IN THE HIGH COURT OF SINDH AT KARACHI

BEFORE:
Mr. Justice Mohammad Shafi Siddiqui

OGRA J.C.M. No.01 and 02 of 2011, 01 of 2012,
02 of 2013, 01 of 2014 and 09 of 2016.

Suit Southern Gas Company Limited

Versus

Oil & Gas Regulatory Authority & another

Date of Hearing:	18.10.20116, 19.10.2016, 20.10.2016, 24.10.2016, 25.10.2016, 26.10.2016, 27.10.2016, 02.11.2016, 03.11.2016
Petitioner:	Through Mirza Mahmood Ahmad along with Mr. Fahad Malik Advocates.
Respondent No.1:	Through Mr. Mr. Salman Akram Raja and Mr. Tariq Bashir Advocates along with Mr. M. Rizwan-ul-Haq, Executive Director Litigation (OGRA).
Respondent No.2:	Nemo
Applicants:	Through Mr. Anwar Mansoor Khan along with Ms. Omemah Khan, Ms. Reem Tashfeen Niaz and Mr. Muhammad Ali Talpur Advocates.

J U D G M E N T

Muhammad Shafi Siddiqui, J.- These are six petitions under section 12(2) of Oil & Gas Regulatory Authority Ordinance, 2002 (hereinafter referred to as Ordinance 2002) filed by Sui-Southern Gas Company Limited against its regulator OGRA in which, amongst others, applications under order I rule 10 CPC filed by different individuals/ entity are also filed.

2. Before proceeding with the case of the petitioner and respondents on merit, it is necessary for me to decide applications under order I rule 10 CPC filed by the interveners/applicants.

3. It is the case of applicants/interveners that they have filed these applications in dual capacity i.e. being shareholders and consumers.

Learned counsel appearing for the interveners/applicants submitted that they may not be aggrieved of the determination of OGRA insofar as tariff and the UFG Benchmark is concerned, however applicants would be directly affected with the outcome of these proceedings and hence per learned counsel application deserved to be granted and the applicants be impleaded as petitioners and/or respondents.

4. Learned counsel for respondent No.1 on the other hand has vehemently opposed the applications. He submitted that Order I rule 10 CPC has to be considered minutely while deciding these applications. Rule 10(2) provides that the name of any person who ought to have been joined whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court factually and completely to adjudicate upon and settle questions involved in the suit, be added. He submitted that the applicants do not come in the frame in any form.

5. On merit counsel for respondent No.1 submitted that as a shareholder the applicants are bound by the decision of the Board of Directors of the company and as being consumers their applications under order I rule 10 CPC appear to be malicious as the only intention that could be gathered, if at all they are aggrieved of the determination, is that they intend to enhance the tariff which is not the case of applicants in the capacity of consumers.

6. I have heard learned counsel for the applicants/interveners and that of learned counsel for respondent No.1 and perused the record and the law applicable thereto.

7. The prime question in determining the application under order I rule 10 CPC is the necessity of the applicant to determine the real question involved in the matter. Order I rule 10(2) insofar as the present applications are concerned provides that the Court may at any stage of the proceedings ..... that name of any person who ought to have been

joined whether as plaintiff or defendant or whose presence before the Court may be necessary in order to enable the Court effectively and completely adjudicate upon and settle all questions be added. What is important here is to see whether the plaintiff/petitioner in such a situation ought to have joined the applicant as necessary and property party and in this phrase of subsection this is the only essential consideration. I would score of this proposition that insofar as determination of questions involved in the petitions are concerned, the petitioner ought to have joined the applicants/interveners as party as in their absence not only that petitioner could present its case but the Court may have also factually and completely adjudicated upon the matter.

8. The second phrase of Sub-Rule 2 of Order I rule 10 CPC relates to a party whose presence may be necessary in order to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit. Such is also not the reality as the Court can factually and completely adjudicate upon all the questions raised by the petitioner in the petition. Any additional point, which may have been raised by these applicants, which does not form part of the pleadings in the petition, is not open for considering. The applicants/interveners may have independent cause in this regard and they may have been aggrieved of any determination as far as the present controversy is concerned, however they do not appear to be necessary and proper party and I am not inclined to join them as such hence their applications are dismissed. In the capacity of a shareholder they are bound by the decision of Board of petitioner and they have not presented the case of oppression. Similarly they cannot be deemed to be aggrieved of the determination of OGRA.

9. Coming to the petitions, brief facts are that the petitioner is a public utility company having majority of its shares held by Federal

Government. The petitioner has obtained a license from respondent No.1 for transmission, distribution and sale of natural gas. Substantially the petitioner company is seeking implementation and interpretation of law applicable to its tariff determination under the Ordinance 2002, the Natural Gas Tariff Rules 2002 (hereinafter referred to as Tariff Rules) and Natural Gas Regulatory Authority (Licensing) Rules, 2002 (hereinafter referred to as Licensing Rules) and the Companies Licenses for transmission, distribution and sale of natural gas. The determinations made in these petitions are dated 02.12.2010, 02.05.2011, 18.05.2012, 01.06.2013, 03.07.2014 and 18.12.2015.

10. The respondent No.1 has raised some preliminary arguments in its reply which relate to jurisdiction of this Court under sections 12(2) of the Ordinance 2002. It is the case of the OGRA/respondent No.1 that this Court in terms of Section 12(2) exercises jurisdiction which is at par with the extraordinary jurisdiction under Article 199 of the Constitution and that for the reasons mentioned therein this Court only then could direct the respondents to refrain from doing anything which is not permitted by law to do or to do something which is required by the law to be done or declaring that any act done or proceedings taken has been taken or done without lawful authority and have no legal effect. Learned counsel submitted that the determinations under challenge are based only on estimated benchmarks regarding Unaccounted for Gas (UFG) and others hence under section 13 of OGRA Ordinance the petitioner has an adequate remedy to file a review of the decision challenged through the instant petitions, therefore, these petitions are not maintainable and are thus liable to be dismissed by this Court; these are misconceived and malafide. This Court, while deciding these questions which are subject matter of the determination of the tariff, cannot sit and exercise the appellate jurisdiction.

11. Learned counsel for the petitioner in this regard has argued that the parameters of the jurisdiction of this Court under section 12(2) of the Ordinance 2002 are no doubt similar to the exercise under Article 199 of the Constitution and the mandate of Section 12(2) is that this Court may declare any act in violation thereof to be unlawful. The scope, as submitted, is limited to the questions:

- That the authority has failed to comply with the specific mandate of and the duty cast upon it by section 8(6)(g) of the Ordinance 2002;
- That the OGRA has failed to comply with the specific rule namely Rules 17(1)(c) of the Tariff Rules & License Condition 21.1 in the context of suiting UFG Benchmark;
- That UFG itself being imposed on the petitioner is nothing more than the penalty and OGRA has acted unlawfully and against the provisions of the Statute and the rules by imposing a penalty in excess of the permissible range provided in law; and
- That the treatment of certain non-operating incomes of the petitioner as operating by OGRA is unlawful, illegal and without jurisdiction.

12. Heard the counsels on this preliminary issue.

13. Insofar as this preliminary issue of jurisdiction is concerned, there is no cavil to this proposition that any judicial review is subject to the policy as framed by the Federal Government. Neither this Court exercises appellate jurisdiction nor any expert opinion is required to be formed by exercising the jurisdiction in terms of section 12(2) of the Ordinance 2002. The domain and mandate through which the impugned determinations are to be scrutinized is built in Section 12(2). Any stretch of such jurisdiction would certainly be beyond the domain of this Court but to the extent of parameters relating to the regulated activity, this Court is competent to scrutinize such determination, if has not been done within the powers provided to the regulator in terms of OGRA

Ordinance 2002 and others as referred above or done in excess of their jurisdiction.

14. Insofar as Section 13 of the Ordinance 2002 is concerned, it relates to a situation where the authority may oblige to review, rescind, change, alter or vary any decision or may rehear an application in the event of a change in circumstances or the discovery of evidence which in the opinion of the Authority, could not have reasonably been discovered at the time of decision or (in the case of rehearing) at the time of the original hearing, if consideration of the change in circumstances or of new evidence would materially alter the decision. The situation as described in Section 13 is different and distinguished from the one provided under section 12(2) of the Ordinance. The matrix to initiate/apply Section 13 of the Ordinance 2002 are different than those available to the petitioner in terms of Section 12(2).

15. In view of the above, I would score of the consideration of the respondent No.1 that this Court has no jurisdiction to scrutinize the decision in relation to regulated activity within the frame of Section 12(2) and hold that in the frame of Ordinance 2002 to the extent of the tariff determination by the OGRA, the petitioner has no other efficacious remedy than the one available under section 12(2) of Ordinance 2002.

16. I would now deal with four questions as raised by the petitioner's counsel on the basis of which a challenge is thrown to the determination of the OGRA.

18. The first contention of Mirza Mahmood Ahmad, the learned counsel for the petitioner, in this regard is that as apparent from the bare reading of Section 8(6)(h) of Ordinance 2002 it cast a duty upon OGRA to ensure SSGC the right of return mentioned in its license. This assurance is not provided in any other regulatory framework as it guarantees to the licensee insofar as the financial benefits are

concerned. He submitted that the mandate and purpose of section 8(6)(h) is as clear as possible by the statutory provisions to be.

19. Learned counsel submitted that the word 'ensure' means a guarantee which cannot be disturbed. He further argued that such assurance and guarantee is in the shape of return of profit in terms of percentage and hence a 17% return in terms of License Condition No.5.2 has to be a minimum benchmark and cannot be subjected to any other interpretation. Learned counsel for the petitioner has relied upon definitions of word 'ensure' as provided in Oxford English Dictionary, Merriam Webster and the 'rate of return' which normally and usually is in percentage of the original investment. He submitted that on the basis of the definitions of 'ensure' and 'rate of return' it is a conscious choice of the legislature in using the two words in section 8(6)(h) that no matter what happen the petitioner is entitled to and is virtually guaranteed to rate of return as provided in its license. It is claimed that this assurance is not an unreasoned one because of the nature of its operation and its reliance on socio economic agenda of the State in its operation.

20. He submitted that the petitioner has no choice for its customers due to the policies of the Federal Government as to what extent it can make and what it cannot nor can it charge a tariff in excess of that dictated by the respondent authority. He further submitted that if such would have been the choice of the petitioner they would desire to supply natural gas to areas which are commercially viable. On the contrary the petitioner is bent upon to supply natural gas to areas where any other commercial entity would consider unviable.

21. Counsel further submitted that Section 8(6)(h) of the Ordinance has to be a paramount consideration insofar as sub-delegated legislation is concerned. The interpretation that OGRA places on section 8(6)(h) amounts to render it subservient to license condition 5.2. It infringes the

cardinal principle that rules made under any Act could never be intended to override specific provisions of the Act itself. He relied upon the case of Province of Punjab v. Munir Hussain Shah reported in 1998 SCMR 1326 and Ziauddin Hospital Trust v. Director-General/ Commissioner, Excise & Taxation, Sindh reported in PLD 2001 Karachi 52. He concluded this point that the mandate of the legislature as expressed in Section 8(6)(h) only requires an interpretation that the rate mentioned i.e. 17% is the bottom cap and not ceiling.

22. He next argued that the exercise of determination of UFG Benchmark is one of the active components in the annual exercise of determining tariff. It is on this account that the evaluation criteria of the total revenue requirement specified in Rule 17(1)(c) provides that the tariff should include a mechanism for all licensees or licensees to get benefit from and pay penalty for failure to achieve benchmarks set by the authority through yardstick regulation. To support such contention in pursuance of Rule 17(1)(c) it is claimed that the License Condition No.21.1 contains a mechanism as mentioned in Rule 17(1)(c). He submitted that the aforesaid License Condition No.21.1 entails that the licensee should care to act by taking all possible steps to keep their UFG within acceptable limits and for that purpose the authority has to affix a target of UFG in consultation with the licensee and experts for each financial year. He submitted that the cumulative effect of Rule 17(1)(c) and the License Condition No.21.1 leaves no room for doubt that the UFG Benchmark has to be an annual exercise to be undertaken by the authority in consultation with the licensee and experts. He further supported the contention of annual exercise with a reasoning that the factors determining the annual UFG Benchmark are ever evolving and changing however OGRA sets UFG benchmark in the year 2005 for next seven years in one go which determination too expired in the year 2012. He submitted that this exercise of setting the UFG Benchmark for seven years is in defiance of Rule 17(1)(c) and License Condition 21.1. In

subsequent attempt or exercise to carry out and determine further benchmark of fixing a date of hearing cannot substitute or override specific mandate of Rule 17(1)(c) and License Condition No.21.1.

23. He submitted that this disallowance of UFG by the OGRA against the petitioner is nothing but a penalty in the shape of disallowance and the OGRA has acted unlawfully and against the provisions of Statue/ Rules by imposing this penalty in excess of permissible range provided under the law. He submitted that only criteria for UFG Benchmarking and consequences of contraventions as contained in Rule 17(1)(c) proves that this disallowance of UFG is only a penalty. He further argued that this Rule empowers the regulator to transform a mechanism for setting up of UFG Benchmarks and provides the consequences in the form of gains and penalties for meeting or contravening the same. The mechanism mentioned in Rule 17(1)(c) has been translated in License Condition No.21.1 which further provides details as to how UFG Benchmark is to be set. The consequences for attaining or contravening the UFG Benchmark are provided by License Condition No.21.2 and 21.3. He thus submitted that the only possible interpretation of the Rule and License Conditions referred above is that if a licensee improves upon UFG Benchmark it would gain on that account and if it fails to achieve UFG Benchmark it will be expose to loss in the form of penalties stipulated in Rule 17(1)(c). He has relied upon the recent judgment of Hon'ble Supreme Court reported in 2016 SCMR 69. He submitted that this loss in meeting UFG Benchmark is a kind of penalty. The penalty is defined by the Hon'ble Supreme Court which include loss, disability or disadvantage of some kind visiting a person or his property on account of his own act or omission. He submitted that UFG Disallowance imposed upon the petitioner over and above limit prescribed under the Ordinance 2002 and Tariff Rules be declared as unlawful and illegal.

24. Lastly but not least he argued that the treatment of certain non-operating income of the petitioner as operative by OGRA is unlawful, illegal and without jurisdiction. It is claimed that the petitioner was granted license by the authority for transmission and distribution of natural gas. The petitioner is also engaged in other activities which are not related to transmission and distribution of natural gas and it is the case of the petitioner that all income accruing on account of such activities are its non-operating income and do not fall within the jurisdiction of the authority. He laid emphasis on Section 6(s) and 6(t) to submit that the rate of return to be ensured to the petitioner by the Regulator pertains to activity arising out of the transmission etc. of natural gas only. In terms of Section 8(1) the Authority's jurisdiction to determine revenue requirement is also limited to transmission etc. of natural gas only. It is the case of the petitioner that any activity falling outside the scope of defined term for natural gas is not amenable to the jurisdiction of the Authority and hence any income arising out from the activities not pertaining to the transmission of natural gas is not its operating income. He argued that the licensee of natural gas apart from its transmission and sale as being carried out can also carry out other activities and businesses which do not necessarily fall within the domain of OGRA to regulate. OGRA has power to regulate certain activities but does not have power to regulate the petitioner or other activities carried out by the company. He submitted that such other activities which per learned counsel do not form part of the regulations are (a) Meter manufacturing profit (b) late payment surcharge (c) royalty from JJVC, (d) sale of LPG and NGL (e) sale of gas condensate and (f) provision of doubtful debt.

25. Mr. Salman Akram Raja, learned counsel for respondent No.1, on the other hand in response to the first contention regarding the rate of return contended that the contention of the petitioner is not warranted by any distinction and/or qualification between different sources of

revenue in any provision of law. The return at the rate of 17% is demanded by the petitioner company on all assets of the company and not only on the assets used in distribution of natural gas. Petitioner company claims that the natural gas tariff be raised so that it enables the company to raise enough revenue from the consumers of natural gas to generate a return of 17% of its assets. He thus submitted that the petitioner cannot enjoy a windfall gains from allied businesses. He submitted that License Condition 5.2 clearly stipulates that for the purposes of calculating the return to the tune of 17% of its average net fixed assets in operation, the prevailing methodology and procedure shall continue to be enforced unless the Authority may otherwise approve.

26. As to the second contention regarding UFG Disallowance learned counsel for respondent No.1 submitted that the contention/stand is not borne out of the language of the aforesaid rule 17(1)(c) of the Tariff Rules and License Condition 21.1. It is claimed that such benchmarks are always set in priority as a standard to be achieved by the regulated entity which is SSGCL. The language of Condition No.21.1 of the License Conditions requires setting up of a benchmark for each year but is not the requirement that it may be set every year. It is claimed that the order determining such benchmark by the Authority was headed by Mr. Muneer Ahmed, former MD of both SNGPL and SSGC and other eminent persons having vast experience in this regard. The benchmark for the year 2011-12 was set as 4/5% and further reduction in UFG Benchmark was expected. Since 2011-12 the allowed UFG Benchmark has been determined by the respondent authority after taking into account the data and facts filed by the petitioner company with its petition and no ground has been observed for deviating from permitting UFG figure of 4.5%. For 2012-13 OGRA allowed UFG at 4.5% which is identical to UFG figure allowed for the year 2011-12 even though OGRA could reasonably have required a lower UFG for the said year.

27. He next argued that insofar as UFG Disallowance is concerned, the company has taken a position that this disallowance in UFG Benchmark, as claimed by the petitioner in its petition, for estimated revenue requirement is in fact a penalty. It is argued that in terms of Section 8 of Ordinance 2002 the petitioner company must have an estimate of its total revenue requirement and the Authority must follow its total revenue requirement. The procedure involves receiving the expenditure, cost, income projected by the petitioner and an independent review. He concluded that disallowance of UFG is simply a part of that exercise. If for example the petitioner company projected an expenditure that the Authority considered was not reasonable, it would not include that in the total revenue requirement. In the same manner the authority applies the same principle to the case of UFG Benchmark hence the entire premise that disallowance of any expenditure in the revenue requirement amounts to penalty, is completely flawed. He submitted that there is no direction or prohibition that the actual UFG may not be above the Benchmark UFG.

28. He further submitted that there is no co-relation between words 'penalty' and 'UFG Disallowance'. He submitted that in the substantial portion of the decisions relied upon by the petitioner i.e. ERR decisions and RERR decisions the calculation for amount by refusing to consider UFG in excess of Benchmark set earlier is called UFG Disallowance.

29. He submitted that without prejudice to the above, the petitioner company has failed to utilize funds allocated for UFG control and its reduction. He further argued that the petitioner company has failed to use such funds without achieving the desired results. The details of such funds could be perused from the record as available as Annexure F/5 along with reply of JM No.9 of 2016 as well as World Bank's letter along with comments in relation to Natural Gas Efficiency Project (IBDR Loan).

30. In relation to non-regulated income counsel for respondent No.1 contended that the petitioner has categorize these non-regulated income into many heads such as late payment surcharge, meter manufacturing profit, royalty from JJVL, sale of LPG/NGL, sale of gas condensate and provision of doubtful debt. As to the late payment surcharge it is claimed that at the time of granting gas connection the petitioner company is required to receive advance security deposit by all categories of consumers in terms of License Condition No.44. The object behind this security deposit is to avoid risk of default. As far as the commercial and industrial deposits are concerned the security deposits are revised on monthly basis or keeping in view average gas bill of last three months. Thus the company is secured against the default as well as delayed payment.

31. There is nothing in the License or in the Ordinance 2002 which requires OGRA to ignore such financial components actually gained by SSGC while determining the overall revenue that it is allowed to raise from its consumers in order to achieve the assured return, as claimed by the petitioner. It is immaterial that since such revenue components described above are not regulated by OGRA therefore liable to be excluded while determining the SSGCL return on assets. The law does not bar or restrain the OGRA from taking such revenue into account while setting the return on assets at the rate of 17%. It is claimed that such inclusion of late payment surcharge in the total revenue of SSGC has been consistent practice since 1992 when the concerned Ministry of Petroleum & Natural Resources used to determine the tariff, which practice is being continued under the Ordinance, 2002.

32. In addition to the above learned counsel for respondent No.1 submitted that the Regulator in accordance with the businesses in respect of credit sale also allows provision for doubtful debt to protect the company from unsecured debt owing to certain factors beyond its

control which include litigation cases, stay orders etc. Such components form part of the revenue requirement. Hence, on this score also the exclusion of claim of late payment surcharge is not tenable. The authority has allowed a provision of doubtful debt against disconnected consumers. However, on account of abnormally high increasing threat and the lack of efforts by company to curtail the same it was kept consistent at the level of RERR for respective years. The constant increase of doubtful debts, as claimed by the petitioner company, is being restricted which reflects nothing but company's lack of efforts and inefficiency. The prompt action of the company insofar as default is concerned could save them from losses.

33. Regarding income from royalty from JJVL, learned counsel submitted that at present no income from royalty of JJVL has been reported in view of the fact that implementation agreement signed between the petitioner and M/s JJVL has become null and void as per decision of the Hon'ble Supreme Court. Without prejudice, he submitted that the royalty from JJVL has been classified as an operating income by OGRA based on the premises that Badin Pipeline was financed through gas price mechanism and has been laid down much earlier than LPG extraction plant.

34. Regarding sale of LPG and other allied components, learned counsel for respondent No.1 submitted that the OGRA is of the firm view that the treatment of any such component cannot be changed and/or be treated in isolation or excluded while the petitioner continue to get return at the rate of 17% on the net fixed assets as stipulated in their License Conditions. Tariff regime is a package and should be enforced in totality. The licensee is entitled to fix return on assets and therefore all revenue arising from the operation should be treated as operating income. Counsel for respondent No.1 in the light of above submissions thus prayed that the petitions may be dismissed with cost.

35. I have heard the arguments of the learned counsel and perused the material available on record.

36. For the purpose of deciding these JMs I may take one set of prayer such as prayer from JM 9 of 2016 which are not in variance with others which is as under:-

> "A. *Strike down the determination of ERR 2015-16 inasmuch as it relates to UFG Benchmarking, penalties for not meeting UFG Benchmarks and the treatment of certain incomes as operating income.*
>
> *B. Declare that under section 8(6)(h) of OGRA Ordinance, read with license Condition 5.2, the petitioner is entitled to receive at least a 17% ensured rate of return for its total revenue requirements through the tariff determination process.*
>
> *C. Declare that UFG may only be set after following the specific criteria and process laid down by Section 17(1)(c) read with Condition 21.1 of the petitioner's license which requires that OGRA meaningfully consult the petitioner and independent experts.*
>
> *D. Declare that OGRA has no authority to disallow any UFG of the petitioner and disallowance can be termed nothing more than a penalty.*
>
> *E. Declare that no penalties over and above the limits prescribed by Rule 20 of the Natural Gas Tariff Rules may be imposed on the petitioner for failure to achieve the UFG Benchmark set by OGRA.*
>
> *F. Declare that penalties may only be imposed after affording due opportunity to the petitioner to show-cause as to the mitigating factors, if any, for the quantum of penalties to be imposed.*
>
> *G. Declare that incomes derived by the petitioner from Meter Manufacturing, sale of gas condensate, sale of LPG/NGL, and LPS are non-operating incomes of the petitioner, being incomes which arise from activities not forming part of regulated activities under the license granted to the petitioner."*

37. Additionally there is one more prayer in some of the subject JMs which is also necessary to be included, which is in relation to Rule 17(1)(c) being ultra vires, which is being reproduced as under:-

> "*Declare Rule 17(1)(c) ultra vires the Ordinance and the Constitution therefore, null and void. Further, permanently restrain and prohibit the Authority from imposing any penalties on the petitioner for failing to achieve benchmarks under the said Rule."*

38. Respondent No.1 i.e. OGRA is a regulatory authority established under Ordinance 2002 and is mandated by law to regulate the midstream and as well as downstream of petroleum industry. Petitioner is dealing in a business which is defined as regulated activity in the Ordinance 2002 i.e. transmission, distribution and sale of natural gas under the Ordinance 2002 and hence the company is required to obtain a license from OGRA to carry out these regulated activities.

39. The petitioner has taken a position that disallowance of the amount in excess of UFG Benchmark which is claimed by the petitioner in its petition for estimated revenue requirement is a penalty. In terms of section 8 of the Ordinance 2002 the company is required to submit an estimate of its total revenue requirements. The exercise of the revenue requirement as carried out by the authority involves receiving of the expenditure, cost and income and the authority is required to independently review it. The Disallowance for the UFG is simply a part of such exercise. In carrying out such exercise if any of the expenses referred and relied upon by the company is unlawfully claimed, the authority while considering total revenue requirement may disallow it being not reasonable and would not include in the revenue requirement which is exactly the position in the case of UFG Benchmark. Disallowing an additional claim of UFG beyond the prescribed limit of the Authority cannot be equated or be kept at par with penalty and the contention of the learned counsel for the petitioner in this regard is misconceived. Under the scheme of revenue requirement, the reviewing authority i.e. OGRA is required to consider all such expenses which are lawful and lawfully claimed in the determination of the revenue requirement. If at all such UFG Benchmark beyond limit prescribed by OGRA is to be considered as part of revenue requirement the entire structure of Section 8 of Ordinance 2002 would be defeated. There would be no purpose left in carrying out such exercise of setting UFG Benchmark.

40. The subject energy which is being transmitted through the network of petitioner is a precious commodity and a benchmark has been set as far as this UFG is concerned. The company may not be prohibited under the law to breach the UFG Benchmark but such percentage of UFG beyond prescribed limit cannot form component of revenue requirement. The burden is to be carried by the company itself and that is what perhaps is the scheme of Section 8(6)(h) of Ordinance 2002 which is reproduced as under:-

> *""total revenue requirement" means for each financial year, that total amount of revenue determined by the Authority for each licensee for natural gas so as to ensure it achieves the rate of return provided in license for natural gas."*

41. Section 8(6)(h) of Ordinance 2002 if read with Section 17(1)(c) of the Tariff Rules it would provide that a tariff should include a mechanism to allow licensee a benefit from and penalties for failure to achieve benchmark set by the Authority through yardstick regulation. Meaning thereby that the company would gain profit if the company achieve the UFG target and would suffer losses in their profit if that Benchmark is breached. It in no way deemed/termed as penalty. In pursuit of complying with set benchmark if company facing losses it is not on account of any action of OGRA nor is a kind of violation which require imposition of penalties by OGRA. There are other violations mentioned in the license and rules breach of which imposes penalty. The context in which the word penalty is used in Rule 17 of Tariff Rules leaves no doubt that what is meant is mechanism that places the burden of inefficiency on the distribution company rather than the consumers who actually pay the bills. Under the scheme set up by Ordinance 2002 UFG Disallowance does not constitute the imposition of penalty and its usage as a shorthand does not determine the legal effect of UFG Disallowance. Even in the decisions such as FRR and RERR the calculations are called UFG Disallowance therefore characterization of

UFG Disallowance as penalty is misconceived. The penalty could only be imposed once a gross violation in complying the terms of the License is committed. Section 8 of Ordinance 2002 envisages a review of the revenue requirement presented by the petitioner company based on the judgment of the Authority considering the expenditure either allowable or not allowable hence at that point of time the question of imposing penalty would not arise. OGRA in its determination dated 19.10.2005 while considering the review of estimated revenue requirement of the petitioner company for the financial year 2005-06 reviewed the UFG Benchmark in its entirety and fixed the same on long term basis.

42. While dilating upon this misconception as far as determination of UFG Benchmark practically on every year is concerned Condition No.21.1 of the License Conditions is relevant which reads as under:-

> *"21.1. The Licensee shall take all possible steps to keep the UFG within acceptable limits. The Authority for this purpose in consultation with Licensee and experts, shall fix target of UFG for each financial year. The Authority may fix UFG target separately for each regulated activity"*

43. This interpretation is not deducible from the language of the aforesaid condition and in fact to some extent contradicts 17(1)(c) of Tariff Rules. The Benchmarks are always set earlier and are intended to serve as a standard to be achieved by the regulated entity. The language of the aforesaid condition of the license envisages that a benchmark be set for each financial year but not necessarily that a benchmark be set every year. An order/decision setting the benchmark on 19.10.2005 was never challenged until the first petition is filed by SSGCL. Even in this petition the petitioner has not substantially challenged such determination and benchmark as set by OGRA in the year 2005.

44. Another factor which is relied upon by the respondent No.1 Authority is that the age of the network system is decreased. This resulted on account of increase in the distribution of gas to the consumers. Consequently a significant enhancement in the proportion of

new pipelines in overall transmission system of SSGCL was observed which eventually should have form basis of a fall in actual UFG. On the contrary this UFG claimed to have been enhanced up to 11 to 12% instead of 4.5/4. A younger system, well equipped with modern technology should reasonably provide a lower UFG Benchmark than observed earlier or the average system should have yielded lesser percentage of UFG i.e. average result of old and new network should have provided better average.

45. This is however nobody's case that at the relevant time when the benchmarks were set the Authority did not consulted the licensee or the experts. All that is contended by the petitioner is that this is a yearly exercise which perhaps is not borne out of the language of the Conditions of the License.

46. The petitioner has placed great reliance on the change in the bulk retail ratio in its supply of gas as a dominant cause in not achieving the UFG Benchmark. One such table of actual UFG as claimed to have been supplied by the petitioner is available in JM 9 of 2016 at page 599. The consumption of gas over a period from 2003 to 2015 reflects that the actual figure of UFG for the year 2013-14 and 2014-15 was 13.82 and 13.62 respectively when the retail sale was 73% and 72% respectively whereas for the year 2012-13 the retail ratio was as high as 74% but the UFG was 8.53 hence the contention of the learned counsel for petitioner that this difference was on account of the change of bulk supply to retail consumers has no force.

47. It may however further added that the petitioner company has failed to utilise funds allocated for UFG control/ reduction or perhaps use them without achieving the desired results. There is no denial that in the revenue requirement a separate fund for the control of UFG is set and has also been provided additionally. Such facts are borne out of the data regarding funds approved for UFG reduction as seen in Annexure

F/5 to the reply of JM 9 of 2016 at page 323 as well as World Bank's letter.

48. The other grounds which relate to a basis for yielding higher percentage of UFG are quite technical in nature. Primary jurisdiction of this Court in terms of Section 12(2) of Ordinance 2002 is to see whether the procedure, as undertaken by the OGRA, is in the letter and spirit of the Ordinance 2002 and the Tariff Rules framed thereunder.

49. As to non-operating incomes, the petitioner has pointed out many heads which per learned counsel for the petitioner should not have been counted as it is beyond their domain and jurisdiction. First head in this regard is late payment surcharge. The petitioner is receiving this late payment surcharge on account of failure to deposit and pay required amount of consumption of gas by the consumer. At the time of gas connection the petitioner company has received advance security deposit from all categories of the consumers for three months. The object is to avoid risk of either late payment or default. This security deposit is being revised as far as commercial and industrial consumers are concerned on monthly basis depending upon their consumption. In case the consumers default the gas supply is liable to be disconnected and that amount of security deposit in the hands of the petitioner could be adjusted. Besides, the petitioner has not been able to show as to what financial burden was additionally borne by the petitioner company regarding which this amount of late payment surcharge is being utilized. Company is thus apparently secured against default as well as delayed payments. This amount is thus an additional amount irrespective of default risk.

50. There is nothing in the license or in the Ordinance 2002 that obliges OGRA to ignore any part of revenue actually received by SSGCL while determining the overall revenue which it is allowed to raise from its consumers in order to achieve the assured return. It is immaterial

that some part of revenue of SSGCL might accrue on account of activities not regulated by OGRA. Such exclusion could only have been made if there was a bar either in law or in the license preventing OGRA from taking such revenue into account. The return on assets to be allowed to SSGCL is with respect to all the assets of SSGCL regardless of fact whether any particular asset involved in generating income is not a regulated activity and is beyond the regulatory purview of OGRA or not part of gas supply operation. The limitation for OGRA for setting tariff is confined to the regulated activity only for ascertaining tariff but this restriction is not for considering overall revenue requirement.

51. The other related ground as taken by petitioner's counsel is in relation to doubtful debts. In view of above reasoning insofar as the late payment surcharge is concerned, claim of doubtful debt reflects company's lack of efforts in effective recovery mechanism for timely payment of gas bill as well as lack of timely disconnection. It is nothing but the company's inefficiency and mismanagement. Yet, as contended by the respondent No.1's counsel, the Authority has always provided finances towards doubtful debt while considering the revenue requirements at the time of determining the tariff to a certain prescribed limit.

52. License Condition No.5.2 also stipulates that for the purposes of calculating the return on its average net fixed assets the prevailing methodology and procedure shall continue to be enforced unless the authority may otherwise approve and they are in such process since last two decades. The petitioner under the umbrella of its license of transmission, distribution and sale of natural gas carried out activities of extraction of condensate LPG and NGL. Such process could not have been carried out in the absence of such license. Such extraction does not stand alone rather is ancillary and co-related to the license of transmission and distribution and sale of natural gas and hence is

additional source of revenue for the company as a windfall and while carrying out the principal activity under a license, additional benefit is being drawn. Significantly, the contention which has gone unchallenged is that the entire system involved in the process had been financed through gas price mechanism and the depreciation of other operating expenses and return related to this plant had been included in the revenue requirement of the company.

53. The claim of royalty from JJVL is also one of the factors which is related to non-regulated activity. However, it seems that in pursuance of a decision of the Hon'ble Supreme Court no income has been reported. Had it been so this extraction of LPG from gas by JJVL could have formed additional source of income which ought to have been included in the revenue requirement had it been operative. The switch over of the petitioner company from bulk supply to retail is the transaction which was accepted by the petitioner. They were never coerced or forced to carry out such expansion. The petitioner is under the statutory obligation to follow not only the procedural requirement but also the benchmarks as set by the regulatory authority. The licensee is not in a position to dictate and command rather they are in a position to take it or leave it. The company has not provided any justified reasons for considering the higher UFG which could be considered by the OGRA while performing their statutory duty.

54. Another crucial point which relates to yardstick regulation under Rule 17(1)(c) of Tariff Rules has also a significant importance in interpretation. Rule 17(1)(c) envisages set up of benchmark through yardstick regulation. The yardstick regulation is the setting standard through comparison with other international comparative standards. These yardsticks constitute international standard and while setting the UFG Benchmark for petitioner these international benchmarks and yardsticks were compared. Indeed this would also include the setting of

yardsticks after consulting experts in this regard which is not contested by petitioner's counsel.

55. The decision of respondent No.1 in relation to FRR for the year 2009-10 deviates from the stance taken consistently by respondent No.1. The reliance however to such a decision cannot be placed in view of decision of the Hon'ble Supreme Court reported in PLD 2012 SC 132 where NAB authorities were directed to conduct full investigation into the matter. It was even otherwise one time decision and a successful attempt to deny the consistent findings of the OGRA has not been made.

56. At the end I may state that the jurisdiction under section 12(2) of Ordinance 2002 is limited to the extent that this Court could only apply judicial view as to whether the procedural requirement as required under Ordinance 2002, Rules and the Licenses have been followed. This Court cannot sit as a Court of appeal and consider those details which the OGRA has undertaken. This Court is neither concerned with the policy nor with the rates. The price fixation mechanism is not a function which is to be undertaken by this Court, off course to the extent where the procedural requirements have been flouted, the Court may provide indulgence. In the given frame this Court has minutely seen all such procedural requirements which were undertaken and considered by the regulatory authority. These specialized performances which are assigned to regulatory authority could hardly be undertaken by this Court in exercise of their judicial discretion. Judicial intervention in the instant matter is required only where the person aggrieved i.e. SSGCL could show that the tariff fixation is a procedure bypassed, arbitrary and ultra vires. It could only then if the statutorily prescribed procedure is not followed, a tariff could be held ultra vires to be remanded back.

57. In view of the above facts and circumstances, I do not see any reason to interfere with the statutory powers exercised by the statutory authority while fixing tariff and the reasons assigned to the Annual

Revenue Requirements and tariff hence the petitions are dismissed along with pending applications.

Dated: **Judge**