

November 29, 2019

The Registrar  
National Electric Power Regulatory Authority  
Atta Turk Avenue (East)  
G- 5/1, NEPRA Tower  
Islamabad

For my attention & info  
— DRO I / (DR) I  
Chairman  
— SACT (h) - SACT-I = chairman  
— DG (m&E) - ADG (H.C.) VC  
— LA (Lic) - MF MCT)  
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**SUBJECT: REVIEW MOTION AGAINST DECISION OF THE NATIONAL ELECTRIC AND POWER REGULATORY AUTHORITY (“AUTHORITY”) IN THE MATTER OF GRANT OF LICENSE TO SINDH TRANSMISSION AND DISPATCH COMPANY TO ACT AS A PROVINCIAL GRID COMPANY DATED 05.11.2019 UNDER SECTION 7(2)(G) OF REGULATION OF GENERATION, DISTRIBUTION AND TRANSMISSION OF ELECTRIC POWER ACT, 1997 (“NEPRA ACT”) AND NEPRA (REVIEW PROCEDURE) REGULATIONS, 2009**

Dear Sir,

1. The titled review is being filed against the determination dated 05.11.2019 (“**Determination**”) of the Authority whereby the same has been pleased to grant to Sindh Transmission and Dispatch Company (Private) Limited (“**STDC**”) a transmission license to act as a provincial grid company under Section 18A of the NEPRA Act (“**License**”). Being aggrieved of the Determination and the License, the instant review motion is being filed.
2. By way of background, NTDC is licensed to act as a national grid company under the NEPRA Act, and license dated 31.12.2002 bearing no. TL/01/2002 issued by the Authority. Pursuant to Section 17 and 18 of the NEPRA Act and the conditions of its license, NTDC is providing safe, reliable transmission and inter-connection services on a non-discriminatory basis to various generators, distributors and bulk power consumers in whole of the country except the area served by K-Electric Limited (“**Service Territory**”). Furthermore, under Article 5 of its license, NTDC has the exclusive right to provide transmission services and carry out transmission business in the Service Territory.
3. The brief facts leading to filing of the instant review motion are that STDC submitted an application for transmission license to act as a provincial grid company dated 11.04.2019 (“**Application**”), which was admitted by the Authority on 17.04.2019. The Authority invited comments from various stakeholders pursuant to notices dated 24.04.2019. NTDC duly submitted its objections/comments to the Application on 21.06.2019 and additional comments on 30.08.2019. Thereafter, a public hearing was held on 04.09.2019 wherein NTDC participated and raised its objections/comments. In disregard of NTDC’s objections/comments and the applicable law and constitutional framework, the Authority vide its Determination has granted the License to STDC.

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4. At the outset, it is submitted that the Determination suffers from errors, infirmities and is based on surmises and conjectures, contrary to the Constitution of Islamic Republic of Pakistan, 1973 (“**Constitution**”) and settled norms of law and justice. The same is therefore, bad in law and liable to be dispensed with/set aside.
5. Under Article 154(1) of the Constitution, the Council of Common Interests (“**CCI**”) shall formulate and regulate policies in relation to matters in Part II of the Federal Legislative List of the Constitution. In light thereof, if a matter falls within the powers of CCI under Article 154, it must be placed before it. The subject of ‘Electricity’ is listed as Entry No. 4 in Part II of the Federal Legislative List of the Constitution and therefore, the policy decisions in respect of the Electricity must be placed before the CCI. This constitutional dictate has been recognized and envisaged by the legislature in the NEPRA Act, Section 14A whereof provides *inter alia* as follows:-

*“14A- (1) The Federal Government shall, from time to time, with the approval of the Council of Common Interests, prepare and prescribe a national electricity policy for development of the power markets:*

...

*(2) The policies referred to in sub-section (1) shall provide for, inter alia-*

...

*(c) integration of national and provincial transmission systems;*

...”

[Emphasis Added]

In light of the foregoing, it is submitted that the grant of license to a provincial grid company under Section 18A of the NEPRA Act and its subsequent operations would inevitably lead to interconnection at provincial and federal levels and has to be centrally and carefully planned. The actions taken by one grid operator may contradict/overlap with the actions of any other operator, thus requiring planning and policy formulation. Similarly, either one or both operators may attribute the responsibility of partial or full grid system collapses to each other. In light thereof, the preparation and prescription of policy framework in respect of *inter alia*, the integration of national and provincial transmission systems under Section 14A of the NEPRA Act is a sine qua non for the operations of, and/or grant of license to any provincial grid company. Unless such policy framework becomes effective, no license could have been granted to any provincial grid company under Section 18A of the NEPRA Act. The same is also evident from a perusal of Section 18A of the NEPRA Act, which provides *inter alia* that the license to act as a provincial grid company may be granted ‘*subject to the provisions of this Act*’.

Consequently, the Determination is contrary to the provisions of the NEPRA Act, the Constitution, and also hampers the smooth functioning of the transmission sector.

6. Section 18A of the NEPRA Act provides for *inter alia* the grant of license to a provincial grid company. Section 18A (2) of the NEPRA Act deals with the mode and mechanism of such grant and provides as follows:-

*“(2) The eligibility criteria for grant of license as a provincial grid company shall be prescribed and shall include, without limitation,—*

*(a) minimum solvency requirements; and*

*(b) minimum technical and human resource requirements.”*

[Emphasis Added]

From a perusal of Section 18A(2) of the NEPRA Act, it is evident that the same provides that the eligibility criteria for grant of license as a provincial grid company shall be prescribed, including the minimum solvency and minimum technical and human resource requirements. Further, the term ‘prescribed’ has been defined by Section 2(xxii) of the NEPRA Act and requires such criteria to be prescribed by rules, to be made by the Federal Government. The term ‘shall be prescribed’ indicates that the prescribing of rules in terms of Section 18(A) of the NEPRA Act is mandatory and a sine qua non for entertaining and adjudicating upon any application for grant of license as a provincial grid company. The significance of a uniform, well thought-out criteria and yardstick for assessing the application and exercising discretion in this regard is also highlighted from the proviso to Section 18A(1) of the NEPRA Act, which provides that only one such license shall be granted for each Province at any one time.

7. In the above backdrop, it is submitted that till date, no rules have been framed to prescribe the eligibility criteria, the minimum solvency requirements and the minimum technical/human resource requirements. It is humbly submitted that in absence thereof, the discretion of NEPRA to grant such licenses remains unstructured, which is contrary to the law. Moreover, it is pointed out that Section 18A of the NEPRA Act is not a self-executory provision as it requires further legislation/steps to become effective and operative. Unless the rules are framed, the rights, duties or powers given under Section 18A of the NEPRA Act could not be exercised. Consequently, NEPRA could not adjudicate upon or assess any application under Section 18A of the NEPRA Act, until the requirements of Section 18A(2) are followed and rules, as required, were prescribed as it is a settled principle of law that if something is required to be done in a manner, it shall be done in that manner alone or not at all. Contrary to the aforesaid principles, the Authority has granted the License to STDC

on the basis of the assumption that it would be able to comply with the minimum solvency requirements, minimum human resource requirements and other criterion as and when prescribed by the Authority in the future. It is submitted that apart from being unrealistic and unworkable, such a practice is unprecedented and reflects lack of application of mind by the Authority. Furthermore, such treatment is discriminatory and falls foul of the requirements enshrined under Article 25 of the Constitution in that all other license applicants are required to fulfill the criteria prescribed by the NEPRA Act, rules and regulations at the time of grant of the license, whereas for STDC, a special treatment has been carved out envisioning ex post facto compliance without any basis or force of law. It is also pointed out that no embargo has been placed by the Authority on STDC's ability to function or undertake any projects until the prescription of the criteria, thereby, giving it a free hand to operate without first being sufficiently eligible to provide the transmission services and act as the only provincial grid company in the province of Sindh. It is humbly submitted that the same is against the letter and spirit of the NEPRA Act, including Section 7(6) thereof which obliges NEPRA to protect interests of consumers and companies providing electric power services, rules and regulations made under the NEPRA Act, and constitutional dictates. Consequently, the Determination and the License are bad in law, discriminatory, and liable to be reviewed.

8. Without prejudice to the foregoing, it is further submitted that the existing legal framework administered by Authority was also not yet competent for grant of license to a provincial grid company due to the following reasons:-
  - (i) National Electric Power Regulatory Authority (Application, & Modification Procedure) Regulations, 1999 ("**Licensing Regulations**") deal with *inter alia* the procedure for application for licenses. Regulation 3(3) of the Licensing Regulations provides that the registrar shall not receive the application unless it is accompanied with the correct amount of application fee. Regulation 3(2) deals with the correct amount of the application fee for various categories of licenses and provides that such fee is prescribed under Schedule II of the Licensing Regulations. It is pointed out that till date, no fee has been fixed or provided for an application for a provincial grid company. In absence thereof, the entertaining of application by the Authority was in non-compliance with Regulation 3(3) of the Licensing Regulations.
  - (ii) Similarly, Regulation 3(6) of the Licensing Regulations read with Schedule III provide for a non-exhaustive list of the documents which shall be provided in support of an application. Till date, Schedule III has not been amended to provide for any list of documents for license of the provincial grid company.

- (iii) In the generation and distribution segment, National Electric Power Regulatory Authority Licensing (Generation) Rules, 2000 and National Electric Power Regulatory Authority Licensing (Distribution) Rules, 1999 have been framed respectively to provide for *inter alia* the terms and conditions of a license and rights and obligations of such licensees. It is submitted that no similar rules have been framed for the transmission segment, which acts as a backbone of the power sector. In light thereof, the application for license for a provincial grid company could not have been entertained unless the requisite legislative framework is put into place by the appropriate bodies/authorities.

The following critical legal aspects have been overlooked by the Authority while issuing the Determination and License. Consequently, the Determination and the License are liable to be set aside for being contrary to the law.

9. Without prejudice to the submission that the eligibility criteria for grant of license to a provincial grid company has not been prescribed yet, it is submitted that the Application failed to meet even the existing general criteria provided under Regulation 5(1) of the Licensing Regulations in the following manner:-
- a. STDC does not have sufficient experience in the transmission sector. It has undertaken only one transmission line project pursuant to the Special Purpose Transmission License granted by the Authority, which is insufficient to entitle it to act as a provincial grid company. Without prejudice to the generality of the foregoing, it is submitted that a perusal of the application reveals the absence of any intent to undertake protection system studies and co-ordination of the network. STDC has, at present, no capacity, skill and experience of the protection system, which shall result in tripping and faults discrimination in the interconnected areas. All the equipment connected to the network must have to undergo a "Protection Coordination Study" in order to have harmonized protection relay settings which ensures localized clearance of the power system faults and avoids travelling of faults to other voltage levels. In the absence of such skills with the STDC, the whole interconnected network will be jeopardized with reference to safety of equipment as well as stability and reliability of the network.
  - b. STDC has not provided evidence of its financial status as required by the Licensing Regulations. The undertaking by the Energy Department, Government of Sindh to provide for the minimum solvency requirements to STDC has been issued without there being any knowledge of the quantum of the minimum solvency requirements and therefore, falls short of the mandatory requirements of the Licensing Regulations.

- c. Furthermore, the information and documents provided by STDC with the Application are insufficient for the Authority to satisfy itself that STDC meets the eligibility criteria under the Licensing Regulations. The mandatory documents such as feasibility studies, designs, plans, environmental approvals were not provided with the Application.

Moreover, Regulation 5(2) of the Licensing Regulations provides that the Authority may decline to issue a license even if an applicant meets the eligibility criteria, if certain circumstances exist. It is submitted that the Regulation 5(2) of the Licensing Regulations was attracted to the Application and the Authority should have rejected the application thereunder due to the following reasons:-

- a. Regulation 5(2)(a) and (b) of the Licensing Regulations:- It is submitted that in the Application, STDC admitted that National Transmission and Despatch Company (NTDC) has already catered for the evacuation of power from most of the existing and upcoming wind power plants in Sindh. STDC has effectively admitted that it attempts to evacuate power from power plants which are still to be conceived. Therefore, the Application was based on speculations, and did not demonstrate any need for such investment and facilities in the power sector. In fact, STDC's operations, without any centralized planning and policy decisions, are likely to jeopardize the existing state of affairs in the transmission sector.
- b. Regulation 5(2)(c) of the Licensing Regulations:- It is submitted that optimal harnessing of wind power falls under the domain of national level planning, requires high level framework and cannot be placed as a standalone activity under a smaller grid levels. It is further submitted that a bare perusal of STDC's existing tariff determination reveals that it has admitted its failure to be as cost efficient as NTDC, and has claimed more costs in its tariff than NTDC. Moreover, it is also evident from such perusal that STDC has admitted its lack of experience in the transmission business.
- c. Regulation 5(2)(d) of the Licensing Regulations:- As per Regulation 5(2)(d) of the Licensing Regulations, the Authority may refuse the grant of license if the site proposed is not suitable on environmental or social grounds. In light thereof, it is evident that environmental impacts of any power project must be thoroughly considered before the grant of license. In the instant case, it is noted with regret that no environmental impact assessment report was provided with the Application in order for the Authority to form its mind as to the environmental impacts of the projects envisaged therein. In absence of such environmental impact assessment,

the grant of Application results in serious consequences to the social and environmental conditions.

10. Under the terms and conditions of the license dated 31.12.2002 granted to NTDC by the Authority, NTDC during the term of its license i.e. till 30.12.2032 has been given exclusivity in the Service Territory. While relying on the said assurance, NTDC has organized its business and commercial affairs and taken decisive steps for laying down transmission infrastructure in the service areas, including in the province of Sindh. However, through the License and Determination, STDC has been granted the permission to provide transmission services in the province of Sindh, including those areas in respect of which exclusivity vested with NTDC. It is submitted that the same constitutes a breach of settled principles of law and interferes with the vested rights of NTDC, which cannot be taken away in such a manner, contrary to its legitimate expectations. Consequently, the Determination and the License being exploitative in nature and in violation of Articles 4, 10-A and 18 of the Constitution are liable to be set aside.
11. In the same vein, it is submitted that NTDC has already planned the generation capacity expansion plan for next two decades. The planning includes optimum harnessing of wind potential in Jhimpir area, keeping in view overall power system stability. In this regard, many of the projects are in pipeline, and loans have also been finalized. To enable STDC to work on such projects will result in huge financial implications for NTDC, along with duplication of work. Additionally, NTDC, in its integrated system planning is addressing wind intermittency through balancing reserve to be provided by combination of hydro and gas turbines including forecasting techniques for load flowing. STDC intends to transmit a huge cluster of variable renewable energy plants in the region, therefore, the addressing of intermittency studies will be duplicated and cost of reserve for power balance will be additional if STDC maintains it. Such duplication of infrastructure for power evacuation of optimum wind potential and other thermal plants including (indigenous coal based and nuclear plants) in the southern region will result in a great loss to national exchequer. STDC may spill over additional powers to NTDC's network, affecting overall dispatch of NTDC resulting in stability issues, and huge economic impacts. Moreover, it may also be noted that HVDC Matiari Lahore Project, which is a private transmission line project was envisaged for evacuation of power from thermal and wind power plants from the southern regions to deliver power to the load centers in the northern regions. Such private transmission line projects receive capacity payments irrespective of actual power flow. In case STDC's operations reduce the power flow through such transmission line project, NTDC will incur capacity payments to its disadvantage. This will, in turn, jeopardize the functioning of NTDC, and also create hindrances in transmission services throughout Pakistan.
12. Without prejudice, the transmission license granted to NTDC dated 31.12.2002 expressly carves out the territories falling within the domain of K-Electric Limited from NTDC's

Service Territory. However, STDC has been allowed to provide services in whole of the province of Sindh without any exception, including the service territories falling under K-Electric Limited's domain. It is submitted that such an act of the Authority, being discriminatory falls foul of the requirements enshrined under Article 25 and Article 18 of the Constitution. The Determination and the License are therefore liable to be set aside on this ground alone.

13. Without prejudice, it is submitted that the function of dispatch remains entrusted to NTDC by virtue of Section 23G and Section 18 of the NEPRA Act. In such circumstances, the use of the term 'dispatch' by STDC in its name is misrepresentative and is capable of misleading the potential investors as to the functioning and scope of work of STDC.
14. NTDC intends and reserves its right to urge and submit any further grounds at or before the hearing.
15. In light of the above, it is requested that Determination and License may kindly be reviewed in light of submissions made above. It is requested that a hearing be provided for the purposes of providing detailed submissions, including a session with the technical professional team of the Authority prior to hearing.


Yours Sincerely,

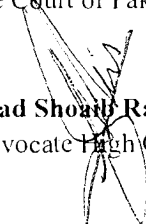
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