under section 9 of Competition Act. However, before a final order could be issued, applicants/LDI Operators requested withdrawal of exemption application for the reasons that *"the industry has not reached consensus on the modalities of ICH operations* and they *"have decided to shelf [the ICH Agreement] for the time being*. *Since, the idea will not be implemented, therefore, we do not consider this as a live case".*

80. The Commission being cognizant of its responsibilities and mandate under Act, passed Order dated 08-02-2012 wherein it was observed that:

[65] Clause 4.3.1, Telecom Deregulation Policy, 2003

> *the ICH Agreement, in essence, (i) was giving PTCL the monopoly to receive all incoming international traffic; (ii) having a single rate for incoming international traffic; and (iii) dividing the market share of incoming international traffic*……. and the LDI Operators were categorically forewarned that:
>
> *…..if in future the Applicants enter into such agreement/arrangement, notwithstanding, any authorization obtained from any other authority such agreement/arrangement prior to its execution would require clearance from the Commission, as, prima facie, it has serious competition concerns and would attract the provisions of the Act.*

81. However, six (06) months later, on 13-08-2012, MoIT without taking the above into account, announced through its Directive that it had decided to establish one gateway (International Clearing House Exchange) for termination of all incoming international traffic.

82. The Commission in terms of its mandate under Section 29 of the Act, issued a Policy Note dated 28-08-2012 to MOIT. The Policy Note highlighted serious competition concerns and recommended withdrawal of MOIT's Policy Directive in the following terms:

> *In terms of the … competition concerns and the statutory responsibility of the Commission under the Act to prevent or eliminate anti-competitive behavior and in pursuance to Section 29 of the Act, we recommend withdrawal of the Directive.*
>
> *Please be advised that any such proposed arrangement/agreement if entered into in terms of Section 4 of the Act is not tenable under law.*

83. The Commission also issued a Special Order dated 30-08-12 to PTA seeking confirmation regarding signing of the ICH Agreement.

84. Finally on 8-10-2012, MOIT replied to the Commission's Policy Note. While this reply was under review, the matter became *sub judice* before the Hon'ble Lahore Court[66] and the Directive of MOIT to establish ICH was suspended by the Court. The Hon'ble Lahore High Court in its stay order dated 25-10-12 (which was subsequently disposed of by the Hon'ble Supreme Court) held as under:

> *It is also noticed that the Competition Commission in its various policy note and communications repeatedly informed the respondents that the proposed ICH Agreement constituted ant-competitive conduct and was likely to be hit inter alia by the provisions of Section 4 of the Competition Commission Act……..It appears that the said advice was not heeded and statutory authority, which is charged with the responsibility of safeguarding interests of the consumer was intentionally and deliberately bypassed in a manner which shows undue haste in the matter regarding which serious questions were being raised at all relevant levels.*
>
> *Till the next date of hearing, operation of Directive dated 13-08-12 issued by respondent no. 1 (MoIT), PTA's Applicable Rates Letter dated 30-08-12, Implementation Latter issued by Respondent no. 2 (PTA) dated 25-09-12 and ICH Agreement dated 30-08-12 shall remain suspended.*

85. It is also interesting to highlight here that after the Order passed by Hon'ble Lahore High Court to suspend ICH regime, PTA issued a letter on 03-12-12 to withdraw its earlier letter dated 25-09-12 whereby all Local Loop Operators , Cellular Mobile Operators were directed to suspend their international inter-connect circuits with all the LDI Operators except PTCL to terminate international incoming traffic with effect from 01-10-12 which was one of the grievance of BTL for filing the writ petition before the Lahore High Court that was converted into Representation before the Commission. The Representation seeks, *inter alia*, declaration of the ICH Agreement as null and void

[66] Brain Telecommunication Limited Vs. MoIT etc. (WP No. 26636/2012)

The ICH Agreement

86. Upon review of the ICH Agreement, we note that in essence, the ICH Agreement (i) confers a monopoly on PTCL to receive all incoming international traffic; (ii) results in a single fixed rate for incoming international traffic and (iii) divides the market share of incoming international traffic based on allocation of shares in terms of fixed percentage which we are informed is based on their installed capacity. The ICH was established in terms of clause 2 of the ICH Agreement which reads as under:

> ***2. Establishment of the International Clearing House***
>
> *2.1 All LDIs hereby authorize PTCL to terminate on their behalf Pakistan Incoming Traffic during the period of this Agreement and each LDI agrees not to terminate any Pakistan Incoming traffic through their network during the term of this Agreement. Each LDI shall suspend and keep suspended all interconnection capacities in relation to Pakistan Incoming Traffic at its end during the period this Agreement remains in effect.*
>
> *2.2 All Pakistan Incoming Traffic shall be terminated exclusively through PTCL during the term of this Agreement*

The formula for distribution of revenue has been provided in Annex A to the ICH Agreement which also specifies the percentage quota for revenue sharing and also mentions the ASR notified by PTA.

Annex A

ICH Parties Shares

Sr. No	ICH Parties	Share
1	Multinet Pakistan (Private) Limited	4.00%
2	4B Gental International (Private) Limited	1.95%
3	Wi-tribe Pakistan Limited	3.50%
4	Dancom Pakistan (Private) Limited	1.95%
5	Wise Communication Systems (Private) Limited	1.95%
6	Worldcall Telecom Limited	3.50%
7	ADG (Private) Limited	2.45%
8	Telecard Limited	3.30%
9	LinkdotNet Telecom Limited	9.00%
10	Circle Net Communications Pakistan (Private) Limited	1.95%
11	Wateen Telecom Limited	5.50%
12	Redtone Telecommunication Pakistan (Private) Limited	1.95%
13	Telenor LDI Communications (Private) Limited	9.00%
14	Pakistan Telecommunication Company Limited	50.00%
	Total	**100%**

Per Minutes ASR Regime and its Distribution as per Policy Directive

	US Cents
ASR notified by PTA	8.8
APC	2.9
LDI Share	5.9
Monitoring up-gradation Charge	0.05
Net LDI Share	5.850

Application of the Competition Act

87. We have already addressed under the issue of jurisdiction, the application of competition law to the parties and activities involved. The provisions of the Competition Act envisage the principles of competition which aim to ensure free competition in all spheres of commercial and economic activity to enhance economic efficiency.

Section 3 - Abuse of Dominance

88. In 2004-05, following de-regulation policy in letter and spirit, telecom market was opened for private investors and in the segment of Long Distance and International services licenses were issued to 13 operators apart from the incumbent PTCL. These LDI Operators were required to roll out infrastructure in a given time frame and were provided a level playing field to foster competition among them. After opening up the market and unbundling a previously monopolistic structure, arrangements like ICH create the spectre of a journey back to a monopolistic structure that may facilitate exploitation and harm consumer welfare in Pakistan.

89. The Directive and the ICH arrangement pursuant thereto has re-created a monopoly of PTCL for the Long Distance incoming international traffic. Under the ICH Agreement, LDI licensees ceded their right, and responsibilities under their licenses, to terminate incoming traffic to PTCL; thereby reducing the market players from 14 to 1.

90. BTL in its Representation has contended that under the ICH regime, PTCL has become the sole LDI Operator with the exclusive rights to terminate all incoming traffic to Pakistan. Whereas circuits provided by PTCL are not working properly or are facing down time. Instead of rectifying the situation PTCL unilaterally suspended the telecom services of BTL causing its business

irreparable loss and damage to reputation.[67] The Bench was informed during the course of hearing that this controversy of BTL stood resolved before the Lahore High Court. Therefore, we will not indulge into this question that whether PTCL has actually abused its dominant position or not in violation of Section 3 of the Act.

91. Nonetheless, it is important to note that a monopolist with monopoly power is likely to leverage its position to the disadvantage of its customers and competitors. The downstream market for LDIs is the local loop operators and cellular mobile operators. Under a competitive regime, a Cellular Mobile Operator or a Local Loop Operator with large number of subscribers would be in a position to negotiate better interconnection rates with LDIs, as well as have choice of entering into arrangements with LDI of their preference or enter into LDI market on its own. Such choice, and ability to negotiate rates, and potential entry into LDI business is not currently available to Local Loop Operators and Cellular Mobile Operators and thereby represents a market where competition is effectively eliminated. This is a clear against the provisions of Telecom De-regulation Policy of 2003, and would possibly attract Section 11 of the Competition Act, which provides for merger/joint venture review resulting in substantial lessening of competition. Since neither the Show Cause Notices nor the Representation invoked violation of section 11, the matter is not pressed further.

92. Notwithstanding the above, if the dominant position of PTCL is not checked through competition, there is a risk of single point of failure which is likely to entail a loss to the consumers and remains a potential threat of likely abuse for the up and down-stream market-players. In this regard, we consider it important to draw attention to Article 18 of the Constitution which in our understanding prohibits creation of private monopolies such as that of PTCL

[67] Para xi, xiii & xv of Grounds, Representation before the Competition Commission of Pakistan

created through the ICH Agreement. Reliance is placed on PLD 2005 SC 193 wherein it was held:

> *29. .....a perusal of Proviso (b) of Article 18 of the Constitution indicates that the regulation of the trade, commerce, or industry is permissible in the interest of free competition therein. Meaning thereby that without free competition amongst traders, no trade, commerce or industry can be regulated. To understand the concept of free competition, this clause maybe read, keeping in view proviso (c) of Article 18 of the Constitution, according to which only Federal Government or Provincial Government or a corporation controlled by such government can carry on any trade, business, industry or service to the exclusion, complete or partial, of such other person… as far as private person are concerned, they cannot be excluded from carrying on trade for the purpose of creating monopoly…*

Determination on Violation of Section 4

93. Section 4 of the Competition Act deals with 'prohibited agreements' whereby competitors coordinate among themselves to prevent, restrict or reduce competition in the market. The most pernicious form of such agreements is coordination among the competitors to fix the price. Such anti-competitive agreements aim to reduce price competition, raise price or effect price in a favourable way for the undertakings involved and certainly has the object and effect of reducing competition in the market. Section 4 of the Competition Act explicitly prohibits such agreements in the following words:

> *4.* ***Prohibited Agreements****.-(l) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have their object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Act..*

(2) Such agreements include, but are not limited to-
(a) Fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;
(b) Dividing or sharing of markets for the goods or services, whether by territories, by volume of sales or purchase, by type of goods or services sold or by any other means;
(d) Limiting technical development or investment with regard to the production, distribution or sale of any goods or the provision of any service;
(3) Any agreement entered into in contravention of the provision sub-section (1) shall be void.

94. The Show Cause Notices allege that the respondents have agreed to fix prices of incoming international calls including the components namely AAR, ASR, APC, LDI Share etc. In response to Show Cause Notices the respondents submitted and argued:

i. There exists no Relevant Market as is required to exist under the Act 2010. The Incoming International Traffic termination business is a service provided to foreign telecommunication operators who want to enable their foreign customers to make telephone calls in Pakistan. Such services neither represent any Relevant Market in Pakistan as defined under Competition Act, 2010 nor do they have any bearing whatsoever on consumers within Pakistan.
ii. No cartelization exists in a market which is licensed and regulated and wherein the floor price is fixed by the regulator[68]. That Clause 3 very clearly states that ASR will be fixed by PTA;[69]
iii. The ASR as fixed by the PTA essentially determines a floor price which an LDI Operator can offer it to an international telecom operator. The ASR is fixed for the very purpose that no LDI Operator may try to offer rates lower than what is the value commanded by the Pakistan market internationally;[70]

[68] Para 4 (v) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.
[69] Para 5 (ii), On Merits of Preliminary Comments/Reply of PTCL to Show Cause Notice.
[70] Para 7 of The Policy Directive. Background. of Preliminary Objections, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

iv. There is no price fixing by LDIs under the ICH Agreement. It is clear that PTA is determining the ASR, AAR and APC as it has done in the past;[71]

95. In the instant case, we would like to reiterate the view of the Commission on relevant market in collusion cases given in earlier orders passed by the Commission that in collusion cases under Section 4 of the Competition Act, determination of relevant market is not mandatory. In PESCO case the Bench held:[72]

> *It is an underlying presumption that all the undertakings involved are operating in the same market, whether horizontal or vertical. Clearly, if they were not, then the need or question of collusion would not have arisen in the first place. Moreover, in cases of collusion, market power is irrelevant. What is relevant is the agreement to collude. Therefore, the identification of a relevant market in cases of collusion is merely for the purposes of reference, and is not a requirement for establishing an anti-competitive action.*

96. Moreover, in preceding paragraphs dealing with the issue of jurisdiction, we have categorically made it clear that the execution of ICH Agreement has taken place in Pakistan, the price-fixing and revenue sharing as alleged in the Show Cause Notices have been implemented in Pakistan. Admittedly, the LDI operators are licensed businesses and offering services in Pakistan. Therefore alleged anti-competitive conduct is occurring within the territorial boundaries of Pakistan; hence the Show Cause Notices rightly define the relevant market as the market for the provision of LDI telecommunication being terminated in Pakistan and the relevant geographic market comprises the whole of Pakistan.

97. Now coming to the allegation of price fixing, the thrust of the submissions and arguments of the parties is that they have not fixed international incoming

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[71] Para 17, 19, 20,21,23& 26, Reply to the So Called Show Cause Notice under Section 30 of the Act Purportedly Pursuant to Order dated 21-02-13 of the Supreme Court.
[72] http://cc.gov.pk/images/Downloads/order_pesco_13_may_2011.pdf

calls rates and the quantum of the abovementioned components in the ICH Agreement, and that it is actually PTA that determines these rates in accordance with the Access Promotion Contribution Rules, 2004 (the "Access Promotion Rules") and Access Promotion Regulations, 2005 (the "Access Promotion Regulations"). They further contend that the rates as mentioned in Annex A of the ICH Agreement are those which have been notified by PTA in accordance with the Policy Directive. MOIT has argued before the Commission in detail that the respondents have always been bound by PTA's tariffs and that the process of such price fixing for ASR and its constituents has been in practice according to the Rules and Regulations for past many years i.e since 2004.

98. Before addressing this issue, it is important to understand how an ASR is determined. In Pakistan, the scrutiny of the Telecommunication Act, Access Promotion Rules and Access Promotion Regulations suggests that there are two distinct regimes in place relating to international incoming telephony. The first relates to the issue of determining the accounting and settlement rates with other countries. The second pertains to the contributions that the respondents as LDI Operators have to make as access promotion contribution prescribed by PTA for the purposes of promoting infrastructure expansion.

99. The Access Promotion Rules reflected that PTCL was envisaged as lead negotiator which was pertinent as at the time of de-regulation as it was the only LDI and brought all incoming international traffic. However in practice pre-ICH, over the past years the LDI operators were now negotiating directly with international operator's as PTCL's market share was reduced and LDI's were competing aggressively to increase their share of incoming traffic.

100. The above negotiated total accounting rate (TAR) was then submitted to PTA for approval under Rule 6 of Access Promotion Rules. Once the TAR was approved, it was known as the Approved Accounting Rate (AAR) as laid

down in Rule 6 of the Access Promotion Rules. The said Rule is reproduced for ease of reference:

> ***6. Approved Accounting Rates**:- (1) The Authority shall maintain a list of approved Total Accounting Rates for different countries.*
>
> *(2) The Authority shall update the list of Approved Accounting Rates from time to time.*
>
> *(3) At such time as the Authority updates the list of Approved Accounting Rates, the Authority shall forward a copy of the updated list to each LD1 Licensee, LL Licensee and Mobile Licensee*.

101. Half of Approved Accounting Rate is set as the Approved Settlement Rate (ASR) and notified by PTA. The LDI Operators, thereafter, could enter into agreements with foreign LDI operators at a rate within an allowed range of the ASR. This Permissible Range, which provided a room for negotiation to LDI Operators to discount upto 80% in LDI share as per the notification 17-08-11 which the parties maintain is no longer there under the ICH Agreement.

102. The permissible range was provided by placing the upper and lower limits of the ASR. This permissible range has been defined under Rule 2(1) (p) of Access Promotion Rules as the *"range of prices between the Approved Settlement Rate, and ninety-five per cent of the Approved Settlement Rate or such other percentage of the Approved Settlement Rate as the Authority may at any time, or from time to time, determine and notify thirty days in advance."*

103. A comparison of ASR under pre and post ICH Agreement is given as follows:

Category/ Head	Payable prior to ICH regime up to 30-09-2012	Payable under the ICH regime w.e.f. 01-10-2012	Price Difference in cents / minute
ASR	6.25 cents/minute	8.8 cents/minute	2.55 cents/minute
LDI Share	5.0 cents/minute	5.9 cents/minute	0.9 cents/minute
APC	1.25 cents/minute	2.9 cents/minute	1.65 cents/minute

104. During the hearing it has been asserted by the parties that ASR has always been fixed by the PTA under the Access Promotion Rules and Access Promotion Regulations, hence there is no change in modality under the ICH Agreement contrary to the past practice and as laid down under the said rules and regulations.

105. In our considered view, there has been a reversal in the process; Post ICH, ASR is being determined first and fixed by PTA with the consent of LDI Operators which is subsequently communicated by PTCL on behalf of all the LDI Operators to foreign operators as final settlement rate - there is practically no permissible range/margin to offer or for foreign operators to bargain and with no traffic terminating on LDI operators the prior negotiations which took place in the previous regime with the foreign operator do not exist. Whereas, in pre ICH scenario there was first, a prior negotiation between foreign operators and LDI Operators and only then PTA could approve ASR which allowed LDI Operators to compete within a permissible range as per the notification dated 17-08-11 which is reproduced here under:

> *The Authority after due deliberations and keeping in view the comments of LDI operators, has decided to revise the Approved Accounting Rate (AAR), Approved Settlement Rate (ASR) and Access Promotion Contribution (APC) with effect from 01-10-11 in the following manner:*
> *AAR: US $ 0.1250 per minute*
> *ASR: US $ 0.0625 per minute*

LDI Share: *US $ 0.0500 per minute*
APC: *US $ 0.0125 per minute*

In order to provide more flexibility to LDIs for rate negotiation, the Authority has further decided to change the permissible range as range of prices between Approved Settlement Rate and 20% of Approved Settlement Rate with effect from 1st October 2011.

The permissible range given in this notification allowed a discount of 80% of ASR, which in effect allowed LDI Operators to give discount from their share. This clearly shows that there was a connection between ASR and prevalent market rates. Despite the fact that MoIT and LDI Operators maintain that permissible range of 20% of ASR is no more available/applicable, we consider it pertinent to note that nothing has been brought on record by the parties to establish that the notification dated 17-08-11 allowing permissible range upto 20% of ASR (80 discount in LDI share) has been withdrawn, amended or has lapsed.

106. In the pre-ICH arrangement, it was perhaps for the reason of permissible range that four of the LDI Operators namely; PTCL, Telenor LDI Communication (Pvt) Limited, Wi-tribe Pakistan Limited and Link Direct International Private Limited were terminating incoming international calls at an average rate of 2.04 cents/minute (as provided by PTA for last five months between April-September pre- ICH Agreement) and were also paying APC at the then prescribed rate of 1.25 cents/minute. It was indeed the lower price that had taken the volume of incoming international traffic before ICH to 1,946 million (1.9 Billion) minutes in September 2012 as against the current volume post ICH 579 million minutes in February 2013 as per data submitted by LDI Operators to PTA.

107. By making it mandatory for PTCL to communicate to foreign operators the ASR approved by PTA as the final rate on which all LDI Operators would settle, the effect of such arrangement is that it has resulted in having no

competition amongst LDI Operators vis-a-vis their respective share for termination of incoming international calls. There are no more prior bilateral negotiations/bargaining inter se LDI Operators and international operators. And the way the ICH Agreement has been implemented by the LDI Operators is such that approved ASR of 8.8 cents/minute is taken as benchmark for settlement with no permissible range for discount available earlier from the share of LDI Operator (which has been increased from 5.0 cents to 5.9 cents) and to ensure this all LDI Operators have suspended their circuits except PTCL for termination of incoming calls.

108. Implementation of the ICH by the LDI Operators with the ASR without allowing any effective permissible range has clearly resulted in fixing a uniform rate of 8.8 cents/minute for termination of incoming international calls by all the LDI Operators which clearly amounts to price fixing; a *per se* violation of Clause (a) of subsection 2 of Section 4 of the Competition Act.

109. There is plethora of orders passed by different Benches of the Commission which discuss the jurisprudence evolved and principles settled in developed anti-trust jurisdictions on the horizontal price fixing as an act of blatant anti competitive behaviour. In LPG Case the Commission while holding price fixing as *per se* illegal referred to various US judgments as follows:

> *In Northern Pacific Railways Co vs. United States, 356 U.S. 1, 78 S.Ct. 514, (1958) the court held that "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal under Sherman Act without elaborate inquiry as to precise harm they have caused or business excuse for their use." In United States v. Parke Davis and Company 362 U.S. 29, 80 S.Ct. 503, (1960) the court held that, "Under Sherman Act, competition not combination should be the law of trade and a combination formed for purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing price of commodity… is illegal per se" In United States v. General Motors Corporation 384 U.S. 127, 86 S.Ct. 132, (1960) the*

court held that "substantial restraint upon price competition is a goal unlawful per se when sought to be effected by combination or conspiracy." The Commission has been consistent in finding that a horizontal arrangement amongst competitors to fix price is condemned to facial invalidation not withstanding any pro competitive justifications that may be offered. [73]

110. Another important case where the Bench dealt with the similar situation and arguments is the appeal filed in ICAP case. The Bench relied upon the judgment in *Arizona vs Maricopa.*[74] The court in this case held:[75]

> *... The argument that the per se rule must be re-justified for every industry that has not been subject to significant antitrust litigation ignores the rationale for per se rules, which in part is to avoid ... the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable - an inquiry so often wholly fruitless when undertaken." (Emphasis added*)

Distribution of Revenue through Quota Allocation under the ICH

111. The second alleged violation in the Show Cause Notices pertains to the establishment of quotas for the division of revenue received from the settlement of international incoming telephony. In response to Show Cause Notices, the parties made the following submissions:

i. No cartelization exists in a market which is licensed and regulated and wherein the floor price is fixed by the regulator[76]. Clause 4 on the other hand deals with the mode and manner of Collection and Distribution of Revenues.

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[73] http://cc.gov.pk/images/Downloads/lpg_final_order_proof_15_december_2009.pdf
[74] Professional Engineers, Arizona v Maricopa (457 US 332 (1982)) and United States v. Topco Inc. 1972
[75] http://cc.gov.pk/images/Downloads/ICAP%20Final%20Order%20(11-3-09).pdf
[76] Para 4 (v) of Preliminary Objections, Preliminary Comments/Reply of PTCL to Show Cause Notice.

The ICH is not an agreement to divide or share a market by territory, volume of sales or purchases or by any other means, but to pass through all international incoming traffic through a centralized monitoring switch.[77]

ii. Purpose and need of the ICH Agreement is to solely implement the Directive in terms. The LDI Operators are mandated to integrate the networks so as to route all incoming traffic into the central monitoring switch. This necessitates commercial issues which require to be handled including but not limited to managing the division of revenues corresponding to each LDI's existing customers and business so as to ensure that while the traffic is routed to a central monitoring switch without incurring additional local interconnect and operating costs by the LDI Operators.[78]

112. It would be pertinent to reproduce the Clause 4 of the ICH Agreement and refer to Annexure A given above which talk about the modality of revenue sharing among the ICH parties/LDI Operators:

4. ***Collection and Distribution of Revenues***

4.2 …PTCL shall retain 50% of the net LDI Share i.e. LDI Share less US cent 0.05 per minute as above, for each minute during each month….

4.3. LDIs, other than PTCL, shall be entitled to receive 50% of net LDI Share on account of each minute of the Pakistan Incoming Traffic terminated by PTCL during such month.

4.4. Upon Collection/Settlement of the invoiced amount for Pakistan Incoming Traffic, PTCL shall within 03 (three) working days transfer 50% of net LDI share to the ICH Escrow Account after deductions as stated in clause 4.9 of this Agreement.

4.6 ICH Committee shall advise to distribute the amounts available in ICH Escrow Account to each of the LDIs except PTCL immediate, as per standing instructions, proportionally in accordance with the percentage specified in Annex A of this Agreement.

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[77] Para 5 (ii of On Merits, Preliminary Comments/Reply of PTCL to Show Cause Notice.

[78] Para 16 of The Policy Directive-Background, Additional Objection pertaining to issues of Maintainability and Jurisdiction already submitted by MoIT.

113. During the course of the hearing, the Bench was informed that the percentages have been fixed based on the installed capacity of each LDI Operator in relation to incoming international telephony. The LDI Operators argued that this fixation of percentages does not amount to a quota as the actual traffic can vary in terms of volume. The Commission was further informed that if the traffic varies, the percentages can be amended accordingly if the LDI Operators agree. In addition, the respondents argued that since the settlement price has been fixed by PTA, there is no point in having any competition between the respondents.

114. It is clear that the respondents have engaged in what is known as the division of the market, carving out quotas how the revenue would flow to each player. The suggestion that division of markets by percentages does not amount to a quota is preposterous; in market division, what matters is how the pie is being divided, not the size of the pie itself.

115. In competitive regime before ICH, the LDI Operators were competing with each other to acquire market shares. Pre-ICH, these shares depended on factors such as price, quality, strategy, and reliability etc. The player with better price, service and strategy could gain a more favourable position in the market. This competitive pressure generally enables businesses to be more efficient and proactive. In the pre-ICH situation, respondents had an incentive to go and compete for more traffic/volume as whatever traffic they brought in was only theirs.

116. As we have discussed above, the respondents have agreed under the ICH Agreement not to compete on the settlement price with foreign carriers. In addition, they have also agreed to share revenue as per the allocated shares. We must draw a distinction between the sharing of revenue as in the instant case and dividing of the market. In the latter a member of cartel is still a market player, whereas in case of former the member of the cartel is pure rent

seeker seeking rent on the strength of its license despite suspending its services as is in the present case. This situation is more egregious than those who divide the market and still provide services.

117. The fact is that in this post-ICH environment, there is no incentive to make any new investments or bring in further traffic. In fact, clause 7.3 of the ICH Agreement actually visualizes divestment by the respondents by calling for the 'rationalization' of individual international voice connectivity and interconnects with local loops and cellular companies. Furthermore, to make matters even worse, clause 7.2 directs all respondents to share contact details and business information about customers with each other through the ICH committee. Contact details and business information about customers is considered sensitive commercial information which is generally not to be shared with competitors. In effect, with such an arrangement they have made sure not to leave any room for competition, whatsoever.

118. In view of the foregoing we consider that ICH Agreement is also clearly in violation of clause (b) of sub-section (2) of Section 4 of the Act.

119. We consider it important to mention that both price fixing and quota allocation have been treated as per se violation of Competition principles. In this regard, attention is drawn 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)

120. Though the price fixing and quota allocation have been condemned as per se violations invariably having adverse effect on competition in terms of restricted choice, higher prices and reduced output. In the instant case, we consider it important to illustrate these effects through empirical evidence available on record.

Entry Barrier

121. The Show Cause Notice further alleges that the ICH Agreement, particularly the clauses 9.1 and 11.2 leaves no incentive for further investment and technical development in the market. Both relevant Clauses of the ICH Agreement are reproduced below.

> *9.1. The Agreement shall come into effect from the Effective Date and shall continue to remain in effect for a term in pursuance of the Policy Directive.*

> *11.2. In the event, PTA grants any new LDI License and/or transfers the existing LDI License to another operator, such new LDI Licensee/transferee shall become party to this Agreement. The Parties shall facilitate the induction of such licensee in the Clearing House framework on the terms and conditions contained herein and shall assist in meeting all the regulatory requirements as applicable at the relevant time. Share of the new shall be mutually agreed amongst all Parties to this agreement.*

4.6 ICH Committee shall advise to distribute the amounts available in ICH Escrow Account to each of the LDIs except PTCL immediately, as per standing instructions, proportionally in accordance with the percentage specified in Annex A of this Agreement

122. It must be appreciated that the ICH Agreement places an almost insurmountable barrier to the entry of new players. A potential new entrant first needs a license from PTA to enter the market. On top of it, during the term of the ICH Agreement, which is indefinite, a potential new entrant would also need all the LDI Operators to agree to the entry in terms of the condition laid out in clause 11.2 of the ICH Agreement. Without disturbing the PTCL share which is 50%, the new entrant could only get a share from the rest of the LDI Operators subject to their consent. There is a barrier to the share of the market available to the existing or potential LDI and the consent aspect from the ICH parties is another barrier which was non-existent in the pre-ICH.

123. It is difficult to appreciate that on what premise the existing players would let go of their shares to accommodate a new player. In any event, the ICH Agreement would disallow a new player from actually competing in the market, as its own share would be fixed by its potential competitors. Hence it would not be able to exert any competitive pressure in the market. The fact that the ICH Agreement is indefinite only exacerbates the situation. Thus, the violation of Clause (d) of Sub section (2) of Section 4 of the Competition Act is clearly made out on part of LDI Operators.

Issue IV - Regulated Conduct Defence

124. The respondents, particularly PTCL have taken the plea before the Commission, that even if their conduct violates the provisions of Competition Act, they cannot be held liable as they were merely following the directions of their regulators as far as entering into the ICH Agreement is concerned. They

referred to the Commission's Hajj Fares case, wherein the Commission employed the EU State Compulsion Test adopted earlier in the KSE Price Floor case.

EU State Compulsion Test

125. The EU State Compulsion test as stated in Hajj Fares case is as follows:

> 60. In the E.U., to plead the defense of state compulsion successfully, the party claiming the defense must satisfy the following three points:
>
> > i. That the state must have made certain conduct compulsory: mere persuasion is insufficient;
> >
> > ii. That the defense is available only where there is a legal basis for this compulsion; and
> >
> > iii. That there must be no latitude at all for individual choice as to the implementation of the governmental policy.
>
> [Footnotes Omitted]

126. Since the respondents have relied on the EU State Compulsion test, we will give it due consideration. Before moving on to that, it must be noted again that we have held that the ICH Agreement violates the provisions of Section 4 of Competition Act to the extent that it provides for the fixing of settlement prices with foreign carriers, the closure of respondents competing networks in favour of PTCL, and the division of revenues among the respondents. According to the respondents, the compulsion to do these actions arises from the Policy Directive issued by MOIT.

<u>That the state must have made certain conduct compulsory: mere persuasion is insufficient</u>

127. The first condition of the test to satisfy is that the state must have made certain conduct compulsory: mere persuasion is insufficient. The word 'state' encompasses here any public authority, including ministries of the Federal Government and other regulatory authorities established under statute, which exercises its powers on behalf of the state. The public authority must have been duly delegated this responsibility.

128. The power to issue policy directives by the Federal Government is laid out in Section 8 of the Telecommunication Act. The complainant and the intervener both have pointed to the fact that MOIT is not the Federal Government for purposes of Section 8 of the Telecommunication Act. They place reliance on the judgement of the Lahore High Court in Barrister Sardar Mohammad Ali v Federation of Pakistan dated 15 January 2013, wherein it has been declared that:

> 32. Federal Government has been defined under Section 2(fa) of the Act [Telecommunication Act] to mean the Ministry of Information Technology and Telecommunication Division unless specified otherwise through an amendment in the Rules of Business, 1973 ("Rules"). The following amendments were brought about in the Rules through insertion of item No.53 under the 'Distribution of Business under the Cabinet Division" in Schedule II of the Rules, placing PTA under the administrative control of the Cabinet Division, Cabinet Secretariat, Government of Pakistan.
>
> In the year 2003
>
> 53. Pakistan Telecommunication Authority (PTA)
>
> In the year 2010:
>
> 53. Administrative Control of National Electric Power Regulatory Authority (NEPRA), Pakistan Telecommunication Authority (PTA), Frequency

> Allocation Board (FAB), Oil and Gas Regulatory Authority (OGRA), Public Procurement Regulatory Authority (PPRA), Intellectual Property Organization (IPO – Pakistan) and Capital Development Authority (CDA).
>
> 33. The Federal Government for the purposes of this Act is, therefore, the Cabinet Division, enjoying administrative control over PTA, among other regulators, since 2003…
>
> [*Footnotes Omitted*]

129. Neither the respondents nor MOIT have been able to provide any rebuttal to this argument nor have they provided any judgement to the contrary by a higher forum. It is, therefore, clear from the judgement of the Lahore High Court that for the purposes of Telecommunication Act, the MOIT is not the Federal Government; instead, it is the Cabinet Division. It follows that the state has not made any conduct compulsory for the respondents, notwithstanding the fact that PTA gave instructions to the respondents pursuant to the Policy Directive vide its letter dated 23 August 2012.

130. Moreover, paragraph 2 of the Policy Directive reads: ". . . MoIT supports the establishment of ICH Exchange by a joint arrangement of LDI operators and accordingly moved a summary for the approval of Prime Minister as Minister in-charge of MoIT, which has been duly approved." The American Heritage Dictionary defines the verb support, inter alia, to mean: "7. To aid the cause, policy or interests of." Compulsion is defined as "n.1.a The act of compelling." Compelling in turn is defined as "adj. 1. Urgently requiring attention. 2. Driving forcefully." Persuasion is defined as "n. 1. The act of persuading." There is a clear degree of difference of positive action required of a state, when it supports, compels or persuades a subject. The MoIT only supports the establishment of ICH Exchange let alone persuade or compel.

<u>That the defense is available only where there is a legal basis for this compulsion</u>

131. Notwithstanding that the Policy Directive failed to meet the first prong of the test, assuming for a moment that the Policy Directive had in fact been issued by the Federal Government, we would assess whether the Policy Directive has legal basis for compulsion. Purportedly, the Policy Directive has been issued under Section 8 of Telecommunication Act.

132. Section 8 of Telecommunication Act is reproduced below:

> **8. Powers of the Federal Government to issue policy directives.—**(1) The Federal Government may, as and when it considers necessary, issue policy directives to the Authority, not inconsistent with the provisions of the Act, on the matters relating to telecommunication policy referred to in sub-section (2), and the Authority shall comply with such directives.
>
> (2) The matters on which the Federal Government may issue policy directives shall be—
>
> (a) the number and term of the licenses to be granted in respect of telecommunication systems which are public switched networks, telecommunication services over public switched networks and international telecommunication services, and the conditions on which those Licenses should be granted;
>
> (aa) framework for telecommunication sector development and scarce resources; and
>
> (b) the nationality, residence and qualifications of persons to whom licenses for public switched networks may be issued or transferred or the persons by whom licensees may be controlled; and
>
> (c) requirements of national security and of relationships between Pakistan and the Government of any other country or territory outside Pakistan and other States or territories outside Pakistan
>
> (2A) Notwithstanding anything contained in sub-section (2), the Cabinet, or any committee authorized by the Cabinet, may issue any policy directive on any matter related to telecommunication sector, not inconsistent with the provisions of this Act, and such directives shall be binding on the Authority.

133. Section 8(2) of Telecommunication Act empowers the Federal Government to issue policy directives in respect of the instances listed from Section 8(2)(a) to 8(2)(c). The Policy Directives scope is beyond these instances, and do not have a legal basis vis-à-vis provisions of the Competition Act. Section 8(2A) empowers the Cabinet, or any other committee authorized by the Cabinet, to issue Policy Directives on any matter related to the telecommunications sector, provided that such directives are not inconsistent with the provision of Telecommunication Act. Since the Policy Directive has not been issued by the Cabinet or any of its authorized committee, it is without legal effect.

134. Assuming again that the Policy Directive has been issued by the Cabinet, such Policy Directive cannot stand the scrutiny of Section 8(2A) of Telecommunication Act as it is inconsistent with the provisions of Telecommunication Act. Section 6(e) of Telecommunication Act clearly requires that PTA shall ensure free competition in the market exists and is maintained while performing its functions. Any directive requiring PTA or its licensees to undertake anti-completive actions would not have been a valid exercise of authority under Section 8(2A) of Telecommunication Act.

<u>That there must be no latitude at all for individual choice as to the implementation of the governmental policy</u>

135. Coming to the third part of the test, we further assume for a moment that the Policy Directive was issued legally issued by a state representative. Having scrutinized the Policy Directive in detail, we find no directive therein which requires the respondents to decommission their international gateway switches or not to take the transit traffic route. Similarly, there is no requirement in the Policy Directive that the respondents need to share revenues according to a pre-determined formula. The only thing the Policy Directive required of the respondents was to ensure that all incoming international traffic is initially entered through a single switch. However, we must point out that there is letter dated December 03, 2012 on record which PTA copped to all LDI

Operators informing that the earlier letter of September 25, 2012 may be treated as withdrawn. Under the referenced letter (September 25, 2012) all LDI Operators were directed to withdraw their international interconnection circuits to let PTCL terminate all international incoming calls. In light of withdrawal of such letter, it becomes further evident that ICH was the initiative and remains at present a private agreement *inter se* the LDI Operators. The withdrawal was a result of the Honourable Lahore High Court interim ruling that asked PTA to suspend the ICH.

136. The respondents' actions, therefore, fail all three parts of the test they have themselves proposed.

Implied Immunity Test in the United States

2. The position in the United States, which is similar to that in Pakistan, is as follows, as stated in the *KSE Floor Pricing* case:

> 61. The position in the United States is as follows:
>
> "[W]hen Congress by subsequent legislation establishes a regulatory regime over an area of commercial activity, the antitrust laws will not be displaced unless it appears that the antitrust and regulatory provisions are plainly repugnant"; and "[r]epeal is to be regarded as implied only if necessary to make the [regulatory act] work, and even then only to the minimum extent necessary." **The Court has also professed an unwillingness to grant immunity "absent an unequivocally declared congressional purpose to do so.**"
>
> [*Footnotes Omitted – Emphasis Added*]

137. In Pakistan, the legislature, through Section 54 and 55 of Competition Act, has made it clear that there will be no implied immunity from Competition Act unless unequivocally declared under Section 54 of Competition Act. The relevant provisions are reproduced below.

> **54. Power to exempt**. —The Federal Government may, by notification in the official Gazette, exempt from the application of this Act or any provision thereof and for such period as it may specify in such notification, —
>
> > (a) any class of undertaking if such exemption is necessary in the interest of security of the state or public interest;
> >
> > (b) any practice or agreement arising, out of and in accordance with any obligation assumed by Pakistan under any treaty, agreement or convention with any other State or States; or
>
> 55. **Act not to apply to trade unions**. —Nothing in this Act shall apply to trade unions or its members functioning in accordance with any law relating to industrial relations for the time being in force.

138. There are only two situations under which an undertaking can claim immunity from the application of Competition Act's provisions; first, if the undertaking is a trade union carrying out a function under industrial relations laws and second, if the Federal Government, which in case of Competition Act is the Ministry of Finance, formally exempts an undertaking or a class of undertakings based on one of the three criteria listed in Section 54 of Competition Act. Undertakings cannot take the generic plea that they are immune from the application of Competition Act since their conduct was directed or regulated by a regulatory authority. In fact, it is clear from the definition of 'undertaking' given in Section 2(1) (q) of Competition Act that even regulatory authorities are subject to the provisions of Competition Act. The overriding effect of Competition Act, as previously discussed, is clearly laid out in Section 59.

139. In this regard, the intention of the legislature not to provide immunity to undertakings in the regulated industries becomes abundantly manifest when the provisions of Competition Act are contrasted with that of its predecessor, the Monopolies and Restrictive Trade Practices (Control and Prevention)

Ordinance, 1970 (MRTPO) where exemptions were much broader in scope and explicitly provided immunity to regulated industries.

140. Thus it is clear that the legislature, in all its wisdom, explicitly withdrew the exemptions available to certain regulated sectors, including the telecom industry, under MRTPO when it passed Competition Act with a much narrower scope of exemptions. This step was in harmony with the changing economic landscape in country where promotion of competition among economic actors is the underlying principle of achieving economic efficiency and growth.

141. The Commission employs the EU State Compulsion test or the US Implied Immunity test with a view to ascertain whether regulated conduct repugnant to the provisions of Competition Act exists and if so ascertain its legality or otherwise that goes into consideration while devising a remedy or imposing the penalty.

142. The irony is such that the PTA, the telecom regulator, itself has shown serious concerns on ICH Agreement in 2011 and forwarded its observations to MoIT with the recommendation to address those concerns in revised ICH Agreement. None of the concerns raised by PTA have been addressed in the revised ICH Agreement. Some of the important concerns of PTA which highlight the anti-competitive aspects of the ICH Agreement are mentioned below:

> *The basic intent of this Agreement is that PTCL shall terminate all incoming international voice traffic in Pakistan. This is anti-competitive per se and against the spirit of whole deregulation process. In this regard, it may also be observed that any decision on the competitiveness of this Agreement, given by Competition Commission of Pakistan, is not binding upon PTA, as PTA has full jurisdiction to regulate competition independently in the telecom sector.*
>
> *TWA being a licensed bandwidth provider has also raised concerns about the proposed ICH arrangement. In its view, if*

total international traffic is coming through PTCL then the business of TWA will be in jeopardy; hence needs to be addressed.

APC for USF rate has recently been further decreased from 2.75 cents/min to 1.25 cents/min (effective from October 01,2011). The rate was decreased with an aim to discourage and curb grey traffic. However, with the ICH framework in place, the rate at which LDI operators will bring in international incoming traffic will become stable and rather increase. This will again give incentive to grey traffickers to indulge in illegal practices.

Under the agreement, it is envisaged that PTCL will take the responsibilities of marketing and bringing international traffic in Pakistan. Apparently, the role of LDIs has been reduced due to which competitiveness in the market would disappear. LDIs should be involved in marketing and they may sign agreements with foreign carriers.

In ICH agreement, PTCL is being held responsible for paying APC for USF dues on behalf of all the LDI operators. In case PTCL defaults in paying these dues, then the whole spirit of the agreement shall be lost. Currently, few operators are regularly paying dues but with ICH agreement in place, it will all depend on PTCL to pay dues on time.

Although the proposed mechanism will help to bring stability in settlement rates and to streamline the future payments, however, this will create monopoly of PTCL in the market which is against the spirit of deregulation policy. It may be noted that as per WTO commitments, GoP issued Deregulation Policy and accordingly PTA issues new licenses to LL and LDIs to end monopoly of PTCL.

Importantly, we cannot ignore the letter dated December 03, 2012 whereby PTA withdrew its earlier letter of September 25, 2012 as discussed in paragraph 135.

143. Notwithstanding the discussion above, it would suffice to refer to the well settled principle of law that a policy directive cannot override, or prevail over, an express provision of the statute passed by the legislature. Hence, no protection or immunity can be sought from the application of the Competition

Act by the undertakings under the umbrella of such a policy directive. Accordingly, all the LDI Operators are held liable for the contravention of Section 4 of the Competition Act established above.

Impact of ICH on Competition

144. There is no doubt that termination rates for incoming international calls have been hiked Under the ICH Agreement. The argument that this burden has no impact on consumers in Pakistan is too naïve as its adverse impact on consumer results from a simple demand shift. PTA' s data shows that the volume of incoming calls as on September 2012 before the ICH Agreement was 1,946 million minutes, which decreased to 579 million minutes in February 2013 after the establishment of ICH. In this regard we would also like to refer to the increase in outgoing traffic in comparison to incoming traffic in Pakistan. We note that there is a decrease in volume of incoming international calls and increase in outgoing traffic. Outgoing represented 9% of total international traffic which has increased to 24% after ICH which demonstrate the demand shift and the burden being passed on to consumers in Pakistan and also explains that price elasticity played a role in generating volumes/demand for consumers. Furthermore, demand shift may suggest either increase in grey traffic or is reflective of reduced economic activity in Pakistan. It is also negates the clearly laid down objective of "i*ncrease service choice for customers of telecommunication services at competitive and affordable rates"* under the Telecom Deregulation Policy, 2003.

145. The corner stone for the implementation of the ICH arrangement has been to prevent evasion of APC payment, recover its dues and to curb the grey traffic. Logically the higher the rates the greater the incentives for grey traffic. As for the monitoring part even in the pre-ICH the relevant telecom Rules and Regulations and license itself clearly spell out the responsibility and the mechanism for monitoring. In this regard it would be useful to refer to the following provisions. LDI License specifically provides:

6.3.1 The Licensee shall provide, at its own cost suitable equipment at premises designated by the Authority in order to measure and record traffic, billing and quality of service in a manner specified by the Authority. The Licensee shall provide the Authority with access to such equipment, and the information generated by such equipment.

146. Effective monitoring of traffic enables the Regulator to control incidence of grey traffic. Monitoring and Reconciliation of Telephony Traffic Regulations, 2010 give an elaborate mechanism to control grey traffic and also to take measures to curb any security threat. The aforementioned Rules are reproduced below in relevant parts:

***Establishment and Administration of a System by Licensee**:- (1) Each LDI licensee and Access Provide shall establish the System at its own cost in accordance with these regulations as determined and required by the Authority from time to time at the PTA designated premises.*

(2) Subject to the mutual consent in writing of all, operational and non-operational licensees or Access Providers or some operational LDI licensees or Access Providers as the case may be, for procuring, establishing, deploying and maintaining of the System, the Authority may allow deployment of such System collectively on the basis of a cost effective solution.

Provided that the term collectively shall not include the mutual arrangement amongst LDI and Access Providers for deployment of the System.

(5) All landing station and infrastructure licensee(s) shall establish a Monitoring System with its interface to the Authority, on its own cist for the purpose of monitoring of telecommunication traffic (voice and data) within one hundred and twenty days of the notification of these regulations:
Provided that the Authority may allow the Landing Station Licensee to enter into an arrangement with the LDI collectively System formed under sub-regulation (2) to deploy a combined System, in accordance with the territorial limits specified its license a s accost effective solution.

(6) Any Monitoring system or system deployed under sub-regulation (2) and sub-regulation (5) above shall comprise and he mandatory feature of monitoring links and controlling grey traffic with the minimum of the following features and shall ensure compatibility to provide such information as required by the authority where applicable.

147. Having reviewed the provisions of LDI License and the Monitoring Regulations, we don't see any justification for LDI Operators to close their switches and rely only on PTCL network to implement the ICH through 'price fixing' and 'quota fixing' a clear violation of the Competition Act; on the pretext of controlling grey traffic when an adequate mechanism was already in place. Even otherwise PTA being the regulator was rightly entrusted with the obligation of monitoring and the licensees could have contributed to upgrade/upkeep of existing set up. Nothing has been placed on record to substantiate that grey traffic has been reduced or controlled after the ICH arrangement. Instead as mentioned above huge reduction in the volume of incoming traffic may suggest otherwise or at least it is reflective of reduced economic activity in Pakistan.

148. The payment/recovery of APC has been the focal point for establishing the ICH. APC arrears pre-ICH roughly comes to PKR 34 Billion against 10 of the LDI Operators who have challenged the same before the court. Under the ICH Agreement the mechanism provided to recover the outstanding dues under Clause 4.9 of the ICH Agreement is not adequate as the recovery for most will go well beyond their remaining license period. It is important to mention that APC was being contested by10 of the 14 LDIs who have APC dues of 33.8 Billion they contest APC matter pending but now agree under ICH to pay it. In the previous notification of the PTA the pattern that emerges is that APC was being reduced over the year and had come down from 7.5 cent in year 2009 to 1.25 cent in 2011 in last price notification prior to ICH. This in our view is attributable to the realization that USF had sufficient funds lying

unutilized (approximately PKR 50 Billion) and the other part, that the windfall profits earlier available to the LDI Operators, was no longer there in the pre-ICH competitive environment.

149. It would also be interesting to see who the real beneficiary of this ICH arrangement truly is. After the division of the market by the ICH Agreement, the nature of the market can be gauged by the greater gains to the respondents in terms of larger shares than pre ICH traffic shares. The table given below provides a summary of estimated revenue earned by LDI Operators before and after the establishment of ICH and also the amount of associated APC due to Government of Pakistan for USF contribution.

Month	Total Traffic (Minutes)	Incoming Termination Market Rates	Incoming Revenue as Per Market Rates (ASR)	Estimated LDI Share in Incoming Revenue	Estimated APC Payable
		Cent/ min	---------- USD in Million ----------		
	<A>	<B>	<A*B>	<A*(B-1.25 Cent)>	<A*1.25 Cent>
Pre – ICH					
Jan-12	1,440,221,330	2.44	35.14	17.14	18.00
Feb-12	1,460,810,607	1.83	26.73	8.47	18.26
March-12	1,707,519,081	1.98	33.81	12.46	21.34
April-12	1,671,251,706	1.98	33.09	12.20	20.89
May-12	1,833,318,129	2.14	39.23	16.32	22.92
June-12	1,782,524,304	2.14	38.15	15.86	22.28
July-12	1,880,853,035	2.14	40.25	16.74	23.51
August-12	2,070,309,850	2.14	44.30	18.43	25.88
September-12	**1,946,294,485**	**1.68**	**32.70**	**8.37**	**24.33**
Post – ICH					

	<A>	<B>	<A*B>	<A* 5.9 Cent>	<A*2.9 Cent>
October-12	999,074,144	8.8	87.92	58.95	28.97
November-12	834,765,563	8.8	73.46	49.25	24.21
December-12	741,446,195	8.8	65.25	43.75	21.50
January-13	654,249,656	8.8	57.57	38.60	18.97
Feburary-13	**578,600,503**	**8.8**	**50.92**	**34.14**	**16.78**
Increase/ (Decrease)	**-1367693982**	**7.12**	**18.22**	**25.77**	**-7.55**
Increase/ Decrease (%)	**-70%**	**424%**	**56%**	**308%**	**-31%**

Source: PTA

The estimated revenue of LDI Operators for the month of September 2012 before the ICH arrangement were US$ 8.37 million, which post ICH, has increased to US$ 59 million in the month of October 2012 and currently stands as US$ 34 Million in the month of February 2013. This shows that ***despite reduction in the incoming traffic by 70% after the establishment of ICH, the revenue of LDI's increased by 308% in Post ICH period.*** The main reason behind increase in Revenue of LDI's is that ASR now has been taken as to 8.8 cents/minutes from rates around 2 cents/minute pre ICH. However, if we look at the ***monthly APC received/ receivable by the PTA, it has decreased from $ 24.33 million to $ 16.78 million (Decrease of 31%).*** On face of it defeating the objective of ICH.

150. It was emphasized again and again before us by all the parties that the very purpose of ICH arrangement is to bring in foreign exchange and improve the balance of payment. It was argued that *"ICH will divert balance of foreign exchange payments and will have positive impact on economy which is estimated to be USD 37.5 Million per month."* However we find merit in the submissions of BTL that most of the LDI operators (11 out of 14) have foreign controlling shareholding and this fact was not disputed during the

course of hearing. Thus the foreign equity would eventually require transfer to their owners, hence the nationalist ground is of no avail.

151. It is important to appreciate that the Telecom De-Regulation Policy, 2003 itself emphasizes the aims of liberalizing the economy and developing a *"fully competitive market in telecom sector"* to give increased service choice for customers, competitive and affordable rates, promotion of infrastructure development, increasing private investment in the telecom sector and encourage local telecom service industry, encourage fair competition amongst service providers etc.

152. Before ICH Agreement there were two players providing international bandwidth - PTCL and Trans World Associates (Pvt.) Limited (TWA). TWA had 10 LDI licensees terminating incoming international calls but as a consequence of ICH Agreement, LDI licensees have suspended their circuits with TWA and rely solely on PTCL for termination of all incoming international traffic. Thus ICH Agreement has not only eliminated the only competitor and has created PTCL's monopoly in international bandwidth market but also has raised barriers to entry for potential entrant in this market. In LDI Market, ICH Agreement has reduced competition between LDI licensees by effectively shrinking the market players from 14 to 1. This is the immediate and most obvious impact on existing competition. LDI operators will not have an incentive to improve quality of service or to invest in network development or improvement of the infrastructure.

153. Furthermore, Local Loop operators have been made completely dependent on PTCL's circuits for international incoming calls when providing services to their customers. Once again it is stressed that choice is the essence of competition. ICH Agreement forecloses the market and kills the choice or even the option of a choice for Local Loop Operators.

154. With no competition left in the market for handling of incoming international call traffic the ICH Arrangement reduces choice, forecloses the market,

removes incentive for better quality of service, removes incentives for investments in improvement of infrastructure, reduces the size of the market and market players, confers anti-competitive advantages and becomes a clear threat to consumer interest in total negation of spirit of Telecom De-regulation Policy, 2003. In fact, ICH Agreement squanders any benefits that the telecom sector has made till now - benefits that have accrued precisely because of focus on competition.

155. The Commission had carefully taken the position earlier that competition in an economy affects not just players within it but also helps make it more attractive for foreign investors. The increasing cost of incoming international call traffic also means that the cost of doing business for any potential investor goes up. It also means added burden for any Pakistan based entrepreneurs trying to attract investors from abroad since a demand shift burdens the person based in Pakistan while at the same time sending out the wrong signal about the competition related potential of our markets. Just by way of comparison it may kindly be noted that India presently has settlement rates of 1.2-2 cents per minute. MoIT in its written submission and also during the course of hearing has relied on ICH model being considered in Bangladesh. While Bangladesh may be considering such an arrangement the modalities appear to be different to the said ICH arrangement as firstly it is not mandatory for a International Gateway (IGW) operator to be part of the consortium unlike the ICH in Pakistan. There is no apparent restriction on the IGW's activity of international traffic incoming and outgoing and also no sharing of the market from what has been placed by MoIT as part of their submission. The ICH being considered is primarily to act as a central monitoring platform. Even otherwise two wrongs would not make a right.

156. We must recognise that an anti-competitive arrangement as far reaching as ICH Arrangement will make the Pakistani telecom market significantly less attractive to any potential foreign investment and would also isolate Pakistan globally. Such policies are certainly not in sync with international trends and

being retrogressive and can have far reaching implications. In the present case we have already witnessed a few instances. Attention is drawn to the recent decision of U.S. Federal Communication Commission (FCC).

157. Vonage, a US company filed a petition with the FCC against high termination rates charged in Pakistan under ICH. FCC issued a public notice on Vonage's petition and in its order dated 05-03-13 observed that the recent actions by certain Pakistani LDI Operators to set rate floors over previously negotiated rates with US carriers for termination of international telephone calls to Pakistan are anti-competitive and require action to protect US consumers. Accordingly, FCC ordered all US carriers not to pay termination rates to Pakistani carriers in excess of the rates that were in effect immediately prior to the rates increase on or around 01-10-12.[79] If this becomes the precedent vis-à-vis other countries it would undoubtedly place Pakistan in an awkward position.

158. Also, the Office of the United States Trade Representative in its report published in 2013 has stated that Pakistan is a member of the WTO with commitments under the GATS Annex on Telecommunications. Section 5 of the Annex on Telecommunication requires the provision of access to telecommunications networks and services in Pakistan on reasonable terms and conditions. The WTO Dispute Settlement Body has found that "access to and use of public telecommunications transport networks and services on 'reasonable' terms includes questions of pricing of that access and use." There is substantial evidence that carriers participating in the market for terminating international traffic into Pakistan appear to be colluding to avoid competition and to fix the rate for such termination at a level significantly above the prior range of rates that was offered when all such participants were actually competing to provide such services. These actions raise concerns about

[79] Petition for Protection from Anticompetitive Behavior and Stop Settlement Payment Order on the U.S.-Pakistan Route, IB Docket No. 12-324, http://www.fcc.gov/document/stop-settlement-payment-order-us-pakistan-route.

Pakistan's obligation to provide reasonable terms for access and use as required by the GATS Annex on Telecommunications.

159. *We live in an age of international commerce, where decisions reached in one corner of the world can reverberate around the globe in less time than it takes to tell the tale.*[80] This phrase from the US Court of Appeals became the basis of what the competition world knows as the "effects doctrine." The effects doctrine implies that no matter where an anticompetitive activity takes places, if it affects one's country, the competition agency of that country can take cognizance of the matter. The effects doctrine is embedded in Section 1(3) of the Competition Act, 2010 where it reads the Act "shall apply to all undertakings and all actions or matters that take place in Pakistan and *distort competition within* Pakistan. Just as this Commission shall not allow the inflow of anti-competitive price in this country, it needs to be appreciated that the relevant authority of other countries would protect their businesses and consumers against any such adverse effect.

160. We have made it clear through the illustrations given above, the pernicious nature of the ICH arrangement, its harmful effects on the telecom sector, consumers and the economy in general which must be condemned and cannot be condoned at any cost.

Remedy

161. In view of the foregoing and having established the contravention of clauses (a), (b) and (d) of sub section (2) of Section 4 of the Competition Act on part of all the LDI Operators which are viewed as hard core violations, there is no doubt that the ICH Agreement is void in terms of subsection (3) of Section 4 of the Competition Act.

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[80] United States v. Nippon Paper Indus. Co., 109 F.3d 1, 8 (1st Cir. 1997), *rev'g* 944 F. Supp. 55 (D. Mass. 1996).

162. The ICH Agreement stands annulled and LDI Operators are directed to cease and desist from carrying on any prohibited practices of such nature and are further reprimanded not to repeat such behaviour or to enter into any other agreement or engage in any other practice with similar object or effect and PTA, is advised to restore competition amongst the LDI Operators as it existed prior to implementation of the ICH Agreement.

163. While the parties have failed to satisfy the test of regulatory conduct there has been apparent involvement of MoIT and PTA (even though without legal effect) in the establishment of ICH. Notwithstanding that the nature of the violation by the LDI Operators on the face of it is so egregious and deliberate that it attracts the maximum penalty, we feel constrained in imposing the maximum penalty; bearing in mind such involvement of MoIT and PTA. However, the facts adequately establish the intent and conduct of the LDI Operators in the implementation of the ICH arrangement whether within or outside the realm of the purported regulatory framework. Therefore, they cannot be absolved from the liability arising from such blatant contravention under the Competition Act. Thus, in the interest of justice, we hereby impose a penalty equivalent to 7.5% of the annual turnover on each of the LDI Operators for the last preceding financial year 2012 and hold them liable to pay the penalty within 45 days from the date of issuance of this order. All penalties under this order, upon recovery shall be credited to the Public Account of the Federation in terms of Section 40 of the Competition Act.

164. Accordingly, from the financial reports of the undertakings available, in terms of the percentage, PTCL is liable to pay PKR 8,309 million (PKR 8.3 billion), whereas Worldcall and Telecard are liable to pay PKR 534 million, and PKR 189 million, respectively. In respect of the remaining 11 LDI operators, the annual turnover was not available to us. Hence, the remaining LDI operators namely: Multinet Pakistan (Private) Limited, Wateen Telecom Limited, Wi-tribe Pakistan (Private) Limited, 4B Gentel International (Private) Limited,

ADG (Private) Limited, Linkdot Net Telecom Limited, Circle Net Communications Pakistan (Private) Limited, Redtone Telecommunications Pakistan (Private) Limited, Telenor LDI Communications (Private) Limited, Wise Communication (Private) Limited and Dancom Pakistan (Private) Limited are hereby directed to submit the annual turnover for the last preceding financial year to the Commission within 10 days of the date of this order. Failure to do so shall, in addition to the 7.5% of their respective turnover as mentioned in paragraph 163, make the subject undertakings additionally liable to pay by way of penalty a further sum of PKR 100,000 for each day of default.

165. For failure to comply with the Order passed by the Commission on 08-02-12 no satisfactory response/reply was offered by the LDI Operators. Despite clear direction by the Commission to the LDI Operator that "*if in future the Applicants enter into such agreement/arrangement, notwithstanding, any authorization obtained from any other authority such agreement/arrangement prior to its execution would require clearance from the Commission*", the LDI Operators acted in blatant disregard of the said Order which in our considered view only warrants a maximum penalty of PKR 1,000,000 (one million). Therefore, all the LDI Operators are hereby held liable to pay this amount.

166. For any loss resulting from illegal gains received by LDI Operations under the ICH Agreement, the aggrieved parties can claim compensation from the LDI Operators before the Court of competent jurisdiction in pursuance of this Order.

167. We must add that international telephony is considered as *an* integral backbone of the infrastructure industries, such as, banking, aviation, shipping, information and communication technology. The growth of an economy is largely dependent on telecom infrastructure and services offered. Pakistan has been labelled as the "poster child" in liberalization of telecom sector in early

2000s, the ICH arrangement being the step in wrong direction has mutilated this image. Such pervasive anticompetitive conduct must not be condoned or tolerated as it has devastating impact on our already reeling economy.

Order accordingly.

(Rahat Kaunain Hassan)	(Dr. Joseph Wilson)	(Dr. Shahzad Ansar)
Chairperson	Member	Member

Islamabad, the April 30, 2013