



COMPETITION COMMISSION OF INDIA

Case No. 76/2011

In Re:

East India Petroleum Pvt. Ltd. (EIPL)

Informant

Ground Floor (Next to Walden)

6-3-871, Snehlata

Greenlands Road

Begumpet

Hyderabad-500016

And

South Asia LPG Company Pvt. Ltd. (SALPG)

Opposite Party

6th Floor, Varun Towers, Siripuram

Visakhapatnam

Andhra Pradesh - 530003

CORAM

Mr. Devender Kumar Sikri
Chairperson

Mr. Sudhir Mital
Member

Mr. Augustine Peter
Member

Mr. U. C. Nahta
Member

Appearances during the final hearing held on 19th April, 2018:

For the Informant:

Mr. A. N. Haksar, Senior Advocate
Mr. Kunal Mehra, Advocate



Mr. Danish Khan, Advocate
Ms. Sitwat Nabi, Advocate
Mr. C.V.S. Suri, CEO of EIPL

For the Opposite Party: Mr. Amitabh Kumar, Advocate
Ms. Vibha Dhawan, advocate
Ms. Diksha Rai, Advocate
Mr. Subramanyam, CEO of SALPG
Mr. Krishna, Dy. CEO of SALPG

For Visakhapatnam Port Trust Mr. Amal Kumar Mehra, Chief Engineer

Order under Section 27 of the Competition Act, 2002

A. Background

1. The information in the instant matter has been filed by East India Petroleum Private Limited (**EIPL** or the **Informant**) under Section 19(1)(a) of the Competition Act, 2002 (**Act**) against South Asia LPG Company Private Limited (**SALPG**), alleging, *inter-alia*, contravention of the provisions of Sections 3 and 4 of the Act.
2. The instant case concerns access to terminalling infrastructure operated by SALPG at Visakhapatnam Port.
3. EIPL is a company set up in 1997. It is engaged in the business of providing terminalling services to oil marketing companies (**OMCs**) viz. Indian Oil Corporation Limited (**IOCL**), Bharat Petroleum Corporation Limited (**BPCL**) and Hindustan Petroleum Corporation Limited (**HPCL**) for import and export of bulk liquid products including fuels like high speed diesel, motor spirit, petroleum products like gas condensate and naphtha and petrochemicals as well as liquefied gas fuels like butane, propane and liquefied petroleum gas (**LPG**) at the Visakhapatnam port. EIL has been importing LPG and other liquefied gases since 1998.



4. SALPG was incorporated in 1999 as a joint venture between HPCL and Total Gas & Power India Private Limited (“TGPI”). SALPG is engaged in the business of providing terminalling services that involves receipt, storage and dispatch of propane/butane/LPG to OMCs at the Visakhapatnam Port.
5. Prior to 1997 HPCL was importing LPG on behalf of OMCs at Visakhapatnam Port. In 1997 HPCL stopped importing LPG due to a fire incident at its refinery at Visakhapatnam Port. In 1998, EIPL started terminalling services for import of LPG at Visakhapatnam Port with a storage capacity of 8400 Metric Tons (“MT”). In March 2000, HPCL wanted EIPL to handle LPG imports for OMCs. To undertake the same, EIPL constructed a pipeline to link itself with the existing pipeline owned by HPCL. From 2000, EIPL started handling LPG import on behalf of OMCs for inland dispatches by tank trucks and from 2004, additionally, through the pipeline owned by Gas Authority of India Limited (GAIL). The imports were unloaded using the arms owned by HPCL.
6. In the meantime, SALPG was established in 1999 as a joint venture between HPCL and TGPI. SALPG was permitted to install two unloading arms for handling liquefied gases on the jetty owned by Visakhapatnam Port Trust (VPT), with the understanding that such a facility would be made accessible to all the users. In November 2003, SALPG started developing an underground cavern with a storage capacity of 60,000 MT at Visakhapatnam Port. The cavern is situated on the land sub-leased to SALPG by HPCL, which has leased the land from VPT for a period of 30 years for LPG import facilities.
7. The agreement between EIPL and HPCL regarding handling of imports, of OMCs, was terminated in 2007. Meanwhile, the cavern became commercially operational with effect from 25th December, 2007. With this, the task of pumping products through HPCL owned pipeline was also handed over to SALPG by HPCL. Thereafter, use of HPCL owned unloading arms was discontinued/ dismantled/ made unserviceable, and all products could be



unloaded through the new unloading arms installed by SALPG.

8. The allegations made in the Information are summarised as under:

8.1. SALPG insists OMCs to mandatorily use cavern and does not allow bypass of the same. By way of this restriction, SALPG does not permit use of its blender on a standalone basis. Further, SALPG has not allowed EIPL to hook up, *i.e.* connect, its own blender to the pipelines of SALPG. As a result, EIPL has not been able to receive cargoes that contain propane and butane imported separately, to be blended thereafter. This has resulted in limiting and restricting the provision of services by EIPL as well as the market for such services. This conduct of SALPG is in contravention of the provisions of Section 4(2)(b)(i) and 4(2)(c) of the Act.

8.2. SALPG is charging exorbitant bypass charges thereby making EIPL's services economically unviable for users. This is thus, an imposition of unfair price in sale of terminalling services, in contravention of the provisions of Sections 4(2)(a)(i) and Section 4(2)(a)(ii) of the Act.

8.3. SALPG allows only 25 per cent of the total volume (pre-mixed LPG) imported from Very Large Gas Carrier (VLGC) to be bypassed for tank truck loading. Consequently, the remaining gas has to be necessarily passed through the cavern of SALPG. Such a stipulation has restricted the business volumes of EIPL and is thus, a contravention of Sections 4(2)(b)(ii), 4(2)(c) and 3(1) of the Act.

B. Prima-facie consideration by the Commission:

9. Upon considering the information and allegations therein, the Commission was convinced that there existed a *prima facie* case of contravention of the provisions of Section 4 of the Act. Accordingly, the Commission passed an



order dated 30th December, 2011 under Section 26 (1) of the Act directing the Director General (**DG**) to cause an investigation into the matter. After a detailed investigation, DG submitted its Investigation Report to the Commission on 30th November, 2012.

C. Findings of investigation in Main Investigation Report

10. Major findings recorded in the Main Investigation Report are summarised as under:

Relevant Market

- 10.1 The relevant market for terminalling services at Visakhapatnam comprises two markets:

- (a) *Upstream terminalling service at Visakhapatnam Port:* This market starts from ship unloading end and terminates at receipt end of HPCL cross country pipeline. This market comprises receipt of propane or butane or LPG, from the ship; blending; storing; and/or discharging LPG into the receipt end of HPCL cross country pipeline.
- (b) *Downstream terminalling service at Visakhapatnam Port:* This market starts from the receipt end of HPCL cross country pipeline and terminates at the dispatch end of Visakhapatnam Port. The downstream terminalling service market receives only LPG at the receipt end of HPCL cross country pipeline, stores and /or dispatches LPG from Visakhapatnam Port into GAIL pipeline/road/rail loading facilities. HPCL and EIPL are the only two service providers in this market.

- 10.2 The cross country pipeline of HPCL running between the upstream and



downstream terminalling service infrastructure can also be considered as a separate market. The cross country pipeline is of approximately 8 kilometres in length. A tap off on the cross country pipeline has been provided to EIPL at a point identified as SV-3, at a distance of approximately 7 kilometres from the starting point. Beyond this tap off point, the cross country pipeline connects with HPCL refinery and terminates at the GAIL pipeline and HPCL bottling plant/road/rail loading end. From SV-3 point, EIPL has laid a pipeline that connects with its terminal, which, thereafter, is also connected separately to the GAIL pipeline and to another road loading end. For operational reasons, HPCL has assigned the task of operating the cross country pipeline to SALPG. However, as EIPL had not alleged denial of access to HPCL cross country pipeline, the investigation did not find it necessary to determine this market as a separate relevant market.

Dominant Position

- 10.3 The investigation by the DG examined dominance in the upstream terminalling service at Visakhapatnam Port and SALPG was found to be the only player. However, as per the DG despite being the only enterprise in the market for upstream terminalling service at Visakhapatnam Port and possessing 100% market share, it does not enjoy dominant position. SALPG has very limited ability to dictate its prices or alter the terms of providing services in this market. Further, SALPG does not possess any power to prevent entry of EIPL into the upstream terminalling service market. EIPL has already applied for grant of permission from VPT for laying a parallel infrastructure. As such, both its customers and potential competitors enjoy countervailing power to constrain the abusive conduct, if any, of SALPG. The nature and structure of the market is such that despite negotiating the rates with its customers, SALPG is in no position to enforce the same. In fact,



neither SALPG nor its customers can decide the rates, as ultimately the rates are to be approved by the Government. Further, the customers being large Government companies can import LPG through other ports and determine business volumes of SALPG. Considering all these aspects, it has been concluded by the DG that SALPG does not enjoy dominant position in terms of the factors enumerated under Section 19(4) of the Act.

Abuse of dominant position

- 10.4 Although DG investigation did not find SALPG to be dominant, it still examined the alleged abuses. The investigation revealed that SALPG insists on mandatory use of its cavern and thus, OMCs cannot avail blending services on piece meal basis. DG was of the view that SALPG has valid efficiency and business justification for denying the use of its blender facility, without using cavern, and also not permitting hook up of EIPL's blender to the propane and butane from the jetty owned by SALPG. The investigation has noted that, it is not known whether the cavern functions only as a storage unit or also plays a necessary role in mixing and providing additional safety level. Further, the restriction that only 25% of the total volumes of VLGC can bypass the cavern was also found to be based on a valid business justification as SALPG has made significant investment in the cavern. Thus, as per investigation, no contravention of the provisions of Section 4 is established.

D. Supplementary Investigation Report by DG

11. After considering the Investigation Report, the Commission forwarded it to the parties for filing their suggestions/objections. In the meantime, EIPL filed an application for cross-examination of the witnesses whose statements were recorded during investigation. The Commission granted the request and referred the matter back to DG under Section 26(7) of the Act for conducting



cross-examination.

12. Aggrieved by the said direction of the Commission, SALPG filed a Writ Petition [W. P. (C) No. 4602/2013] before the Hon'ble High Court of Delhi *inter-alia*, on the ground that cross-examination was allowed without notice and without hearing SALPG. The writ petition was dismissed on 2nd September, 2013 stating that an order of this nature does not visit the person, against whom information is provided or reference is made to the Commission, with any civil consequences nor does it in any manner impair any legal right of such a person. Thereafter, SALPG filed an intra-court appeal [LPA No. 857 of 2013] before the Division bench of Hon'ble Delhi High Court, which was also dismissed on 3rd September, 2014.
13. After completion of cross-examination, DG submitted the Supplementary Investigation Report on 30th March 2015. This was forwarded to the parties for filing their replies/objections.

E. Further inquiry *vide* order dated 10th January, 2018 passed by the Commission

14. The Commission heard EIPL and SALPG on 13th January, 2016 and decided to seek further information from the parties, OMCs and VPT on terminalling infrastructure, safety aspects, relevant market, feasibility of tap-in and tap-out, bypass of cavern and pricing of terminalling services. EIPL and SALPG filed their response on 9th December, 2016 and 28th December, 2016, respectively. BPCL, IOCL, HPCL and VPT submitted their responses on 18th January, 2017, 19th December, 2016, 4th January, 2017 and 16th January, 2017, respectively. The Commission heard the parties as well as VPT on 18th July, 2017.
15. Based on the material on record, including submissions of the parties and third parties, the Commission did not find sufficient reason to agree with the findings of DG on the aspects of relevant market, dominance and abuse of dominant



position. Accordingly, the Commission *vide* its order dated 10th January, 2018 decided to further inquire into the matter and directed the parties to respond to the observations of the Commission therein regarding the said aspects of the case. It was, however, made clear that nothing stated in the order shall tantamount to final expression of opinion on the merits of the case and that observations made therein were tentative in nature based on the material available on record. The parties were directed to file their reply to the observations of the Commission and appear for an oral hearing. EIPL and SALPG both filed their submissions on 20th February, 2018. They were heard by the Commission on 19th April, 2018. The submissions of the parties will be dealt with in detail under relevant heads, while analysing the matter on merits.

F. Analysis and findings of the Commission

16. The case primarily concerns access to LPG terminalling infrastructure at Vishakhapatnam Port, which comprises several components *viz.* unloading arms at the jetty, blender, heat exchanger and cavern. Over the years, import of pre-mixed LPG has reduced. The data provided by the parties show that no pre-mixed LPG was imported since 2011-12. At present, propane and butane are imported separately. These are blended at the port before onward transmission to OMCs. While allowing EIPL to use blender of SALPG, the latter has been insisting on mandatory use of cavern. This entailed payment of significant charges. As a result, OMCs were not finding the services offered by EIPL economically viable and were constrained to avail the terminalling services offered by SALPG only. The terminalling charges payable by OMCs with and without use of cavern are reproduced as under:

Table 1: Terminalling Charges payable with and without use of cavern

(In Rupees/MT)

Terminalling charges in case of bypass of cavern	SALPG (200) + HPCL (105) + EIPL (719) = 1024
Terminalling charges in the absence of bypass (<i>i.e.</i> passing through cavern)	SALPG (1540) + HPCL(105) + EIPL (719) = 2364



It has been contended that, OMCs have to pay for storage services twice *i.e.* INR 1540 to SALPG and INR 719 to EIPL in the absence of bypass of cavern if they wish to use the services of EIPL. In other words with bypass, OMCs have to incur INR 1024/MT to avail the services of EIPL [including INR 200/- to SALPG as bypass charges and INR 105/- for use of HPCL cross-country pipeline] but without bypass, they have to pay an additional sum of INR 1340/- to SALPG to avail the services of EIPL. It thus makes no economic sense for the OMCs to avail the services of the informant. This has priced out EIPL, reducing its business volumes substantially. In fact, EIPL has submitted that it is almost out of business on account of the impugned restrictions.

17. To address this, EIPL first proposed to use the blender of SALPG and thereafter, take the output directly to HPCL cross-country pipeline, bypassing the cavern. This was not agreeable to SALPG which allowed bypass of cavern to the extent of 25 percent only of VLGC imports. As an alternate, EIPL proposed to install its own blender, for which it wanted a tap out and tap-in from the propane and butane lines to discharge blended LPG, bypassing the cavern. Under this arrangement, EIPL proposed tap out from propane and butane lines to take gases for mixing in its blender and thereafter, discharge the blended output back into the SALPG pipelines through a tap in. This was also not acceptable to SALPG. Upon this, EIPL offered yet another proposal seeking tap-out from the propane and butane lines at jetty to its own blender and construction of its own infrastructure between its blender and storage facility. However, this was also not acceded to by SALPG.
18. By imposing restrictions on bypass as well as by not accepting provision of tap out and/or tap in, SALPG is alleged to have denied market access to EIPL, thereby contravening the provision of Section 4 of the Act.
19. Against this background, the issues relevant for determination in the case are as under:



Issue 1: What is the relevant market?

Issue 2: Whether SALPG is dominant in the relevant market?

Issue 3: If the answer to Issue 2 is in the affirmative, whether SALPG has abused its dominant position in the relevant market?

20. Before getting into the merits of the issues the Commission would like to dispose of the request of SALPG seeking grant of hearing to HPCL before passing the final order.
21. Upon considering the request, the Commission, *vide* its order dated 28th March, 2018, *inter-alia*, decided that the necessity of hearing HPCL will be gone into after hearing the parties and VPT on 19th April, 2018. Now through this order, this issue is being dealt with.
22. At the final hearing, Mr. Amitabh Kumar, the learned counsel appearing for SALPG contended that cross-country pipeline owned by HPCL has throughput capacity limitations, allowing bypass to facilitate EIPL services would impact its use and accordingly, he urged that HPCL be heard as an interested party in the matter.
23. In support, he referred to the statement of Mr. M. Selvakumar, Deputy General Manager, LPG-Operations, HPCL, before the DG to suggest that HPCL cross-country pipeline is already utilised to its maximum and if bypass is allowed to facilitate EIPL terminalling services, discharge from the cavern would have to be stopped. The counsel also contended that no adverse order should be passed without hearing them as the same would be in violation of principles of natural justice. Reliance was placed upon the judgment of the Hon'ble Supreme Court in the case of *Competition Commission of India v. Steel Authority of India Limited and Another*, (2010) SCC 744 to contend that HPCL is a necessary party in terms of Order 1 Rule 10 of the Code of Civil Procedure, 1908 and its presence is necessary to adjudicate the issues involved in the present case.



24. On the other hand, Mr. A.N. Haksar, the learned senior counsel appearing for EIPL, objected to the aforesaid request of SALPG and stated that this is neither appropriate, nor necessary. It was contended that views of HPCL have already been taken during the investigation by the DG as well as pursuant to order dated 24th November, 2016. Further, grant of relief as sought by EIPL does not adversely affect the position of HPCL as it would continue to receive the present access fee from OMCs regardless of whether terminalling services of EIPL or SALPG are used. It was also pointed out that HPCL itself has not made any submission, nor has it asked for any hearing in the present matter. He further argued that HPCL's interests are legally represented as it holds 50 percent shareholding in SALPG. Lastly, Mr. Haksar pointed out that grant of hearing would only further delay the long standing dispute between the parties with no obvious and tangible benefit to the judicial process.

25. The Commission has considered the application made by SALPG and submissions made by the parties on the issue. The Commission appreciates the need to take into account views of HPCL in the matter given its stake in the infrastructure. However, the issue for consideration is whether there is a need to grant a hearing at this stage. On perusal of Investigation Report and the relevant records, it is evident that DG has conducted an in depth examination of HPCL to ascertain various aspects relating to the case including the cross-country pipeline. DG had issued notices dated 08th February, 2012, 17th February, 2012, 01st March, 2012, 11th June, 2012, 26th February, 2012 and 16th August, 2012 to HPCL seeking information and providing it sufficient opportunity to present its views, information and documents relevant for the purpose of investigation. The DG had further recorded statement of Mr. M. Selvakumar, Deputy General Manager, LPG-Operations, HPCL to examine various aspects of terminalling infrastructure at Vishakhapatnam Port wherein specific questions were put to him, inter-alia, on cross-country pipeline. The DG also offered him opportunity to provide any other information he would



like to provide in relation to investigation to which the witness, *i.e.* Mr. Selvakumar said, “*I have nothing more to add*”. Thus, HPCL was provided sufficient opportunity to present its views and contentions in the matter.

26. After the submission of Investigation Report and hearing of the parties on it, Commission was of the view that further inquiry is required and inputs from OMCs and stakeholders would be of relevance to determine the issues in the case. Accordingly, detailed questionnaire was sent to OMCs, including HPCL seeking information on the terminalling infrastructure, safety aspects, relevant market, feasibility of tap-in and tap-out, bypass of cavern and pricing of terminalling services. In response, HPCL filed its submission on 4th January, 2017. These have been taken on record.
27. The Commission notes that the contentions of HPCL in its submissions are similar to those made by SALPG. Besides, when OMCs were specifically asked if they have any further submissions in connection with the matter. HPCL has already stated ‘No’ in its response. HPCL as such has been given enough opportunity at different stages to present its views.
28. It is also important to note that HPCL has not moved any application for being heard in the matter. Instead, SALPG is insisting for the same on the pretext that cross-country pipeline is owned by HPCL when in fact it is being operated by it for a long time. It is relevant to note that SALPG is a joint venture with 50 percent participation by HPCL. Further, request of SALPG was moved as late as on 24th July, 2017, which is after nearly six years of initiation of investigation. Such a request should have been made and pressed for at the earliest possible opportunity. An application seeking hearing or their joinder, at the fag-end of the proceedings in the case appears to be nothing but a dilatory strategy to delay the outcome of the case.
29. The Commission, thus, notes that HPCL having been given sufficient opportunity in the past both at the stage of the investigation by DG as well as



during the inquiry made thereafter, their views are known and have been taken into account. Moreover, HPCL has not moved any application for hearing. As such, Commission is of the view that there is no need to collect any more information or hear HPCL to decide the instant case. For these reasons, Commission finds no merit in SALPG's application seeking grant of hearing to HPCL. Accordingly, the said application is declined.

Issue 1: What is the relevant market?

30. The Commission notes that the terminalling infrastructure of SALPG comprises:
 - (i) unloading arms at the jetty;
 - (ii) connecting pipeline from jetty to blender, where propane and butane are mixed; and
 - (iii) Pipeline facilities connecting the blender to HPCL Pump House: one allowing the use of cavern with a storage capacity of 60,000 M.T. and the other bypassing the cavern.
31. The HPCL pump house is located on the cross-country pipeline of HPCL, which allows LPG/butane to be taken either to EIPL's storage facility or HPCL's refinery or HPCL's bottling plant or the GAIL pipeline for onward dispatch to industrial/domestic users. HPCL has assigned the operations of cross country pipeline to SALPG. Thus, in effect, SALPG has control over the entire terminalling infrastructure at Visakhapatnam port.
32. The DG defined the relevant markets as (i) upstream terminalling services at Visakhapatnam port that starts from the ship end and terminates at the receipt end of HPCL cross country pipeline; and (ii) downstream terminalling services at Visakhapatnam port starting from receipt end of HPCL cross country pipeline and ends at the despatch end of Visakhapatnam port. In its order dated



10th January, 2018, the Commission, *inter-alia*, noted that the terminalling infrastructure at Visakhapatnam port has various components/ facilities which includes unloading arm at the jetty, connecting pipelines, blender, cavern and the cross country pipeline. Each of these components performs a unique function and one cannot be regarded as a substitute of each other. However, whether all of these can be considered as one composite market or some of them would constitute a separate relevant market would depend on users perspective based on price, characteristics and intended use. The Commission further observed that SALPG allowed OMCs to bypass cavern, upto 25 percent in case of pre-mixed LPG imported through VLGCs, to meet their tank truck loading requirements. The use of cavern was thus, not an essential pre-requisite. Similarly, pre-mixed LPG imported by OMCs did not require blending services at the terminal. Hence, the Commission observed that blending services and storage services at Visakhapatnam port are separate relevant markets, apart from services for unloading and transmission of propane/butane/LPG to the blender. The Commission was also of the view that adoption of any of the alternative market definitions would result in the same competition assessment given that SALPG is the only player present in the upstream terminalling services market at Visakhapatnam port.

33. In response, SALPG has contended that import of pre-mixed LPG is not economically viable for OMCs. Thus, blending cannot be regarded as a separate relevant market on the notion that pre-mixed LPG does not require blending services. Blending and storage are integral components of terminalling services. Further, OMCs negotiate price for the entire terminalling service and rates are approved by Ministry of Petroleum and Natural Gas (**MoPNG**) and Ministry of Finance (**MoF**). It has stated that there is no need thus to categorize the market for upstream and downstream LPG terminalling services.
34. On the relevant geographic market, SALPG has averred that all other ports in India where LPG terminalling services are undertaken, would form part of the



relevant geographic market. OMCs plan nation-wide logistics of LPG based on a number of factors like region-wise demand forecast, location of import terminal, mode of logistics arrangement for hinterland distribution, cost effectiveness, *etc.* The gas pumped through cavern is supplied to Andhra Pradesh, Telangana, Orrisa, Chhattisgarh, Maharashtra, West Bengal, Uttar Pradesh, Madhya Pradesh, Bihar, *etc.* Given the preference of OMCs and competition exerted by other ports, SALPG has contended that the relevant geographic market cannot be restricted to Visakhapatnam port alone.

35. In regard to relevant product market, EIPL has submitted that various components of LPG terminalling services at Visakhapatnam port cannot be considered as a composite market. OMCs do not consider them as a composite market and do not necessarily prefer to use all the facilities of blending, storage and dispatch, at all times. They consider cavern and blender as an alternative and not necessarily complimentary. For instance, in the cross-examination of Mr. Sudeep Mullik of BPCL by SALPG, it was deposed that simultaneous discharge into SALPG's cavern and EIPL's storage is possible and the same could be a priority. Thus, three separate relevant markets could be defined, namely, (a) market for receipt and unloading services including control over connecting pipeline; (b) market for blending services for mixing propane and butane; and (c) market for storage and dispatch services. As regards relevant geographic market, it has been submitted that Visakhapatnam port is not substitutable with other ports and thus the relevant geographic market is Visakhapatnam port. During the hearing, Mr. Haksar, learned senior counsel appearing for EIPL further contended that Ennore and Haldia ports are already operating in their stretched capacity and thus, cannot cater to the hinterland served by Vishakhapatnam Port.
36. The Commission notes that EIPL and DG have defined the relevant geographic market in the present case as 'Visakhapatnam port'. SALPG, on the other hand has sought to expand the relevant geographic market to the whole of India as the gas stored in cavern is supplied to Andhra Pradesh, Telangana,



Maharashtra, West Bengal, Orissa, Chhattisgarh, Uttar Pradesh, and Madhya Pradesh. It is observed that the geographic market definition in the instant case is linked to the hinterland served by Visakhapatnam port. Based on the submissions of OMCs, the Commission notes that ports like Haldia and Ennore are not posing any competitive constraint on Visakhapatnam port. For instance, BPCL in its submission dated 9th January, 2017, has pointed out that

“Both Ennore and Haldia Ports are being used presently at their stretched capacity..... Above mentioned quantities of LPG presently handled at Ennore are just sufficient to cater the demand of nearby Market in the state of Tamilnadu and part of Andhra Pradesh whereas quantities handled at Haldia are not even sufficient to meet the demand of nearby Eastern Region market. Hence bringing product from Ennore & Haldia Ports to hinterland markets fed by Vizag is not feasible except bringing some miniscule quantities in Andhra Pradesh market from Ennore if availability of product at Vizag is not sufficient. Further, it is also not economical to bring the product from Ennore and Haldia to Vizag Market because of high transportation cost (emphasis added). ”

37. In its submission dated 15th December, 2016, IOCL has also stated that

“Haldia is the lone LPG handing import terminal in Eastern Region and is required to be utilized to meet the deficit of Eastern Uttar Pradesh also. Presently, Haldia import Terminal is being operated to the extremely stretched level. In the event, imports for Vizag fed area is also arranged at Haldia, some of the markets/ plants presently catering to Eastern Region may face disruption in supply line. Similarly, Ennore is primarily utilized for meeting the import requirement of Tamil Nadu State and part of Southern Andhra Pradesh. Spare capacity at Ennore port is currently not available to meet the additional requirement of Vizag Port catered areas as the import Terminal is being utilized to stretched level. (emphasis added) ”

38. Even HPCL has denied the possibility of customers using the terminalling services offered at Ennore and Haldia ports as substitute to services offered by SALPG at Visakhapatnam port. HPCL, in its submissions, has stated that

“Each LPG Import Facility has its envelope to feed markets based on its position and mode of dispatch facility connected to the Terminal. Based on above, Product placement cost to Plants of Industry on Visakh-Secunderabad LPG Line of GAIL would be always economical



from Visakh. There is no pipeline available as on date nor planned from Ennore to the state of Telangana & Andhra Pradesh. Feeding markets of Visakh port from Haldia will be backward movement with additional cost & not feasible to feed those markets from Haldia (emphasis added)."

39. These submissions of OMCs themselves clearly bring out that the hinterland served by Visakhapatnam port could not be served by the adjacent ports like Haldia and Ennore. That being so, terminalling services in other ports in India do not constrain the services offered by SALPG in Visakhapatnam port. In other words, it would not be possible for customers of SALPG to use terminalling services of other ports to cater to the hinterland of Visakhapatnam port. Accordingly, the Commission concludes that relevant geographic market in the instant case is 'Visakhapatnam port'.
40. As regards the relevant product market, the Commission notes that SALPG is in agreement with the definition of DG. However, SALPG has objected to further segmentation of the upstream markets, as is delineated by the Commission in its order dated 10th January, 2018. Instead, it has been, *inter-alia*, stated that customers of SALPG avail the terminalling services as a whole and are charged accordingly. There has not been a possibility to use blender or cavern in isolation. On the other hand, EIPL has also delineated three relevant markets within the upstream terminalling services, *i.e.* (a) receipt and unloading services including control over connecting pipeline; (b) blending services for mixing propane and butane; and (c) storage and dispatch services. Though, the Commission, in its order dated 10th January, 2018, observed that blender and cavern could be separate markets, it also noted that competition assessment in the instant case would not change by adopting any of the plausible market definitions in the facts and circumstances of the case. This is because SALPG is the only entity offering terminalling services at Visakhapatnam port. It is also relevant to note that SALPG has not contested these observations of the Commission. Considering the submissions of all the parties, the Commission finds the relevant product market as '*market for*



upstream terminalling services’.

41. In view of the foregoing, the relevant market in the instant case is ‘*market for upstream terminalling services at Visakhapatnam Port*’.

Issue 2: Whether SALPG is dominant in the relevant market?

42. As stated earlier, the DG concluded that SALPG does not enjoy dominant position in the upstream terminalling service market at Visakhapatnam Port and that OMCs can import gas through other ports like Ennore. However, based on the submissions of parties, OMCs and VPT, the Commission, in its order dated 10th January, 2018, *inter-alia*, observed that SALPG is the only player operating in the market for upstream terminalling services in Visakhapatnam Port and enjoys 100 percent market share leading to absolute dependence of consumers.
43. In response, SALPG has contended that as the relevant market cannot be restricted to Visakhapatnam Port alone, its market share and size and resources are not significant. It is not the only player offering upstream terminalling services in India and thus consumers are not dependent on it. Further, the service network of HPCL or TGPI is not available to SALPG and it does not enjoy vertical integration. It is submitted that entry barriers do not exist in the relevant market as EIPL has itself repeatedly admitted that it is possible to replicate the terminalling infrastructure of SALPG. Moreover, customers of SALPG are OMCs, which have size and resources. Thus, they have substantial countervailing buying power. In fact, it is OMCs, which decide the terminalling charges payable to SALPG. Thus, SALPG does not enjoy the dominant position. Arguendo, even if the relevant market is restricted to Visakhapatnam Port, then also SALPG would not remain dominant given the bargaining power of OMCs. Further, he placed reliance upon the decision of US Supreme Court in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP* to suggest that monopoly does not necessarily imply a dominant position.



44. EIPL, in its response has agreed with the observations of the Commission in order dated 10th January, 2018 on the issue of dominance. It has submitted that imports through Visakhapatnam Port cannot be substituted with those of Ennore or Haldia ports on account of prohibitive additional costs, even if one assumes spare capacity is available in these ports. Further, EIPL asserted that SALPG and HPCL are part of the same group for the purpose of Section 4 of the Act. This group is present in both the upstream and downstream terminalling services markets defined by DG as well as the upstream, mid-stream and downstream markets submitted by EIPL. Such vertical integration gives SALPG significant advantage over the competitors like EIPL. Further, joint venture agreement between TGPI and HPCL envisages Minimum Critical Quantity, whereby, SALPG is assured a minimum return for a period of fifteen years from the commencement of its operations. This commercial advantage contributes to the strength enjoyed by SALPG to operate independent of market forces.

45. The Commission has considered the submissions as well as information on record and observes that admittedly SALPG is the only player offering terminalling services in Visakhapatnam Port and it enjoys 100 percent market share in the relevant market delineated by the Commission. Based on the submissions of OMCs, which are already discussed in Paragraphs 36, 37 and 38, the Commission finds no reason to accept that OMCs can import gas from other ports like Haldia and Ennore. The data provided by OMCs, which has been accessed by SALPG through inspection, shows that they have transported either zero or very nominal LPG from other ports such as Haldia and Ennore to cater the hinterland served by Visakhapatnam Port. As noted earlier, even HPCL has refuted the possibility of the terminalling services at Haldia and Ennore ports being an alternative to the terminalling services offered at Visakhapatnam Port on account of infrastructure or cost constraints. Being the only player offering upstream terminalling facility at Visakhapatnam Port,



OMCs are dependent on SALPG for terminalling services and have no other option to serve the hinterland of the Visakhapatnam Port. As such they do not enjoy any countervailing power.

46. The Commission is also not inclined to agree with DG and SALPG that there is no significant barrier to entry into the relevant market. Based on the submissions of the parties and others including VPT, it emerges that development of parallel infrastructure is both time consuming and cost intensive. HPCL took nearly seven years to lay its infrastructure. Further, VPT has pointed out that it is practically not feasible to berth more than one LPG vessel for shore discharge. The application of EIPL for establishing another of unloading arms at the LPG jetty was rejected by VPT because having two sets of unloading arms would require the ship being repositioned for each arm. This would according to VPT, be an extremely impractical situation. Consequently, VPT directed SALPG to allow tap-out to EIPL from the unloading arm/connecting pipeline. But, due to persistent denial and objections of SALPG to grant these concessions, VPT allowed EIPL the option to setup second unloading arm at the jetty. However, VPT has submitted that even though such an approval is granted *“it is more efficient for both terminals (SALPG and EIPL) to operate through a single set of unloading as unnecessary ship movement will be avoided”*. Besides, laying of cross-country pipeline like infrastructure would require significant investment and time. Thus, there are significant barriers to laying of terminalling infrastructure besides the long gestation period, which this would involve. Such entry barriers, further enhance dependence of OMCs on SALPG as they could neither enter the market themselves nor expect entry of any other player, who could constrain SALPG in foreseeable future.
47. Though SALPG has contended that the terminalling services are being offered at the price dictated by OMCs and approved by MoPNG and MoF, the Commission is of the view that this fact alone is not sufficient to disprove the



dominance enjoyed by SALPG. It is the lone supplier of terminalling services at Visakhapatnam Port and OMCs are entirely dependent on it. This comes out eloquently in the statement of the witness from IOCL. On being questioned about the possibility of importing LPG at Visakhapatnam Port, he has stated that the same is not possible without using the facilities of SALPG. The relevant extract of the deposition is reproduced as under:

“Since the unloading facilities and pipelines belonged to SALPG exclusively.....it would not have been possible to handle LPG at Vizag without the use of their facilities.”

48. Based on the market share in the relevant market, monopoly in operating the terminalling infrastructure, absence of any alternative for OMCs, existence of significant entry barriers, high degree of consumer dependence and other factors discussed above, the Commission has no hesitation to conclude that SALPG enjoys an undoubted dominant position in terms of Section 19(4) of the Act in the relevant market for upstream terminalling services at Visakhapatnam Port. This would remain the case even if one were to segment the upstream terminalling services because, as discussed in the preceding paragraphs, SALPG is the only player operating in the market for upstream terminalling infrastructure at Visakhapatnam Port.

Issue 3: Whether SALPG has abused its dominant position in the relevant market?

49. The factual developments on the proposals of EIPL for access to terminalling infrastructure and other alleged restrictions have already been summarized in paragraphs 16 and 17 above. The essence of the alleged abuse is concerned with EIPL's access to the LPG terminalling infrastructure at Visakhapatnam Port. The issue for determination is whether SALPG has denied market access to EIPL by restricting its access to the terminalling infrastructure, without any plausible justification.



50. As discussed earlier, SALPG had not been allowing blended LPG to bypass the cavern. Only a limited bypass of 25% of VLGC imports was being allowed with respect to premixed LPG. As a result, EIPL's services were priced out and scope of its business was restricted to pre-mixed LPG only and that too to the extent bypass was allowed. However, with the decline in imports of premixed LPG overtime, no business was left with EIPL. Details of capacity utilization of pre-mixed LPG at Visakhapatnam Port, between 2009-10 to 2015-16, are as under:

Table 2: Capacity utilization for pre-mixed LPG at Visakhapatnam Port

Mode of using the cavern	(Quantities in MT)						
	2009-10	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16
Using cavern	109673	4205	8305	19998	0	0	0
Using cavern bypass	110201	19619	0	0	0	0	0

51. As earlier pointed out in paragraphs 16 and 17, but at the cost of repetition being material to the case, imports of pre-mixed LPG are no longer being made as this is not cost effective. To overcome this, EIPL proposed to blend propane and butane, imported separately, by using SALPG's blender and then transmit the output directly into the cross-country pipeline, bypassing the cavern. Alternatively, EIPL proposed a tap-out from SALPG's propane and butane lines at the jetty end to EIPL's proposed blender and discharge of the blended LPG back into the jetty lines through a tap-in and from there transmit LPG to EIPL's own storage terminal through the cross country pipeline, skipping the cavern. On objections by SALPG to these proposals, EIPL sought only tap-out facility from SALPG's propane and butane pipelines at the jetty end for blending in EIPL's proposed blender and thereafter, transmit the blended products to its terminal through its own proposed pipeline/ infrastructure. SALPG disagreed with all these proposals.
52. The Commission notes that EIPL cannot offer terminalling services without access to the infrastructure operated by SALPG. This has made services of



EIPL economically unviable and has the effect of denying market access to EIPL. The denial of market access, in any manner, by a dominant enterprise cannot be justified. But, in the facts and circumstances of the case, the Commission considers it appropriate to deal with and look into the merits of safety concerns as well as justifications offered by SALPG for its actions.

53. SALPG has sought to justify the impugned restrictions chiefly on safety and technical feasibility grounds. It has also offered efficiency and business justifications. SALPG has further contended that it is a sub-lessee of the land in which the terminalling infrastructure has been developed and unlike the claim of EIPL, Clause 24 of the relevant lease agreement between HPCL and VPT does not contemplate piecemeal sharing of the terminalling infrastructure. Further, it argued that the terminalling infrastructure operated by SALPG is not an essential facility to be allowed access under the competition law. Lastly, SALPG asserted that any piecemeal sharing of SALPG's facility would involve making structural changes to the existing model and this would impact the safety of the entire facility by compromising the operational safety integrity levels (SIL), thus exposing SALPG to unknown risk. SALPG has contended that it operates in a fragile environment where it is dealing with volatile and hazardous products, which attracts the principle of absolute liability in law, in case of any negligence/ mishappening. It was highlighted that the cross-country pipeline runs through densely populated areas and consequences of any accident would be serious. Moreover, if infrastructure is shared, it would be difficult to ascertain the liability of SALPG and EIPL.
54. EIPL, on the other hand, maintained that the contentions of SALPG regarding safety aspects and justification are based on conjunctures and surmises. All along, it has refuted the arguments made and position taken by SALPG. It has further put forth counterclaims to demonstrate as to how providing access to EIPL would not compromise safety and integrity of the overall terminalling infrastructure, in any manner. Each of these aspects is dealt with separately as



under:

A. *Safety and technical feasibility concerns raised by SALPG*

54.1 In the Main Investigation Report filed on 30th November, 2012, DG has noted that pending report of technical expert in the matter, it is not known whether it is safe and technically feasible to allow tap-out and tap-in. The investigation has also noted that, it is not known whether the cavern functions only as a storage unit or also plays a necessary role in mixing and providing additional safety level.

54.2 While the investigation was pending, during the hearing of the parties on EIPL's application for interim relief, the Commission, *vide* its order dated 8th February, 2012 read with subsequent order dated 19th April, 2012, had directed that

“...SALPG shall permit EIL or any other independent expert appointed by VPT to give a report about the technical feasibility of connecting EIPL blender to the existing pipeline”.

In pursuance thereof, VPT sought to appoint Bureau Veritas (India) Pvt. Ltd. and DNV GL, Chennai to conduct the study. However, due to technical objections raised by SALPG, VPT could not appoint any independent consultant. Instead, SALPG commissioned a study on its own by Engineers India Limited (“**EIL**”) to assess the technical feasibility of connecting EIPL's blender to the existing pipelines. EIL submitted its report on 30th October, 2012. In the report, it was concluded that acceding to demands of EIPL is fraught with risks and pumping propane-butane mixture, through existing HPCL facilities, is not feasible. Upon this, EIPL appointed Projects and Development India Limited (“**PDIL**”) to review the EIL Report, which submitted its report on 29th November, 2013. The PDIL review, *inter alia*, observed that:



“It has been realised and noticed that some critical issues, as raised by EIL, had been expressed with the extreme kind of measurement and in disproportionate way, which can be averted and clarified to least significant, if EIL/SALPG explored the valuable inputs as well as engineering data/drawing/information from EIPL and took the advantage of the presence of EIPL expert by inviting them into the table for this exercise.

The PDIL Report concludes that, *“In view of the above study, it can be concluded the proposed blending facility (from tap-off to tap-in including blender) shall meet the entire design and safety requirement ensuring safety and trouble free operation”*. Based on the PDIL Report, EIPL has claimed that EIL Report is biased and needs to be disregarded.

- 54.3 It may be pertinent to note that EIPL, in its reply dated 9th December 2016, had stated that its proposal to install LPG blender was approved by Petroleum and Explosives Safety Organisation (PESO) on 21st April, 2011. Before that the Commission, on 24th November, 2016 had asked VPT to comment on the safety and technical feasibility issues. In its response of 12th January, 2017, VPT stated that:

“VPT has appointed an independent consultant to study this as part of the various safety studies commissioned from time to time. The studies are yet to commence as information and cooperation from some of the parties concerned is not forthcoming.”

- 54.4 With respect to the studies commissioned by SALPG and EIPL, respectively, VPT has commented that EIL did not consult or take any input from VPT. However, PDIL report was submitted to VPT, which forwarded it to OMCs and SALPG for comments. PDIL had also provided its response to SALPG’s observations/comment on its report to VPT. Based on this VPT had opined that:

“Due to repeated non-acceptance of SALPG and HPCL to accept PDIL’s report, VPT is of the view that an independent consultant must study the safety aspects and come up with a



solution that will enable EIPL to receive products directly from the ship.”

54.5 It is in the above background, the Commission, observed, in its order dated 10th January, 2018, as under:

“It emerges from the responses of the Informant and VPT that SALPG has not been cooperating to allow any independent study for evaluating the safety concerns arising out of sharing of its terminalling infrastructure. Although SALPG voices exposure to unknown risk and impact on SIL-3 certification for the overall infrastructure, it is indiscernible as to why another audit could not be conducted addressing all the relevant concerns. Given that there are two reports on the issues arriving at different conclusions, an independent study on safety concerns, by an agency appointed by VPT, is critical and assumes significance. Nevertheless, the persistent non-cooperation by SALPG to allow such study appears to be with a view to refuse potential sharing of its infrastructure with the Informant”.

54.6 In response to the above observations of the Commission, SALPG submitted that it is not correct to say that it did not extend cooperation for undertaking an independent third party study on safety and technical feasibility of blender connectivity. SALPG has instead always maintained that scope of any third party study must be correctly defined and clearly agreed upon to take real advantage of third party expertise.

54.7 It contended that order of the Commission clearly stipulated the scope of the technical study *i.e.* examination of technical feasibility of connecting EIPL blender to the existing pipeline only. The same was also communicated to VPT by SALPG vide letter dated 20th May, 2015 wherein SALPG agreed to contribute 50% of fee of the third party study. However, contrary to the mandate given by the Commission, VPT proposed DNV GL, Chennai should be engaged to carry out three studies setting out varying scopes of study. Since there was no consensus on the scope of study, SALPG got a study done through EIL



and submitted its report to VPT on 29th April, 2013.

54.8 It argued that given the reputation and expertise of EIL, its recommendations regarding EIPL's proposals cannot be undermined. Further, conclusions in the report were arrived at after providing adequate opportunity to all concerned including VPT. On the other hand, PDIL, which was commissioned by EIPL to review EIL's report, did not provide opportunity to SALPG to offer its comments before the finalization of its review report. Further, according to SALPG, PDIL has not done a holistic study and its report fails to point out any infirmity in the EIL report.

54.9 To appreciate the safety concerns raised, the Commission had ordered a study by an independent agency on technical feasibility of connecting EIPL blender to the existing pipeline. However, the same could not be undertaken mainly on account of the issues raised by SALPG on the scope of study. The Commission is not convinced by the arguments of SALPG. In case there was an issue regarding scope proposed by VPT, SALPG could have approached the Commission for necessary clarification. Alternatively, SALPG could have extended its cooperation and later, raised issues, if any, before the Commission. Instead, SALPG did not cooperate with VPT and unilaterally proceeded with EIL. On the other hand, EIPL engaged PDIL to review the report submitted by EIL. All this has led to a situation where the Commission has on record two conflicting reports, none of which can be regarded as an objective third party study. The issue could have been resolved in a timely manner had SALPG extended its cooperation to VPT. The Commission thus has to look into the safety aspects, based on the material available on record including the said reports. The determination of the Commission in this regard are as under:



54.10 With respect to the specific safety concerns, Mr. Amitabh Kumar, the learned counsel appearing for SALPG contended that while its pipeline from jetty to cavern is capable of handling LPG at low temperature *i.e.* below 0 degree centigrade, operating temperature of the cross-country pipeline is (+10) degree centigrade to (+40) degree centigrade. Thus, the temperature of LPG/Butane subjected to the cross-country pipeline has to be more than (+10) degree centigrade.

54.11 Mr. Haksar, the learned senior counsel appearing for EIPL, on the other hand, has contended that it is safe to subject products from blender to the cross-country pipeline, without using cavern. Based on EIL Report, EIPL has contended that cavern cannot receive products with temperature less than (+2) degree centigrade as the same would result in ice formation in the cavern leading to cracks in the cavern wall. It referred to the following relevant excerpts of the EIL Report:

“The Seawater Heat Exchanger system is designed to heat a mixture of propane at -45C and butane at -5C from the mixed temperature of approx. -20C to +2C. This positive temperature is required to avoid rock fracture due to ice formation in the rock mass...The imported propane and butane are metered and mixed (blended) in blender before being heated to at least +2C for monitoring and balancing the quality and quantity of the incoming product.”

54.12 Mr. Haksar further stated that as per the design specifications of the cross-country pipeline, minimum temperature at which products could be sent is (+1) degree centigrade and not (+10) degree centigrade. That being the case, it is asserted that any product which is safe to go into the cavern is automatically safe to be subjected to the cross-country pipeline, as the minimum temperature for product to be put in cavern is (+2) degree centigrade, which is higher than the design temperature of the cross country pipeline *i.e.* (+1) degree centigrade.

54.13 Further, Relying on EIL report, Mr. Haksar explained that the Seawater



Heat Exchanger system is designed to heat a mixture of propane at (-45) degree centigrade and butane at (-5) degree centigrade from the mixed temperature of approximately (-20) degree centigrade to (+2) degree centigrade. Thus, heat regulation system has the ability to elevate the temperature of the products by (+22) degree centigrade. In case of import of butane and propane separately, propane alone is heated using ship heater to convert it to a positive temperature, upto (+50) degree centigrade, from (-45) degree centigrade. However, butane is not heated in ship. Both the products when transmitted out of the ship, can pick up ambient heat too. After blending of propane and butane, temperature of the resultant LPG is in the range of (+5) degree centigrade to (+8.5) degree centigrade. Thereafter, the heat exchanger could further raise the temperature by (+22) degree centigrade resulting in a product of temperature in the range of (+27) degree centigrade to (+ 30.5) degree centigrade. This is definitely above (+10) degree centigrade and hence, is safe to be subjected to the cross-country pipeline.

54.14 In its written submission, EIPL has further submitted that the extant emergency mechanism of the terminalling infrastructure is sufficient to take care of the safety concerns. It is SALPG' own submission that they have high level of Automation System (Distribution Control and PLC Logics), which is interlocked with the terminal emergency shutdown system. The system shuts down automatically the complete terminalling operations in case of an emergency.

54.15 Considering the submissions of both the parties and factual developments which have been placed so far, Commission is of the view that the safety concerns raised by SALPG have two aspects: *first*, those related to provision of tap-out and/or tap-in; and *second*, providing of bypass to pre-mixed and blended LPG. These are dealt with in the succeeding paragraphs.



Tap-out and Tap-in

54.16 SALPG's key objection to tap-in and tap-out proposal has been that structural changes to its infrastructure may affect the safety integrity levels. Additionally it has asserted that allowing such request may result in accidental release of refrigerated cargo into HPCL's pumps and cross country pipeline leading to disastrous consequences. In this regard, the Commission observes that any access involving structural modification to the existing infrastructure has to essentially meet the relevant requirements and would be allowed only after obtaining necessary approvals. The Commission notes that EIPL had sought approval of the Petroleum and Explosives Safety Organisation (PESO) for setting up of LPG blender in 2010. PESO administers Explosives Act, 1884, Petroleum Act, 1934 and Inflammable Substances Act, 1952 and is the authority responsible for ensuring safety and security of public and property from fire and explosion. It grants approval after satisfaction of criteria relating to, *inter-alia*, safety aspects, as prescribed under the aforementioned statutes. Pursuant to the aforesaid application of EIPL, PESO *vide* letter dated 5th August 2010 observed that the drawing showing EIPL's proposed blender facility at the Visakhapatnam port met the approval of PESO and the same was returned with duly endorsed token of approval subject to several conditions stipulated therein. These included demonstration of safe operating procedures and emergency response measures, undertaking from VPT regarding responsibility on firefighting arrangements and a clear consent letter from the owners of the propane and butane pipelines authorising tap off for the purpose of using the proposed LPG blender. Subsequently, the detailed statement and feasibility report submitted by EIPL, PESO, *inter-alia*, further directed EIPL to give intimation '*once the facilities are fully ready along with detailed Site/Layout and P & I Diagram of entire area to arrange its inspection to consider granting permission*



for commissioning’.

54.17 All this suggests that PESO had not found fault with the design of EIPL’s LPG blender and allowed it to install the same albeit certain conditions. SALPG was confronted with these facts *vide* Commission’s order dated 10th January, 2018. In response, SALPG has stated that as per PESO letter dated 05th August, 2010, there is a requirement that a clear consent letter should be obtained from the owners of the twin pipelines authorising tap off for the use of EIPL’s proposed blending unit. SALPG has not given any consent in this regard till date. Hence, it has been asserted that no PESO approval exists for Tap-Out and Tap-in from SALPG facility.

54.18 While it is understandable that SALPG would like to be assured about safety aspects before giving its consent, it is in this context that the need for independent study assumes further significance. As discussed earlier, Commission had directed that SALPG shall permit EIL or any other independent expert appointed by VPT to give a report about the technical feasibility of connecting EIPL blender to the existing pipeline. Had SALPG extended its cooperation to such a study, safety and technical feasibility aspects could have been determined in a timely manner.

54.19 At this juncture, it is also relevant to note the contention of Mr. Haksar, learned senior counsel appearing for EIPL that representative of SALPG himself had stated to VPT that there are no technical constraints for provision of tap off. The relevant extracts of the minutes dated 8th November, 2010 of a meeting held at VPT, reads as under:

“M/s. SALPG Representative informed that tampering (Tap off) of the existing system is not possible, since it is integrated system with cavern. Dy. Chairman enquired them whether there are any



technical constraints for Tap off. The SALPG Representative clarified that there are no technical constraints but that the piping system is dedicated for unloading into the Cavern and further stated that M/s. EIPL, M/s. HPCL and M/s. IOCL are using the integrated system of unloading facilities and Cavern including the blender. Dy. Chairman asked whether M/s. EIPL could use their blending system. M/s SALPG representative informed that it is not possible and further stated that only an end user can approach them and have a business tie up with them.”

As may be seen, mandatory use of cavern was insisted on the pretext that the whole of the upstream terminalling infrastructure is an integrated system and piece-meal access has not been envisaged. It was specifically clarified that there was no technical constraint in provision of tap out nor any safety concern was expressed. The investigation has revealed that SALPG was initially not averse to provide a tap out from the unloading arms to the Informant but objected to tap in back into its pipeline system. VPT, in its meeting held on 16th March, 2013, also required SALPG to provide tap off. VPT again issued a letter dated 6th April, 2015 to SALPG to provide a tap off. Later on, SALPG *vide* letter dated 10th June, 2015 refused to provide even tap out. All these indicate the possibility of tap out from the jetty and the purported objections to tap out appear to be an afterthought. The Commission also notes that the terminalling infrastructure developed by SALPG is purportedly a state-of-the art facility with an automated failsafe mechanism to address safety and emergency situations. Under these circumstances, general objection to tap-in and tap-out, without specifics regarding the potential safety outbreaks being demonstrated, is considered vague and *sans* merit.

54.20 SALPG has contended that for providing tap-out, it has to stop its operations and make fresh reference to concerned Ministries and Statutory bodies for obtaining necessary approvals. The Commission



notes that weighed with the possibility of competition in LPG terminalling services by granting access to EIPL, hurdles to operations of SALPG because of regulatory requirement/audits are not a justification to deny access. Moreover, statutory and regulatory processes are going to address the concerns including those related to safety raised by SALPG. The contention of SALPG that tap-in and tap-out had not been done in any other port in India cannot also be a reason to decline the proposal of EIPL if the same is found to be feasible otherwise. Allowing feasible access cannot be termed as puncturing of the existing infrastructure, as is being portrayed by SALPG. It is expected that one should keep faith in the regulatory process which would permit access to EIPL only if the same is permissible under applicable law/regulations.

54.21 SALPG has further contended that being the proprietor and operator of the terminalling infrastructure, it is best placed to determine the safety concerns associated with tap-in and tap-out. The Commission observes that SALPG being the only player offering upstream terminalling services at Visakhapatnam Port, it has control over the terminalling infrastructure also. Thus, no other person can have access to the same and offer competing terminalling services, without the concurrence of SALPG. This gives rise to a situation where the person who has incentive to foreclose competition and thereby protect profits, has control over the access of entrants/ competitors. One has to keep such a circumstance in the backdrop while evaluating the alleged denial under competition law.

54.22 Having said that, the Commission does not see merit in the objections raised by SALPG to provide tap-out and/or tap-in to EIPL. This is more so given the conflict of interest discussed above. As per EIPL, it would require bypass of cavern in the event of tap-out and tap-in to the propane and butane lines from the jetty. SALPG has raised safety concerns in



relation to bypass, in addition to the purported concerns specific to making structural changes for tap-in and tap-out. The merits of SALPG's concerns regarding bypass are dealt separately in succeeding paragraphs.

Bypass of Cavern

- 54.23 As for the safety concerns associated with bypass of cavern, it is observed that LPG is generally sold in the market either in the form of pre-mixed LPG in the ratio of 50:50 (propane: butane), or exclusively in the form of butane. While propane is stored at (-45) degree centigrade, butane is stored at (-2) to (-5) degree centigrade. If propane and butane are imported separately, they are mixed together in the blender. However, if LPG is sold exclusively in the form of butane no blending is required. Pre-mixed LPG also does not require blending services.
- 54.24 SALPG has raised the issue of accidental release of cold propane into HPCL's cross-country pipeline. It was further contended that higher homogeneity of product can be achieved by mixing of the product coming into the cavern. The Commission observes that in case of imports of propane and butane separately, propane is first subject to an on-board ship heater to achieve a positive temperature. It gains ambient heat while passing through the pipeline. Both propane and butane are then discharged into the blender for mixing. Therefrom, the resultant mixture is subjected to the heat exchanger to elevate the temperature further. The product coming out of the exchanger is presently discharged into the cavern. EIPL seeks bypass of cavern and wants the blended output to be directly pumped into the HPCL cross-country pipeline, to which SALPG has raised safety concerns and given justification based on efficiency and commercial interest. The key safety concern expressed is that HPCL cross-country pipeline cannot



handle LPG at a temperature below (+10) degree centigrade. It has been contended that cavern acts as buffer for receipt and discharge operations and ensures that only LPG at a temperature of (+10) degree centigrade is discharged into the cross-country pipeline.

54.25 While SALPG has mentioned that operational temperature with respect to the cross-country pipeline is (+10) degree centigrade, it must be noted that the design parameter of cross-country pipeline is (+1) degree centigrade. The EIL report has expressed its apprehension based on operational parameters of cross-country pipeline alone. At the same time, SALPG has all along downplayed the importance of on board heating at vessel and efficiency of its failsafe mechanism, and has been alleging ten instances of on-board heater failure in vessels. However, VPT in its response dated 12th January, 2017, has stated that there was no ship heater failure reported to it so far. Thus, it appears that EIL report has assumed extreme possibilities of failures and therefore, the study commissioned by SALPG lacks an unbiased approach to the issue. A proper analysis should entail objective comparison of both design and operational parameters of blender, heat exchanger, cavern and the cross-country pipeline.

54.26 The Commission observes that as per the EIL report, seawater heat exchanger system, which receives LPG from the blender, is *designed* to heat a mixture of propane at (-45) degree centigrade and butane at (-5) degree centigrade from the mixed temperature of approximately (-20) degree centigrade to (+2) degree centigrade. This temperature is to avoid rock fracture due to ice formation in rock mass, which term according to EIPL is the wall of the cavern. However, neither the EIL report nor the submissions of SALPG provide details of the operating temperature levels of the blender and the heat exchanger.



54.27 During the final hearing on the matter, Mr. Haksar, learned senior counsel appearing for EIPL drew the attention of the Commission to details of actual temperature at which propane and butane are discharged from the vessel, temperature of the product after blending as well as the heating potential of the heat exchanger. These submissions are summarised above in paragraphs 54.11 to 54.14. Annexure 1 to the supplementary investigation report dated 27th March, 2015, *inter alia*, provides details of the pumping log of SALPG with respect to certain vessels like Venus Glory, Thetis Glory, Flanders Liberty and Maharshi Vamadeva. These details are in respect of the temperature of propane and butane discharged from the respective vessels. It is noted that propane is discharged out of all these vessels at a plus temperature. For instance, in case of Thetis Glory, the temperature of propane discharged ranged between (+5) and (+11.5) degree centigrade. The average temperature works to (+8.5) degree centigrade. Temperature of butane for the same vessel ranged between (-3.2) and (-2.8) degree centigrade. EIPL has contended that positive temperature of propane is due to the heating process carried out in the vessel. Similar temperature levels are observed with respect to other vessels mentioned above. This coupled with the design and operational parameters of the heat exchanger would ensure that the temperature of the resultant product would in any case be above (+10) degree centigrade. And this is with the assumption that the product discharged from vessel does not pick up any ambient heat, which would result in raising of temperature further. In case of on-board heater failure at the vessel, the Commission notes that the failsafe mechanism and the design parameters of the heat exchanger [*i.e.* elevating temperature from (-20) to (+2) degree centigrade] and the cross-country pipeline [*i.e.* ability to receive products at (+1) degree centigrade] should be able to address the safety concerns expressed by SALPG.



54.28 The Commission is in agreement with the submissions of Mr. Haksar, learned senior counsel appearing for EIPL. It appears from the foregoing details that in normal course, temperature of product mixture coming out of heat exchanger would be definitely above (+10) and would thus, meet the desired operational temperature level of the cross-country pipeline. Further, in the event of on-board heater failure, which is a worst case scenario, mixture discharged from the heat exchanger would be having a positive temperature and would meet the design parameter of the cross-country pipeline [*i.e.* (+1) degree centigrade] to receive the product. Further, it is expected that emergency procedures would take care and address the unforeseen safety risks.

54.29 During the hearing as well as in its submissions, SALPG could not rebut the aspects regarding temperature and specifications/ abilities of on-board vessel heaters, heat exchanger, cavern and the cross-country pipeline which were advanced by EIPL or controvert the pumping log date in respect of vessels discussed above. It has also not been able to demonstrate that safety concerns are insurmountable.

B. *Efficiency and objective business justifications given by SALPG for not allowing bypass*

54.30 The DG in its report accepted the efficiency and objective justifications offered by SALPG for not allowing bypass of cavern. It acknowledged the claim that bypassing cavern would result in underutilization of its facility and thus, SALPG has a legitimate case in protecting its business interest by refusing hook-up to EIPL.

54.31 Regarding efficiency of the use of cavern, the DG has also noted that the throughput capacity of Vishakhapatnam terminal is limited by the HPCL cross-country pipeline capacity of 250-300 MT/per hour, irrespective of whether the discharge is through the bypass route or the



cavern route. The cavern has been designed to receive and store products at a high flow rate which reduces ship occupancy at the jetty, thus enabling free time for handling other products vessels for OMCs and VPT. The discharge from the vessel in case of use of cavern can go upto 1000 MT/hr. But if bypass is permitted, the discharge rate is limited to 250 MT/hr. which is the carrying capacity of HPCL cross-country pipeline. During the bypass of LPG, cavern evacuation is blocked fully as HPCL cross-country pipeline is common to both cavern evacuation and bypass operations and can handle one of them at a time. That being it, LPG evacuation at the port is limited by the carrying capacity of HPCL cross-country pipeline, resulting in increased vessel retention time at the berth and thus, higher cost (demurrage charges) to OMCs both for unloading and demurrage.

54.32 The Commission, however, in its order dated 10th January, 2018, *inter-alia*, noted that the efficiency claims do not take into consideration the inefficiencies/losses resulting from prohibition of bypass of cavern and denial of tap-out to EIPL.

54.33 In response to these observations of the Commission, SALPG has contended that limited bypass of cavern is allowed only for pre-mixed LPG and butane. Moreover, HPCL does not allow bypass of low temperature propane and blended LPG as the metallurgy of the material of its pumps and cross-country pipeline are not designed to handle the same. Further, it argued that bypass of cavern would decrease the existing evacuation rate at SS jetty from 500-600 MT/hour to 200 MT/hour which would lead to increased vessel retention at the berth resulting in huge demurrage costs for OMCs. In case of delayed vessel discharge, nearly USD 18000-20000 per day is required to be paid as demurrage charges. In support of its contention, it has stated that till 2007, Visakhapatnam Port has berthed LPG vessels of capacity in the range of 6000-12000 MT cargo size. The commissioning of the cavern



with the storage capacity of 60000 MT, has helped OMCs in a big way to bring large cargo parcels using VLGC carriers of capacity 30000-45000 MT. It is also a fact that storage of EIPL has become technically unviable after the commissioning of the cavern. During the hearing, Mr. Amitabh Kumar, the learned counsel appearing for SALPG further contended that EIPL cannot be allowed to free ride the infrastructure developed by SALPG and that it cannot be asked to make investments so as to provide access to EIPL.

54.34 On the contrary, EIPL contended that because of the bypass restrictions and prohibitions being forced by SALPG, OMCs have estimated to have lost around INR 325 crores. EIPL submitted that cavern has only one receptacle and it is not possible to route different propane and butane mixes through cavern at the same time. On the other hand, EIPL's storage capacity has three storage spheres and it is possible to route LPG of different mixes through these spheres. It stated that the said fact was confirmed by the witness of IOCL in his cross-examination by EIPL, which reveals that the efficiency at the Visakhapatnam Port shall increase if Informant is allowed to compete with SALPG. The continued reluctance of SALPG to provide a hook up or bypass is not the result of cavern being underutilised but that of erosion of monopolistic profits. As regards VGLC imports, it submitted that the cavern in itself is not responsible for facilitating VGLC imports at Visakhapatnam Port as the port jetty has been designed and built to berth VLGCs. The witness of VPT in his cross-examination by SALPG also confirmed this fact. Any port with 11.5 metres berthing depth, air draft of 10 metres and unloading arms of sufficient scale can facilitate VLGC imports. The ports at Ennore, Haldia and Kandla have storage capacities of 30,000 MT, 30,000 MT and 15,000 MT respectively, which is much below the cavern of SALPG. Yet, they import LPG through VLGCs. During the hearing, Mr. Haksar, learned senior



counsel appearing for EIPL further submitted that OMCs should be free to decide whether to avail the services of EIPL or SALPG.

54.35 Theoretically, use of EIPL's storage facility after availing the entire terminalling services of SALPG *i.e.* up till the use of cavern would cost OMCs Rs. 2259 (Rs.1540 to SALPG and Rs.719 to EIPL). If cavern facility is bypassed, OMCs could take products to GAIL/Tank trucks by paying only Rs.919/- (Rs.200/- for bypass to SALPG and Rs.719/- to EIPL). However, at present, SALPG allows only 25 percent of pre-mixed LPG to be bypassed for which only Rs. 200/- is payable to SALPG. Blended products are completely banned from bypassing cavern. If bypass is not allowed, it makes no economic sense for OMCs to avail the services of EIPL, as they have to pay for SALPG's cavern as well as Informant's storage services. These restrictions, in effect, limit the scope of business of EIPL to pre-mixed LPG/ butane and that too to the extent bypass of cavern is allowed. Although bypass results in reduced price to OMCs, SALPG sought to justify the restriction on the basis that bypass results in underutilization of cavern and SALPG cannot recoup its investment. The DG has suggested that the bypass restriction is justified on the ground that cavern is the core and integral part of SALPG's terminalling infrastructure and it has objective business reasons for insisting on use of cavern.

54.36 The Commission notes that protection of commercial interest by a dominant enterprise, at the cost of competition, is contrary to its responsibility cast under the Act. SALPG has pointed out that allowing bypass would reduce the discharge rate *i.e.* from 1000 MT/hour to 250-300 MT/hour, thereby increasing the demurrage charges to OMCs. Seen from the perspective of competition, the Commission is of the view that if option of bypass is allowed, the users, *i.e.* OMCs could in that case decide on the choice to make for after weighing the cost and



other relevant factors. In other words, it is for the customers to decide whether they would like to pay for use of the cavern or opt for higher vessel retention. The Commission observes that effective competition does not necessarily mean prevalence of the most efficient to the exclusion of relatively less efficient choices to consumers. Therefore, in the absence of capacity constraints to accommodate the services offered by EIPL, restraint on competition exerted by SALPG on the pretext of the former being less efficient, would not be justified. Against this background, the Commission looked into the capacity utilisation details of the LPG terminalling infrastructure to see whether there exists any capacity limitations to accommodate the services offered by EIPL which could otherwise be an additional choice to consumers besides being a competitive constraint to SALPG.

54.37 In its order dated 10th January, 2018, the Commission had expressed concerns regarding significant waiting period at the jetty and the possibility of simultaneous discharge into cavern as well as EIPLs' storage facility. To this, SALPG has submitted that the waiting is largely due to improper planning by OMCs and there is no possibility of simultaneous discharge. It has also contended that simultaneous discharge is not a possibility and bypass would reduce the LPG handling capacities significantly. On the other hand, EIPL has alluded to the possibility of simultaneous discharge. The Commission observes that as per the details provided by VPT, capacity of LPG berth is 3 million MT of LPG per annum. But actual capacities utilized were only in the range of around 34% to 45%, between 2010-11 and 2016-17. For the same period, data on vessel occupation at LPG jetty at Vishakhapatnam Port suggests that the occupancy was around 28% to 37%. The relevant details are reproduced below:



Table No. 3: Year-wise (Since 01-04-2010) handling data of LPG berth pertaining to premixed LPG/Butane and Blended LPG (Propane and Butane separately)

Exporter Importer	YEAR							(in MT)
	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	Grand Total
LPG								
BPCL	1,69,301	1,62,205	1,65,878	1,52,426				6,49,810
HPCL	4,79,517	5,49,331	5,65,306	4,78,902				20,73,056
IOCL	3,62,045	3,11,190	3,72,965	3,15,642				13,61,842
SHV ENE.	17,320							17,320
A. Total	10,28,183	10,22,726	11,04,149	9,46,970				41,02,028
Butane								
BPCL				25,468	97,270	1,47,857	1,29,684	4,00,279
HPCL				4,400	2,78,258	3,13,196	2,99,244	8,95,098
IOCL				23,450	2,15,952	2,47,859	1,61,747	6,49,008
B. Total				53,318	5,91,480	7,08,912	5,90,675	19,44,385
Propane								
BPCL				15,600	78,590	1,24,687	1,07,071	3,25,948
HPCL				13,600	2,52,482	2,86,909	2,84,253	8,37,244
IOCL				19,152	1,89,729	2,21,851	1,46,190	5,76,922
C. Total				48,352	5,20,801	6,33,447	5,37,514	17,40,114
Grand Total (A+B+C)	10,28,183	10,22,726	11,04,149	10,48,640	11,12,281	13,42,359	11,28,189	77,86,527

Source: Response dated 12th January, 2017

Table No. 4: Data regarding, No. of days, the LPG jetty was occupied by vessels carrying LPG/Propane/Butane during 2010-16 on year – wise basis

Sailed On	YEAR (Total no. of Days Occupied)							Total
	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	
Jan	12.66	12.65	7.23	13.69	5.68	12.14		64.05
Feb	11.14	12.51	10.64	8.73	12.94	9.92		65.88
Mar	9.81	8.61	6.99	10.88	10.00	9.44		55.73
Apr	8.61	11.33	14.96	11.96	11.57	8.69	11.39	78.50
May	11.05	12.21	9.45	8.78	9.78	10.29	11.37	72.94
June	11.81	8.82	12.46	7.62	9.53	8.77	11.27	70.29
July	10.09	13.60	10.02	8.89	6.19	12.71	8.24	69.74
Aug	14.50	7.61	13.54	7.19	10.00	10.70	16.00	79.54
Sep	13.30	10.61	11.48	11.40	9.09	12.04	10.87	78.79
Oct	9.66	6.03	12.89	10.26	9.34	13.88	11.53	73.60
Nov	7.46	10.75	13.59	8.30	11.62	10.04	14.22	75.98
Dec	15.35	10.77	8.48	5.52	12.70	10.58	8.05	71.45
Total	135.43	125.51	131.73	113.23	118.46	129.20	102.94	856.50

Source: Response dated 12th January, 2017

54.38 These details show that, waiting of vessels, if any, is not on account of capacity constraints. Not even half of the actual capacity seemed to have been utilised. It also transpires that a more efficient scheduling on



the part of OMCs and traffic management by VPT would go a long way to reduce such a waiting. Even now, it is not certain whether simultaneous discharge into the cavern as well as the storage facility of EIPL is possible. Based on the foregoing discussion, Commission is of the view that allowing access to EIPL and thereby, providing additional storage option to OMCs would be a positive development. This is expected to make the relevant market more competitive resulting in more competitive price, quality of service, optimal sharing and efficient use of terminalling infrastructure, including the jetty at Visakhapatnam Port.

54.39 If simultaneous discharge into cavern as well as EIPL's storage is not feasible, details on capacity utilization and occupation of LPG jetty suggest that there is a possibility of increased vessel retention to provide better access to EIPL, even at a lesser discharge rate of 200-250 MT/hr. and to bypassing of cavern. Such vessel retention may not necessarily increase the waiting time of other vessels given the extent of unutilized capacity and possibility of effective congestion and traffic management.

54.40 The details discussed above show that substantial capacity of LPG terminal at Visakhapatnam Port remained unutilised over the last seven years. Similarly, the LPG jetty was occupied by vessels for only around one third of the time during the same period. Here, again it is relevant to point out that even SALPG, in its submission dated 20th February, 2018 had submitted that present waiting of vessels is largely on account of inefficient planning by OMCs.

54.41 The Commission concludes that efficiency justifications advanced by SALPG ignore the inefficiencies/losses resulting from prohibition of bypass of cavern and denial of tap-out to EIPL and the resultant



foreclosure of competition and the consequent loss of efficiencies. Moreover, claims of SALPG with respect to capacity of the jetty, possibility of simultaneous discharge and necessity of further blending are disputed. In the absence of holistic approach to the efficiency and claims of SALPG not being supported by clear and cogent material, these are not considered plausible and sufficient to justify the restraint on competition.

54.42 As regards the objective justification to protect commercial interest of SALPG, EIPL has contended that based on the volumes handled so far, SALPG would have recouped twice the value of its investment in cavern. The Commission notes that, on this count too, SALPG failed to provide any facts or figure to justify the denial of access or bypass and resultant restriction on competition. In any case, there is no justification for imposing restriction on competition by a dominant enterprise to protect its commercial interest.

55. SALPG has further contended that the facilities of the SALPG are not essential in nature and accordingly, there is no obligation on it to share its infrastructure. Mr. Amitabh Kumar, the learned counsel appearing for SALPG vehemently argued on this point and stated that essential facility doctrine has been used rarely even in mature jurisdictions like EC to prevent freeriding. He placed reliance upon decision of *Oscar Bronner* wherein a newspaper nationwide delivery scheme was not regarded as essential as there were no technical/ legal or economic obstacles to establish another similar delivery scheme.

56. Having discussed the entry barriers such as cost, gestation period and resulting difficulty to replicate any alternative terminalling infrastructure in near future and substantial dependence of consumers, the Commission reiterates that the relevant market exhibits insurmountable barriers to entry and thus, dominant position enjoyed by SALPG is unconstrained. Under the circumstances, access



to infrastructure of SALPG is found critical for offering terminalling services at Visakhapatnam Port. Having held SALPG to be the dominant enterprise, Commission does not find it necessary to decide whether the terminalling infrastructure of SALPG is an essential facility or not as dominance of SALPG has been established in terms of relevant parameters under Section 19(4) of the Act. As a result, it is vested with special responsibility to not inhibit competition and be compliant with the requirements of the obligation cast under Section 4 of the Act.

57. Finally, on the scope and interpretation of Clause 24 of the Long Lease Agreement dated 6th October, 2003 between HPCL (Lessee) and VPT (Lessor), the Commission notes that conflicting interpretations were offered by the Parties. The said Clause provides that the Lessee HPCL and sub-lessee i.e. SALPG shall share the Cavern facility-pipeline system with other users, on reasonable terms, as recommended by the Lessor *i.e.* VPT. While VPT and the Informant have asserted the possibility of piece-meal sharing of the unloading arms, blender, or cavern, SALPG has contended that sharing envisaged under Clause 24 implies access to its entire infrastructure and nothing to the contrary. The Commission observes that determination of the meaning and scope of the impugned provision of the Lease Agreement is not a pre-requisite to establish a contravention under the Act. Even if one assumes that the Lease Agreement restricts piece-meal access, abusive conduct of SALPG is a subject matter of examination under the Act and the Commission has authority to remedy restrictions and impositions that are found as contraventions under the Act.
58. Based on the forgoing assessment, the Commission is of the view that SALPG has the ability to deny market access to competitors given its monopoly position in operating terminalling infrastructure at Visakhapatnam Port. Further, given its commercial interest in insisting on the use of cavern, SALPG has incentive to foreclose the use of EIPL's storage and the proposed blending services. Its reluctance to undertake an independent study on safety concerns can be construed as a ploy to refuse sharing its terminalling infrastructure. Such



a conduct amounts to denial of market access as well as a limitation and/or restriction on the services otherwise being provided by the Informant, in contravention of Section 4(1) read with Section 4(2)(b)(i) and Section 4(2)(c) of the Act. This is more so when VPT has been recommending and directing SALPG to provide tap-out to the Informant.

59. Further, bypass restriction imposed by SALPG appears to be primarily with the view to protect its commercial interest at the cost of competition. The Commission is of the view that SALPG requiring users to necessarily use cavern and pay higher charges is an unfair imposition in provision of terminalling services; and is likely to discourage imports and restrict the services otherwise offered by the Informant. Thus, the impugned restrictions on bypass of the cavern facility are in contravention of Section 4(1) read with Section 4(2)(a)(i), Section 4(2)(a)(ii) and Section 4(2)(b)(i) of the Act. Since the bypass restrictions were found to have restricted the business volumes of EIPL, without any reasonable grounds, the same is also found to be a denial of market access, in contravention of Section 4(2)(c) of the Act.

ORDER

60. From the facts of the case, it is evident that access to infrastructure operated by SALPG is indispensable to offer terminalling services at Vishakhapatnam Port for servicing the hinterland. As has been brought out, issues in this case had its genesis in the bypass restrictions and stipulation for mandatory use of cavern, imposed by SALPG. These impositions by SALPG have priced out EIPL and reduced its business volumes substantially. To overcome these, EIPL proposed provision of tap-out and/or tap-in to the butane and propane lines from the jetty. The proposals of EIPL were not accepted by SALPG. The conduct of SALPG, being without reasonable grounds, the Commission holds the said restrictions as denial of market access, to be in contravention of Section 4 of the Act.



61. Having found SALPG in contravention of Section 4 of the Act, the remedies herein are intended to provide terminalling service providers, potential or existing, a meaningful access to the terminalling infrastructure at Vishakhapatnam Port, so that they can effectively compete in provision of terminalling services. Accordingly, the Commission orders the following remedies, which are considered necessary and proportionate to address the harm to competition flowing from the impugned abuses.

62. Effective access to the terminalling infrastructure should be granted immediately by any or all of the following options:
 - (a) SALPG shall not insist mandatory use of its cavern and shall allow bypass of cavern for both pre-mixed and blended LPG, without any restrictions; and/or

 - (b) SALPG shall allow access to its competitors, potential as well as existing, to the terminalling infrastructure at Visakhapatnam Port, subject to compliance with all safety integrity and other requirements under applicable laws and regulations framed thereunder. Such an access should avoid additional cost burden on SALPG, and the entity seeking access shall bear the cost, if any, towards necessary changes to the existing infrastructure. Under this option also, SALPG shall not insist on mandatory use of cavern and it shall allow bypass of cavern, without any restriction. SALPG shall extend full cooperation for the study/audit undertaken by VPT in relation to the remedies ordered herein. Needless to say, SALPG shall not do anything raising rival's cost.

63. The Commission has also considered the issue of imposition of monetary penalty on SALPG and has given its thoughtful consideration thereon.



64. Under the provisions contained in Section 27(b) of the Act, the Commission may impose such penalty upon the contravening parties, as it may deem fit which shall be not more than ten per cent of the average of the turnover for the last three preceding financial years, upon each of such persons or enterprises which are parties to such agreement or abuse.
65. In this connection, it would also be apposite to refer to the decision of the Hon'ble Supreme Court in *Excel Crop Care Limited v. Competition Commission of India and Anr.* [common judgment dated 8th May, 2017 in CA No. 53-55, 2874 and 2922 of 2014] , holding that 'turnover' to be taken for imposition of penalty should be the relevant turnover from the product in question and not the total turnover of the enterprise. The Hon'ble Supreme Court has observed as under: “92. *When the agreement leading to contravention of Section 3 involves one product, there seems to be no justification for including other products of an enterprise for the purpose of imposing penalty. This is also clear from the opening words of Section 27 read with Section 3 which relate to one or more specified products. It also defies common sense that though penalty would be imposed in respect of the infringing product, the 'maximum penalty' imposed in all cases be prescribed on the basis of 'all the products' and the 'total turnover' of the enterprise. It would be more so when total turnover of an enterprise may involve activities besides production and sale of products, like rendering of services etc. It, therefore, leads to the conclusion that the turnover has to be of the infringing products and when that is the proper yardstick, it brings home the concept of 'relevant turnover'.*”
66. Thus, the starting point of determination of appropriate penalty should be to determine the relevant turnover and then, to calculate the appropriate percentage of penalty based on facts and circumstances of the case. The Commission has held that the contravening anti-competitive conduct of



SALPG amounts to denial of market access in the '*market for upstream terminalling services at Visakhapatnam Port*'. The relevant turnover for this activity would be the revenue of SALPG from *market for upstream terminalling services at Visakhapatnam Port*. As per the audited financial statements available on the automated information system of Ministry of Corporate Affairs, it has reported its income under two heads; 'Net Sales/ Income from Business Operations' and 'Other income'. Since the terminalling services is the only business of SALPG, the revenue reported under the head 'Net Sales/ Income from Business Operations' has been taken as the relevant turnover in the instant matter.

67. SALPG argued that in the event of penalty, the relevant period for computation should be FY 2008-09, FY 2009-10 and FY 2010-11 as the information was filed in 2011. The Commission notes that the impugned abuses continues till date and thus, the penalty shall be based on the financials of SALPG during the preceding three financial years *i.e.* FY 2014-15, FY 2015-16 and FY 2016-17. Accordingly, the relevant figures work as under:

Table 5: Turnover of SALPG between FY 2014-15 and 2016-17

(Amount in INR crores)				
Name of OP	Turnover for FY 2014-15	Turnover for FY 2015-16	Turnover for FY 2016-17	Average turnover for three years.
SALPG	155.60	193.46	227.17	192.07
Source: Automated Information System of the Ministry of Corporate Affairs				

68. SALPG has claimed confidentiality over its financial statements submitted by it. However, the Commission does not find merit in such request as the audited financials of SALPG are accessible on the automated information system of Ministry of Corporate Affairs and also its revenue details are reflected in the annual report of HPCL, being one of the parent entities.



69. Having decided what constitutes relevant turnover, the Commission now proceeds to calculate the appropriate percentage of penalty. The twin objectives behind imposition of penalty are: (a) to reflect the seriousness of the contravention; and (b) to ensure that the threat of penalties will deter the infringing undertakings. Therefore, the quantum of penalty imposed must be proportional to the gravity of the contravention and must be determined after having due regard to the mitigating and aggravating circumstances of the case.
70. The Commission notes that denial of market access is one of the severe forms of abuse of dominant position. The assessment of the Commission clearly brings out that the abusive conduct of SALPG is primarily with a view to protect its commercial interest at the cost of competition. Such abusive conduct for a prolonged period is an aggravating factor. Further, Commission is of the view that no mitigating factor exists in the facts and circumstances of the present case.
71. Based on above, the Commission finds it appropriate to impose penalty on SALPG at the rate of 10 percent of their average annual turnover generated from the relevant market for upstream terminalling services at Visakhapatnam Port for the Financial Years 2014-15, 2015-16 and 2016-17 as stated at para 67 above.
72. Consequently, the Commission imposes a penalty of INR 19,20,70,000/- only (rupees nineteen crore twenty lakhs and seventy thousand only) upon SALPG for infringing the provisions of Section 4 of the Act.
73. The Commission directs SALPG to deposit the aforesaid penalty amount within 60 days of receipt of this order.
74. It is ordered accordingly.



75. The Secretary is directed to transmit copies of this order to all concerned.

Sd/-
(Devender Kumar Sikri)
Chairperson

Sd/-
(Sudhir Mital)
Member

Sd/-
(Augustine Peter)
Member

New Delhi
Dated: 11/07/2018

Sd/-
(U. C. Nahta)
Member