



National Electric Power Regulatory Authority
Islamic Republic of Pakistan

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Registrar

No. NEPRA/DG(M&E)/LAD-08/ 4080

March 22, 2024

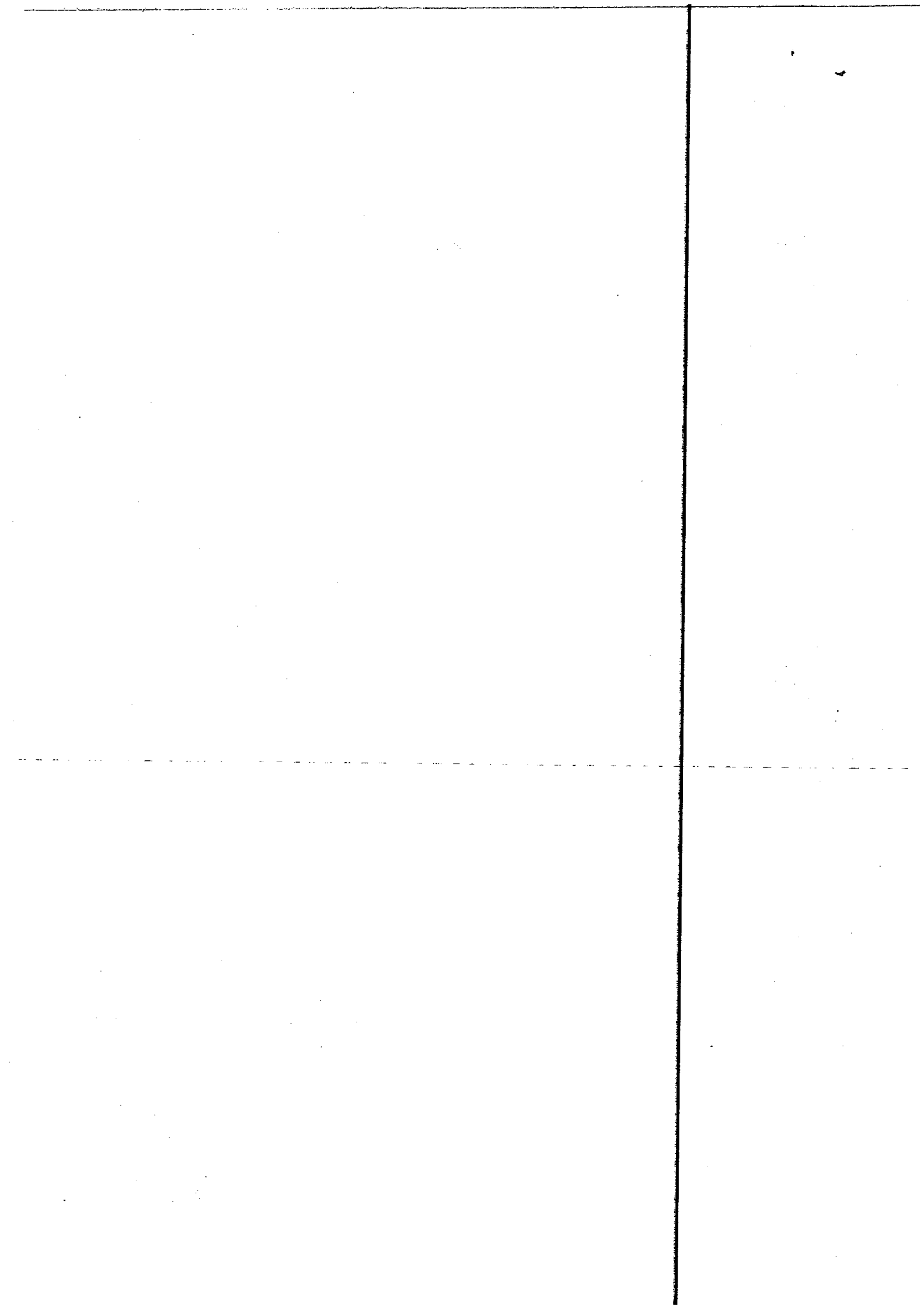
Chief Executive Officer,
Hyderabad Electric Supply Company Limited (HESCO),
WAPDA House, Hussainabad,
Hyderabad

Subject: **ORDER OF THE AUTHORITY IN THE MATTER OF EXPLANATION DATED 18.08.2023 ISSUED TO HESCO ON ACCOUNT OF THE ESTABLISHMENT OF SAFETY DIRECTORATE/DEPARTMENT – UNDER REGULATION 4(1) & (2) OF NEPRA FINE REGULATIONS, 2021**

Please find enclosed herewith, the Order of the Authority (total 09 pages) in the subject matter for information and compliance.

Enclosure: Order of the Authority (total 09 Pages)

(Engr. Mazhar Iqbal Ranjha)





National Electric Power Regulatory Authority

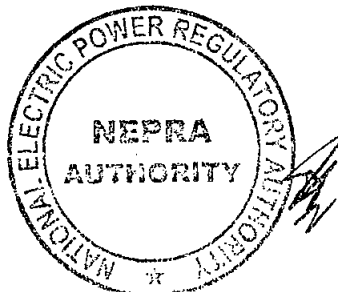
ORDER

**IN THE MATTER OF EXPLANATION DATED 18.08.2023 ISSUED TO HESCO ON
ACCOUNT OF THE ESTABLISHMENT OF SAFETY
DIRECTORATE/DEPARTMENT - UNDER REGULATION 4 (1) & (2) OF NEPRA
FINE REGULATIONS, 2021**

1. Hyderabad Electric Supply Company (HESCO) (the "Licensee") was granted a distribution license (No. DL/05/2023) by the National Electric Power Regulatory Authority (the "Authority") on 09.05.2023 pursuant to section 20 read with 21 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 ("NEPRA Act")

Background:

2. According to Section 7.1 of the Power Safety Code, all the Licensees are required to establish their independent directorate/department of Occupational Health Safety and Environment before December, 2021, and the same was informed to Licensee vide NEPRA letter dated 10.09.2021 followed by a reminder dated 02.03.2022 and a final notice dated 19.10.2022 were also issued. However, no response from Licensee was received despite lapse of the stipulated time.
3. Meanwhile, the same issue was raised during the hearing of Licensee dated 15.05.2023 at NEPRA in the matter of **Adjustment/Indexation Requests Filed by HESCO In Tariff Adjustment for FY 2023-24**. During the hearing, the Authority took serious notice and strictly directed Licensee to comply with the Authority's direction, within 30 days, failing which stern action shall be initiated.
4. Keeping in view the above directions, a letter dated 30.05.2023 was issued to Licensee and again directed to comply with directions and establish an independent Health, Safety and Environment Directorate/Department well within time. However, no response from Licensee was received.
5. It is a matter of record that despite repeated and continuous correspondence, the Licensee has failed to submit response to the direction of the honorable Authority. The Licensee also failed to establish independent Health Safety and Environment Directorate in its service territory despite lapse of two years time. The Licensee should have understood that the HSE is basic requirement of any organization. Moreover, non-submission of response by the Licensee reflects that it lacks interest towards inculcating safety culture in its service territory.
6. Therefore, the Authority decided to initiate legal proceedings against the Licensee under NEPRA Fine Regulations, 2021.

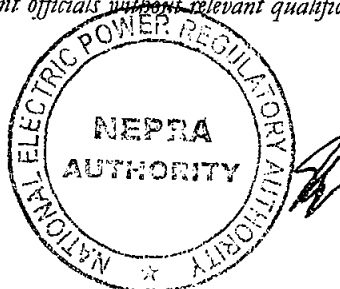


Explanation:

7. In view thereof, an Explanation was served to the Licensee under Regulation 4(1) and 4(2) of NEPRA (Fine) Regulation, 2021, vide NEPRA's letter dated August 18, 2023, on account of violation of Performance Standards, Distribution Code, Power Safety Code, and other applicable documents. The salient points of the Explanation are as under:

3. *WHEREAS, the Rules and Regulations framed under the NEPRA Act as well as the Distribution License and Distribution Code fall within the definition of "applicable documents" as defined under NEPRA (Fines) Regulations 2021, (Fine Regulations) and for any violation of the applicable documents, fine could be imposed by the Authority; and*
4. *WHEREAS, pursuant to the section 21 (2) (f) of the NEPRA Act, the Licensee is required to follow the performance standards laid down by the Authority for distribution and transmission of electric power, including safety, health and environmental protection; and*
5. *WHEREAS, pursuant to section (48) of the NEPRA Act, the Authority shall have the power to issue such directives, codes guidelines, circulars or notifications as are necessary to carry out the purpose of this Act and the Rules and Regulations made hereunder; and*
6. *WHEREAS, pursuant to section 5.1 of Power Safety Code, if Licensee fails to comply with the requirements of Power Safety Code and other applicable documents, NEPRA may initiate legal proceedings against the Licensee or registered persons under NEPRA (Fines) Rules, 2002*
7. *WHEREAS, pursuant to section 7.1 of Power Safety Code, Licensee shall establish, implement, maintain and communicate "Occupational Health, Safety & Environment (HSE) Management System Manual" depending upon its own requirements, organizational needs, types of activities, processes, products, services and risks/ aspects. Licensee shall cover all his operational sites and adopt industry's best practices and standards related to his work activities besides compliance to Power Safety Code and other requirements; and*
8. *WHEREAS, the Authority always promotes the Occupational Health Safety and Environment in power sector of Pakistan, and from time to time different seminars/ meetings with Licensees are conducted on HSE to promote HSE culture and always appraised the efforts taken by the Licensees; and*
9. *WHEREAS, the Authority took serious notice of numerous number of fatal and nonfatal accidents occurring at workplaces in the power sector of Pakistan, and the Authority vide its letter dated September 10, 2021, followed by a reminder dated March 02, 2022, and Final Notice dated October 19, 2022, issued directions to its Licensee to establish an independent and functional directorates/ departments of Occupational Health, Safety and Environments latest by December 2021 with dedicated, experienced, qualified and trained HSE Staff, under the direct control of Chief Executive Officer or equivalent; and*
10. *WHEREAS, further, the Authority directed Licensee that the minimum number of HSE personnel shall be evaluated on a case-to-case basis, depending upon the level of risk, criticality of operational activities, and the need of supervision. Moreover, HSE positions shall not be filled by irrelevant officials without relevant qualifications and certification or*

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charged for on ad-hoc basis/ additional charge. The appointed/deputed HSE personnel shall have technical background and possess at least one of the approved safety qualifications; and

11. WHEREAS, the Licensee was directed to comply with the directions of the Authority and submit a compliance report within stipulated time, if the Licensee fails to comply with directions of the Authority legal proceedings may be initiated against Licensee under applicable laws; and
12. WHEREAS, after a lapse of stipulated time frame given by the Authority, the Licensee has failed to comply with the directions of worthy Authority to establish the Health Safety and Environment directorates/ departments and to promote safety culture; and
13. WHEREAS, the Licensee has failed to respond to the Authority directions and has committed violations of Section 7.1 and 5.1 of Power Safety Code, read with Section 21(2)f of NEPRA Act, Article 11 of the terms and conditions of License's Distribution Licensee, and is in non-compliance with the repeated directions of Authority, thereby, is also in violation of section 48 of the NEPRA Act; and

Submissions of licensee:

8. In response, the Licensee vide its letter dated 31.08.2023 submitted the response against said Explanation. The summarized points of the same are as under:

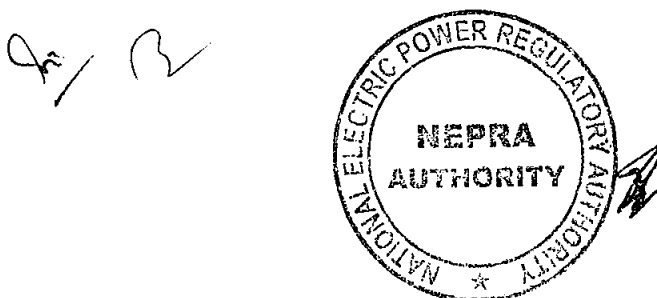
It is believed that from the perusal of the reply, the worthy Authority will close the proceedings. However, in case, it is decided to proceed further into the matter, then we reserve our right to raise any further ground considering the facts and circumstances of the case. Further that, an opportunity of hearing is also requested.

Preliminary Objections and Submission:

(a) That it is respectfully submitted at the outset that HESCO, being a distribution Licensee of NEPRA is fully aware of its responsibilities to provide safe and reliable electric power services to its consumers and has always endeavored to fulfil its obligations in accordance with the applicable laws.

(b) That as per NEPRA Act, 1997, "the contraventions" are to be dealt with as per the procedure to be prescribed through Rules in terms of section 46(2)(d) of the Act, but it is a matter of record that no such "Rules" are in field, hence the subject proceedings are prima facie against the provisions of NEPRA Act, 1997.

(c) That the subject explanation is issued on the alleged violation of the provisions of inter-alia Safety Code. In this regard, it is to submit that even in the Safety Code of NEPRA itself, it is provided in section 5.1 that "if Licensee fails to comply with the requirements of Power Safety Code and other applicable documents, NEPRA may initiate legal proceedings against the Licensee or registered persons under NEPRA (Fines) Rules, 2002". The relevant Rules are no more in field; therefore, the subject proceedings are totally against the law on the subject.



(d) That the explanation has been issued under NEPRA (Fines) Regulations, 2021 which are framed under section 47 of the NEPRA Act, 1997 (the Act). It is submitted with respect that section 47 of the Act does not authorize the Authority to frame "Regulations" for the purposes of imposition of fines owing to any contravention of the provisions of NEPRA laws. Instead, section 46 (2) (d) requires inter-alia that for the procedure in case of any contravention of any provision of the Act, Rules are to be framed. Such Rules are not in field, therefore, prima facie the subject "explanation" is against the provisions of the NEPRA Act, 1997.

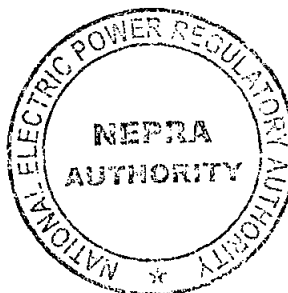
(e) That the Licensee is a Company to be managed by its Board of Directors. In the NEPRA Safety Code, it is provided in section 7.1 that the Licensee shall establish, implement, maintain and communicate "Occupational Health, Safety & Environment (HSE) Management System Manual" depending upon its own requirements, organizational needs, types of activities, processes, products, services and risks aspects. Therefore, to formulate any system, the Code provides for a discretion for the Licensee to establish as per its own requirements etc. Thus no violation as such is there for which any penal action could be initiated against HESCO. However, notwithstanding the given legal position, HESCO has already initiated the process for establishment of the Safety Management System in line with the directions of the Honorable Authority and has invited Bid through publication of Request for Proposal (RFP) document/ EOI for hiring services of an individual HSE Consultant/Firm for development and implementation of Safety Management System (SMS) throughout HESCO jurisdiction. The letter for publication of advertisement for invitation of Bid has been issued by HESCO on 30-08-2023 and will be widely published in the newspapers dated: 02-09-2023 and the process will be finalized in due course of time. Thus, prima facie, there is absolutely no violation on the part of HESCO regarding non-implementation of any directions from NEPRA.

Para wise reply of the Explanation:

Paras 1 to 5 of the "explanation" are factual in nature, therefore, no response is required as such

Para 6. Not admitted as stated. In this para, the initiation of proceedings under NEPRA (Fines) Regulations, 2021 are mentioned whereas in the referred "Safety Code" as available on NEPRA Website as on 30.8.2023, the NEPRA Fines (Rules) 2002 are mentioned which are not in field. Therefore, the subject "explanation" is totally against the given legal position on the subject by NEPRA itself.

Para 7. to reply to this para, it is submitted that HESCO being a responsible Company, is already giving weightage, to the directions/ instructions of the Honorable Authority and it can never even think of making any violation thereof. It needs to be clarified that the NEPRA Safety Code, it is provided in section that the Licensee shall establish, implement, maintain, and communicate "Occupational Health, Safety & Environment (HSE) Management System, Manual" depending upon its own requirements, organizational needs, types of activities, processes, products, services and risks aspects. Therefore, to formulate any system, the Code provides for discretion for the Licensee to establish as per its own requirements etc. Thus no violation as such is there for which any penal action could be initiated against HESCO. However, notwithstanding the given legal position, HESCO



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Para 8. No comments

Paras 9 to 11. In reply to these paras, it is submitted that HESCO is already in the process of establishment of Safety Management System, for which an RFP stood already floated on 30-08-2023 for its publication. However, the other directions as referred in these paras may be beyond the jurisdiction of Honorable Authority as those may tantamount to internal management as to the affairs of the Licensees such as prescribed qualifications, mode of appointment and internal management of the concerned professionals. As per understanding of the Licensee, these matters are to be dealt with by Licensee as per SOPs and subject to fulfillment of the qualifications and

Para 12. In reply to this para it is submitted that HESCO has already initiated a process regarding establishment of Safety Management System. The Board of Directors of HESCO in their 232nd meeting held on 27th of June, 2023 had already granted approval for hiring of a Consultant for development and implementation of Safety Management System of HESCO through competitive process subject to fulfillment of all codal formalities and strict compliance of the applicable PPRA Rules. Further it is submitted that HESCO has also approved for publication of the advertisement in National newspapers on 2nd of September, 2023 wherein the date for opening of the proposals is fixed as 21st of September, 2023 at 11.30 AM. Thus it

Paras 13 to 16. In reply to these paras, it is submitted that there is absolutely no violation on the part of HESCO regarding any applicable document..

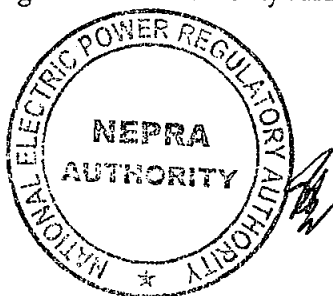
HEARING:

9. Moreover, in the best interest of justice, hearing opportunity on the subject matter was also provided to the Licensee which was held on 10.10.2023, wherein, the following submissions were made by the Licensee's representatives:

The representative of Licensee stated that BoDs HESCO directed to hire a consultant for assessment/feasibility of required manpower, equipment, etc. as per requirement of HESCO. Moreover, on September 21, 2023, EoI was floated, and 02 No. bids have been received and are under scrutiny for Technical Evaluation and will be finalized in the coming week.

FINDING/ANALYSIS

10. The Authority has considered the submissions of the Licensee as given at Para 8(a) above and observes that there is no need to reply on the contrary the stance of the Licensee that being fully aware of its obligations. The Authority further observes that the Licensee has

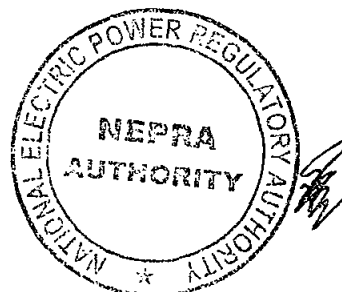


miserably failed in performing and discharging of its duties and obligation which they were obligated to follow all the directions of the Authority in accordance with applicable documents. The Authority further observes disparity between the Licensee's claims and the actual situation. In last 05 years, 22 Employees and 74 Public Persons have been electrocuted in the service territory of the Licensee due to serious safety hazards which Licensee has failed to rectify the same. Moreover, Despite explicit directives by the Authority instructing the Licensee to establish a Safety Directorate and implement safety standards in its daily operations. However, the Licensee has not taken such directives seriously, even after a period exceeding two years. This highlights the Licensee's lack of responsibility and commitment to adhere to NEPRA's applicable documents. Therefore, it can be said that the submissions given by the Licensee are not justified.

11. The Authority has also considered the submissions of the Licensee as given at Para 8(b) and observes that the contents of this Paragraph are denied as being misconceived. It is clarified that the position of the Licensee is based on conjectures and surmises; the licensee has failed to identify any legal provision which would require for contraventions to be dealt with under 'Rules' framed under the NEPRA Act. The Authority further observes that:

- (a) Section 27B of the NEPRA Act clearly provides that "Any person who acts in contravention of this Act or the rules and regulations made thereunder or fails to comply with the conditions of a licence issued or registration granted to that person and such person is a party to such contravention shall be punishable ...". In light thereof, if the primary legislation that has empowered the Authority to impose a fine for a contravention of the provisions of the Act, or the rules and regulations made thereunder, and that such power cannot be subservient to delegated or subordinate legislation in the form of Rules.
- (b) Section 46 of the NEPRA Act uses the term 'may' for the making rules for matters required to be prescribed under the NEPRA Act. The list provided in Section 46 (2) of the NEPRA Act is not exhaustive, neither is it mandatory on the Authority or the Federal Government to cause for the making of 'Rules' only to the extent of such list or even all of such list. It is in the wisdom and discharge of duties and functions of the Federal Government and/or the Authority to cause for the making of 'Rules'. It is further clarified that:
 - (i) It is common knowledge that Rules have been framed under the provisions of the NEPRA Act for matters which are not reflected in the list contained/reflected in Section 46 (2) of the NEPRA Act, clearly demonstrating that this is an indicative list only; being non exhaustive and not mandatory.
 - (ii) the Supreme Court of Pakistan in Abu Bakar Siddique & Others v Collector Customs Lahore and another [SCMR PTD 2187] has held that it is well-settled that word 'may' is discretionary and an enabling word and unless the subject-matter shows that the exercise of power given by the provision using the word 'may' was intended to be imperative for the person to whom the power is given, it might not put him under an obligation to necessarily exercise such power but if it is capable of being construed as referring to a statutory duty, it will not be entirely for such person to exercise or not to exercise the power given to him under the law.

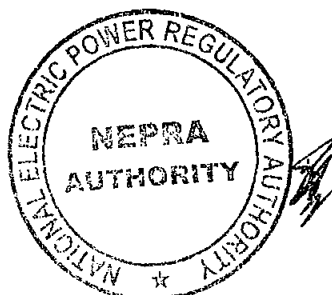
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- (iii) The use of word 'may' in the statute in the plain meanings is to give discretion to the public authorities to act in their option in the manner in which such authorities deem proper but if the public authorities are authorised to discharge their functions in their option in a positive sense, the word 'may' used in the provision would be suggestive of conveying the intention of Legislature of imposing an obligation.
- (iv) If it was the intent of the legislature to mandatorily require the Federal Government and/or the Authority to frame Rules to deal with matters relating to contravention, the term 'shall' would have been so used in the NEPRA Act; 'shall' when appears in a statute "is used as a term of art to impose a duty to do what is prescribed, not a discretion to do it or not according to whether it is reasonably practicable to do it or to do something like it instead"
- (v) In connection therewith, the legislature has carefully and with due consideration chosen to use the term 'may' in Section 46 of the Act, to allow the Federal Government and/or the Authority to exercise discretion as to whether Rules for the purposes of dealing with contraventions are necessary or not. It is further submitted that proceedings taken place under the enabling provision in a primary legislation do not require the support of sub-ordinate or delegated legislation.

12. The Authority has gone through the submissions of the Licensee as given at Para 8(c) and observes that the contents of this Paragraph are denied as being misconceived. It is clarified that the Authority in due exercise of its powers under the NEPRA Act has framed the NEPRA (Fines) Regulations 2021 in terms of Section 47 of the NEPRA Act, which provides for the legal framework for support, acting as subordinate legislating in the matter of imposition of fines by the Authority. It is further clarified that notwithstanding the foregoing, if the primary legislation that has empowered the Authority to impose a fine for a contravention of inter alia the provisions of the Act, or for failure to comply with the conditions of a licence issued or registration granted to that person, along with pecuniary limits specified in the primary legislation, the exercise of such power cannot be subservient to delegated or subordinate legislation in the form of Rules. Subordinate and/or delegated legislation may only provide a further assistance framework for the imposition of the fine(s) vis-à-vis the contravention, however, the charging provision shall always remain within the primary legislation; without which, no subordinate and/or delegated legislation can exist in the first instance.
13. The Authority has also examined that submissions of the Licensee and observes that the contents of this Paragraph are denied as being misconceived. It is clarified that the position of the Licensee is based on misreading of law, or a deliberate attempt to cause confusion. It is further clarified that neither Section 46 nor Section 47 expressly make reference to 'fines'; and with the argument being towed by the licensee, the Authority and/or the Federal Government should not have the mandate to prescribe either Rules or Regulations for the regulation of fines to be imposed by the Authority for a contravention under the NEPRA Act. The Authority does not subscribe to the unsubstantiated and preposterous

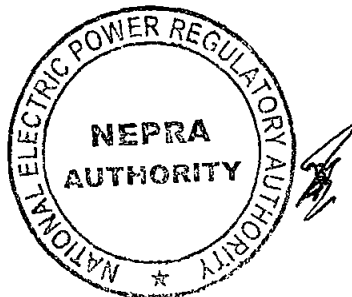
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argument advanced by the Licensee. The Authority in due exercise of its powers under the NEPRA Act has framed the NEPRA (Fines) Regulations 2021.

14. The licensee has submitted that according to Section 7.1 of Power Safety Code, "the Licensee shall establish, implement, maintain and communicate "Occupational Health, Safety & Environment (HSE) Management System Manual" depending upon its own requirements, organizational needs, types of activities, processes, products, services and risks aspects. Therefore, to formulate any system, the Code provides for a discretion for the Licensee to establish as per its own requirements, etc. Upon reviewing the Licensee's assertions, the Authority has observed with surprise that, despite a lapse of two years, the Licensee has not established an HSE directorate. The Authority views this non-compliance with apparent concern, interpreting it as a sign of the Licensee's lack of commitment to fostering a safety culture within its service territory. The Authority concludes that the Licensee seems unaware of the importance of developing a safety management system and accuses it of jeopardizing human lives through unlawful practices, thereby rendering the system more susceptible. The absence of a Safety Directorate is seen as a missed opportunity to prevent a significant number of fatalities. Consequently, the Authority deems the Licensee's submissions as invalid in light of these considerations.
15. The Licensee has also submitted that it has already initiated the process for the establishment of the Safety Management System in line with the directions of the Honorable Authority and has invited Bid through publication of Request for Proposal (RFP) document EOI for hiring services of an individual HSE Consultant/Firm for development and implementation of Safety Management System (SMS) throughout Licensee jurisdiction. The letter for publication of advertisement for invitation of Bid has been issued by Licensee on 30-08-2023 and will be widely published in the newspapers dated: 02-09-2023 and the process will be finalized in due course of time. The Authority observes that the Licensee received its initial directive in December 2021 to establish a Safety Directorate, with subsequent reminders and verbal instructions during hearings on different matters. Despite these repeated directions, the Licensee did not promptly respond. The Licensee now asserts that the process has been initiated and will be completed in due course of time. However, this raises concerns about the Licensee's approach to the Authority's directives, as it fails to provide a specific timeline for full compliance. Additionally, the Licensee has only commenced the process pending since two years after initiation of legal proceedings by NEPRA, highlighting a lack of proactive action that could have prevented fatal accidents.
16. Foregoing in view, it is concluded that the Licensee has failed to comply with the Authority's directions to establish an independent directorate of Health Safety and Environment in its territory despite repeated correspondence. Further, the Licensee has also failed to submit a satisfactory response against the served explanation. Therefore, the Licensee is in violation of Sections 7.1 and 5.1 of the Power Safety Code, read with Section 21(2)f of the NEPRA Act, Article 11 of the terms and conditions of License's Distribution Licensee, and is in non-compliance with the repeated directions of Authority, thereby, is also in violation of section 48 of the NEPRA Act.

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Decision

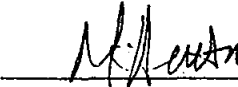
17. After due deliberations and taking into account the submissions/arguments made by the Licensee during the hearing and in light of the NEPRA Act, NEPRA (Fine) Regulations, 2021, and other applicable documents, the Authority is of the considered opinion that the Licensee has failed to provide any satisfactory reply to the Explanation served to it, therefore, the Authority hereby decides to issue a Show Cause Notice to the Licensee in terms of Regulations 4(8) & (9) of the NEPRA (Fine) Regulations, 2021.

AUTHORITY

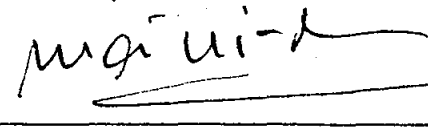
Rafique Ahmed Shaikh
Member (Technical)



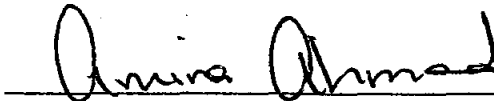
Engr. Maqsood Anwar Khan
Member (Licensing)



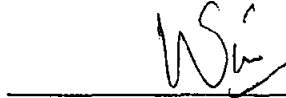
Mathar Niaz Rana (nsc)
Member (Tariff)



Amina Ahmed
Member (Law)



Waseem Mukhtar
Chairman



Dated 22/03/2023



