



National Electric Power Regulatory Authority
Islamic Republic of Pakistan

Registrar

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No. NEPRA/R/LAT-01/13111-13150


September 4, 2015

Managing Director,
National Transmission & Despatch Co. Limited.
414 WAPDA House,
Shaharah-e-Quaid-e-Azam,
Lahore.

Subject: **Decision of the Authority in the matter of Motions for Leave for Review filed in respect of Modification-II in Transmission Licence # TL/01/2002 of National Transmission and Despatch Company Limited (NTDC)**

Enclosed please find herewith decision of the Authority (15 pages) in the matter of Motions for Leave for Review filed by different IPPs against the determination of the Authority dated May 29, 2015, pertaining to Modification-II in the Transmission Licence No TL/01/2002 of National Transmission and Despatch Company Limited (NTDC).

Encl: As above


(Syed Safer Hussain) 04.09.15

CC for information:

1. Secretary Ministry of Water & Power, 'A' Block, Pak Secretariat, Islamabad.
2. Managing Director, Private Power and Infrastructure Board (PIIB), 50-Nazimuddin Road, Sector F-7/4, Islamabad.
3. Chief Executive Officer, Alternative Energy Development Board (AEDB), 2nd Floor, OPF Building, G-5/2, Islamabad.
4. Director General, Pakistan Environmental Protection Agency, House No. 311, Main Margalla Road, Sector F-11/3, Islamabad.
5. Chief Executive Officer, Faisalabad Electric Supply Company Limited (FESCO), Abdullahpur, Canal Bank Road, Faisalabad.
6. Chief Executive Officer, Gujranwala Electric Power Company Limited (GEPCO), 565/A, Model Town, G.T. Road, Gujranwala.
7. Chief Executive Officer, Hyderabad Electric Supply Company Limited (HESCO), WAPDA Offices Complex, Hussainabad, Hyderabad.
8. Chief Executive Officer, Islamabad Electric Supply Company (IESCO), IESCO Head Office, Street 40, Sector G-7/4, Islamabad.
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NATIONAL ELECTRIC POWER REGULATORY AUTHORITY

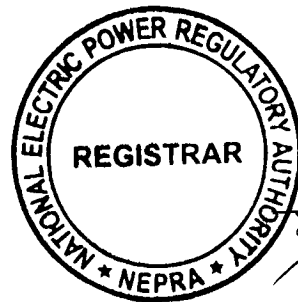
Decision of the Authority in the Matter of Motion for Leave for Review filed by

- (i) Foundation Wind Energy I (Private) Limited**
- (ii) Foundation Wind Energy II (Private) Limited**
- (iii) Fauji Kabirwala Power Company Limited**

Under Regulation 3(2) of NEPRA (Review Procedure) Regulations, 2009

Against Determination of the Authority dated 29 May, 2015

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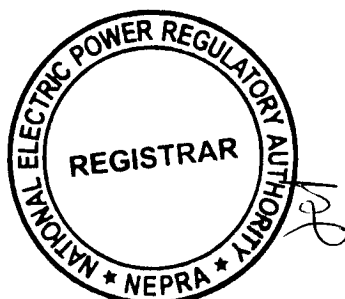
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DECISION

1. The subject review petitions were filed on 05 August 2015 against the Determination dated 29 May 2015 given by the Authority (the "Determination") in the matter of Licensee Proposed Modification (LPM) filed by National Transmission and Dispatch Company Limited (NTDC) in respect of its Transmission License (No. TL/01/2002). Through the Determination the Authority approved the LPM and amended the said Transmission License which provides for the transfer of, *inter alia*, the functions of power purchase and settlement and development of a competitive market from NTDC to a new independent entity named as Central Power Purchasing Agency Guarantee Limited (CPPA-G).

I. BACKGROUND

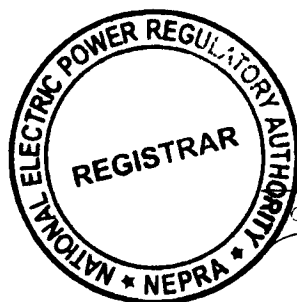
2. NTDC, being a Transmission Licensee of NEPRA filed a Licensee Proposed Modification (LPM) to modify its existing Transmission Licence on 08 April, 2015 in accordance with Regulation-10(2) of the NEPRA Licensing (Application & Modification Procedure) Regulations, 1999 (the "Regulations"). The said LPM was intended to exclude the functions of Central Power Purchasing Agency (CPPA) from its Transmission Licence and accordingly various amendments were suggested in the Transmission Licence.
3. It was stated in the support of said LPM that the functions of the CPPA were allocated to NTDC as a stopgap measure in addition to its core transmission and system operation business. CPPA was contemplated to be a standalone entity but for practical reasons at the time of grant of Transmission Licence this could not be achieved. Therefore, it was included in the said Transmission Licence. The market is now at the point where a separate entity can be established and operated



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effectively to carry out the envisioned market reforms. The Government of Pakistan, in pursuance of achieving a competitive market, has set up CPPA-G and is now in the process of transferring the agency functions (power procurement on behalf of ex-WAPDA DISCOS and the function of settlement, administration and development of competitive power market). While the power generation entities are finalizing their arrangements with CPPA-G, the functions of CPPA are no longer required to be housed in the Transmission Licence of NTDC.

4. After completion of all the required information as stipulated under the Regulation 10 (2) and 10 (3) of the Regulations by NTDC, the Authority accepted the LPM for further processing as stipulated in the Regulations. Further, following the procedure laid down in the Regulations, LPM was published on 16 May, 2015 in daily Newspapers, informing the general public, interested/affected parties and other stakeholders about the LPM and inviting their views in favour or against the same within fourteen days of publication.
5. The Authority considered the LPM and the comments received in this regard and observed that the purpose and objective of establishing CPPA-G cannot be undermined. Separating the functions and business of settlement and development of competitive market from NTDC and assigning it to an independent company i.e. CPPA-G will establish, govern and promote an efficient and transparent billing, settlement and payment system. Consequently, CPPA-G will emerge as a market operator and will be responsible for the development and implementation of Competitive Power Market.
6. Considering the fact that NTDC/Licensee has complied with all the requirements of the Regulations pertaining to the LPM and that LPM is reasonably necessary for the NTDC to effectively and efficiently perform its obligations under the licence



and also to ensure the continuous, safe and reliable supply of electric power to the consumers, the Authority approved the LPM of NTDC.

7. In pursuance of bifurcation of transmission and market operations of NTDC, the Authority also approved the application filed by NTDC under Section 33 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the "NEPRA Act"), with regard to the re-organization of its business structure. Further, NEPRA (Market Operator Registration, Standards and Procedure) Rules, 2015 (the "Market Rules") were framed which envisage a legal framework for a market operations and registration and regulation of a market operator. In addition, to enable CPPA-G to carry out its function as market operator a Commercial Code prepared by CPPA-G was also approved by the Authority.
8. Thereafter, a number of Independent Power Producers (IPPs) submitted comments raising concerns in respect of the Determination of the Authority, the Market Rules and the Commercial Code. In these comments the Authority was requested to reconsider its determination/decision or allow time to file review petitions in the matter. The Authority considered these comments and decided to allow time to file review petitions. In this regard a letter was sent on 16 July 2015 to all IPPs/stakeholders to file review petitions, if so desired, raising their specific objections in the matter.
9. The Authority received three review petitions from (i) Foundation Wind Energy I (Private) Limited (ii) Foundation Wind Energy II (Private) Limited and (iii) Fauji Kabirwala Power Company Limited while comments were received from the following IPPs:
 - i. Pakgen Power Limited (PPL)
 - ii. Uch-I (Private) Limited (UPL-I)
 - iii. Lalpir Power Limited (LPL).

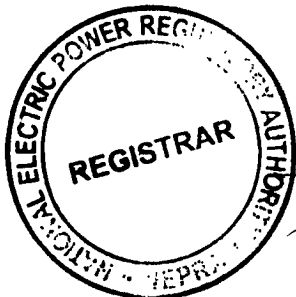


- iv. Kohinoor Energy Limited (KEL)
- v. Habibullah Coastal Power Company(HCPC)
- vi. Orient Power Company (Private) Limited (OPCPL)
- vii. Uch-II (Private) Limited (UPL-II)
- viii. NishatChunian Power Limited (NCPL)
- ix. Saif Power Limited (SPL)
- x. Atlas Power Limited (APL)
- xi. Sapphire Electric Power Company Limited (SEPCL)
- xii. Nishat Power Limited (NPL)
- xiii. Liberty Power Tech Limited (LPTL)
- xiv. CMEC Power (Private) Limited (CMECPPL).
- xv. Jamshoro Power Company Limited (JPCL)
- xvi. FFC Energy Limited (FFCEL)
- xvii. ROUSCH (Pakistan) Power Limited
- xviii. Altern Energy Limited (AEL)
- xix. Attock Gen Limited (AGL); and also
- xx. Independent Power Producers Advisory Council (IPPAC)

10. Considering the identical nature of comments and issues raised in the review petitions, the Authority decided to conduct a hearing to allow IPPs, who had submitted comments, to participate therein . The notice of hearing was also published on 11 August 2015, whereby all stakeholders and interested parties were invited to participate in the hearing to be conducted on 19 August 2015 to give their specific comments/objections. Hence, all parties were given fair opportunity of hearing on 19 August 2015 to present their objections/comments.

11. During the hearing, the petitioners re-iterated their stance taken in the review petitions. The other participants also expressed their points of concerns. After hearing the parties, the Authority gave another 07 days time till 26 August 2015 to submit further comments, if any, in the matter. However, parties submitted their comments on 31 August and 01 September 2015, i.e., after the stipulated period. Considering the stake of the parties, the Authority decided to condone the delay in filing the comments and considered the same; notwithstanding late filing. The comments were filed from the following:-

- i. Fauji Kabirwala Power Company Limited
- ii. Nishat Power Limited



- iii. AttockGen Limited
- iv. Sapphire Electric Company Limited
- v. Nishat Chunian Power Limited
- vi. TNB Liberty Power Limited
- vii. Pakgen Power Limited
- viii. Lalpir Power Limited
- ix. Uch-II Power (Private) Limited
- x. Orient Power Company (Private) Limited
- xi. Engro Powergen Qadirpur Limited
- xii. Saif Power Limited,
- xiii. The Hub Power Company Limited; and also
- xiv. Independent Power Producers Advisory Council

II. SUBMISSIONS OF PARTIES

1. Through their respective submissions, the concerns/objections raised by the petitioners and other IPPS may be summarized as under:-

Determination in the LPM of NTDC

- i. The power sale & purchase is governed by Power Purchase Agreement (PPA) with NTDC and Implementation Agreement (IA) with the GoP and the obligations of power purchaser is secured by a sovereign guarantee. These instruments set out the rights and obligations of the generation companies for the duration of the project. Any change without the consent of generation companies in existing arrangement is a matter of concern.
- ii. The novation of PPA from WAPDA/NTDC to CPPA-G adversely affect the accrued, vested rights of the generation licensees under the power generation licenses and existing PPAs entered into with the WAPDA/NTDC and sovereign guarantees issued by the GoP.
- iii. It appears that CPPA-G does not have comparable assets and financial strength for it to be reasonably considered to be sufficiently creditworthy to commercially justify the assumption of the substantial payment obligations under the PPAs. Petitioners have no objection to the existence and functions of CPPA-G but liability of financial obligations of power purchaser must continue to remain vested with NTDC/WAPDA unless the financial strength and capacity of CPPA-G can be determined.
- iv. Before NTDC's transmission license was modified by the Determination, it provided in the proviso to Article 7(1) dealing with power purchases by CPPA that "*provided that this sub article shall not apply to existing contracts between the Licensee and*

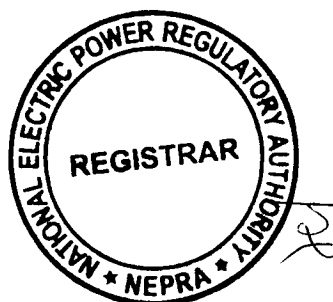


generation licensees for the purchase of electric power duly approved by the Authority or contracts, which are backed by sovereign guarantees and all such contracts shall continue to remain enforceable up to their full term." It is clear that the Authority itself has in past expressly recognized and preserved, the rights of generation licensees under their existing contracts but has unfortunately overlooked the same by allowing a transfer of functions to CPPA-G.

- v. Authority while granting licenses to IPPS under 1994 power policy added additional terms in their licenses whereby it was clearly provided that the Rules are applicable to the Licensee however should a circumstances arise where the manner of application of the rules could result in an impairment of the rights or an enhancement of the obligations of the Licensee, the Authority has provided an assurance that the Rules would not be applied in particular manner. Further, Article 2(2) of their licenses specifically defined the scope of the application of the rules that there would be no inconsistency with the Agreements or any material adverse effect on the Licensee's contractual rights or obligations, which are backed by sovereign guarantees.
- vi. As per Art. 6(1) of the Company's Generation License, the generation companies under 1994 power policy have the option, not mandatory, to participate in the development of a Competitive Trading Arrangement. The proposed arrangement is a step towards Competitive Trading Arrangement and in view of our Generation Licenses the companies are not obligated to participate in the recent changes but has the option of continuing with the current structure as provided in its PPA.
- vii. Proposed amendments in the approved LPM of NTDC to the extent that the licensee shall not expand, modify or extend any power purchase agreement that it has signed or has been novated/assigned to it under 2002 license, except to transfer or novate those PPAs to CPPA-G for which it has obtained consent of the respective generation licensees. Further, PPAs that are not novated in favour of CPPA-G, the licensee shall continue to be responsible for the management of the billing and settlement functions and for all other obligations of the licensee including procurement of and payment for electric power under such PPAs.

**NEPRA (Market Operator Registration, Standards and Procedure) Rules,
2015**

- i. Scope of Rule 9(d) is not clear that whether it is limited only to the distribution companies and not intended for generation companies, If the intention of this Rule is to apply across the board, including generation companies, the companies wish to inquire about additional fee and charges the Authority is seeking to apply on generation companies pursuant to this Rule.
- ii. Rule 9(b) contravenes PPAs as it states that each Market participant shall comply with Commercial Code including billing, collection, payment and settlement mechanisms.
- iii. Scope of Rule 12 (Power to call for information) is very wide, therefore, it may be limited.



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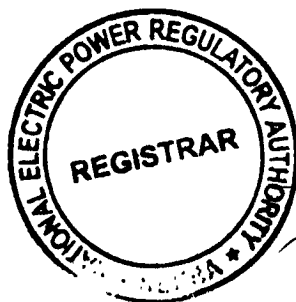
- iv. Rule 16 (Dispute Resolution) is in contradiction to the dispute resolution procedure specified in the PPA. Authority may review Rule 16 and bring in line with that of PPA.
- v. The Penalty of upto 100 million rupees is an excessive amount which needs to be reduced by NEPRA.

The Commercial Code of CPPA-G

- i. The new settlement and billing procedures under the Commercial Code are in contravention with the PPA. Further, clarity is required on the proposed arrangement of settlement and billing during the interim period before the novated/assigned PPA are executed.
- ii. As per 9.4.5 of Code a priority payment list has been introduced whereby payment of capacity invoices & delay payment invoices shall be given least preferences and considering the cash shortfalls and circular debt, there would be no payment to IPPs under this head. This priority payment list is against the provisions of PPA which states that all invoices shall be paid on First in First out (FIFO) basis.
- iii. No procedure is defined for the nomination and appointment of the members of the Review Committee. It is also not clear that whether the Review Committee is permanent.
- iv. It is not clear whether companies be provided an opportunity to review and comment on the SOPs for settlement and billing procedures prior to its approval.
- v. As CPPA-G will administer a "Market Settlement System". It is not clear whether it is merely an internal market system relating to calculating settlement of PPAs and NTDC Use of System Charges.
- vi. Market Participant should be allowed to challenge the Preliminary Settlement Statement at the earliest - the current language does not stipulate a time period. Market Participant is only allowed to challenge the Final Settlement Statement which may cause unnecessary delay.
- vii. Since the CPPA-G is acting as an agent to the DISCOs and Generation companies signing PPA with the CPPA-G then how come CPPA-G is not liable for payments with the Generation companies.

III. DISCUSSION

- 2. Before going into detailed discussion on the submissions of the parties, we would like to appreciate the forthcoming approach of IPPs regarding the support for establishment of CPPA-G. During the hearing, the parties stated that they have no objection to the performance of the relevant functions by CPPA-G, however, they



brought to the attention of the Authority their concerns which have been summarized as above.

3. We have gone through the objections/comments of the parties in relation to (a) the Determination, (b) the Market Rules and (c) the Commercial Code. Considering the nature of comments relating to specific provisions of the Market Rules and the Commercial Code of CPPA-G, the Authority decided to initiate separate proceedings. Therefore, the concerns of the parties specific to the Market Rules and the Commercial Code will be dealt with separately and this decision will address the submissions of the parties regarding the LPM of NTDC and the Determination given in the matter.
4. As for the submissions regarding modification in Transmission License of NTDC, it has been stated that transfer of functions, particularly, the novation of the PPA from WAPDA/NTDC to CPPA-G may adversely affect the accrued rights of the generation licensees under the power generation licenses and the existing PPAs entered into with the WAPDA/NTDC and the sovereign guarantees issued by the Government of Pakistan in relation thereto. Parties have shown their reservation that the Authority has, in the past, expressly recognized and preserved, the rights of generation licenses under their existing contracts but has unfortunately, overlooked the same by allowing a transfer of the relevant functions and novation of power purchase contracts to CPPA-G in the Determination.
5. In this regard, attention of the Authority was drawn to amendment in Article 7 in NTDC Transmission License. Before NTDC Transmission License was modified by the Determination, it provided in the proviso to Article 7(1) dealing with power purchases by CPPA that

provided that this sub article shall not apply to existing contracts between the Licensee and generation licensees for the purchase of electric power duly approved by the Authority or contracts, which are



backed by sovereign guarantees and all such contracts shall continue to remain enforceable up to their full term.

6. Further, IPPs issued generation licenses under 1994 power policy referred to Article 2 (2) of the their respective generation licenses as under:

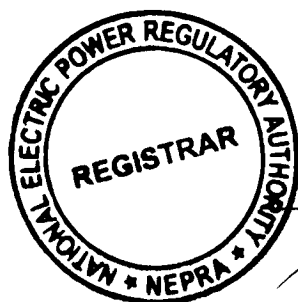
Article 2(2) During the subsistence of the Agreement entered into by the Licenses prior to the enactment of the Act, nothing contained in the Rules or this License shall be applied in manner which is inconsistent with the Agreements and materially increases the obligations or impairs the rights of the Licensee under the Agreements.

7. From the submissions made vis-a-vis rights of generation licensees covered under their existing PPAs, the Authority understands that the parties are concerned regarding any adverse effect of modification in NTDC's Transmission License on their accrued rights under the existing PPAs. In this regard, it is clarified that the Authority is conscious of the fact that long term power purchase agreements are norm of the electricity business and sovereign guarantees have been issued by the Government of Pakistan in relation to the aforementioned PPAs.
8. The Authority has dealt with the similar situation in 2003 at the time of issuance of generation licenses to 12 IPPs who entered into PPAs backed by sovereign guarantees prior to commencement of the NEPRA Act. Taking into account the apprehension of IPPs regarding their rights under the PPAs and sovereign guarantees issued in relation thereto, the Authority in its determination dated 26 August 2003 made it categorically clear that *"they have sought assurance in the License that the rights and obligations under their Agreements would not be adversely effected by the application of the Rules. The Authority is of the opinion that in view of the guarantees provided by the Government and to avoid a default situation leading to dire financial consequences for the Government of Pakistan. an exception has to be made with respect to the manner of application of the rules."*



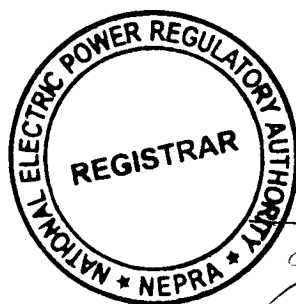
9. In the instant proceedings, the issue at hand is again the assurance of the licensees that the rights and obligations under their power purchase agreements will not be affected adversely. Therefore, to accommodate these long term contracts of IPPs for which sovereign guarantees have been provided by the government, specific provisions have been included in the Market Rules and the Commercial Code to safeguard the rights of IPPs under their respective licenses and existing PPAs. In this regard, it may be clarified that saving clauses provided in the Market Rules and the Commercial Code ensure that nothing will in any way affect or diminish the rights of the generation licensees under their respective licenses and existing PPAs.
10. Parties have proposed amendment in the Articles of approved LPM of NTDC to the extent that PPAs signed by NTDC or assigned/novated to it under 2002 license shall not be modified except to transfer or novate those PPAs to CPPA-G for which it has obtained consent of the respective generation licensees. In case novation of PPAs is not completed in favour CPPA-G, the licensee shall continue to be responsible for the management of the billing and settlement functions and for all other obligations of the licensee including the procurement of and payment for electric power under such PPAs.
11. From the above referred proposed amendment in NTDC-LPM, we understand that parties seek clearance regarding the novation process and the role of CPPA-G till novation is completed. In this regard, Article 7.1 of approved LPM of NTDC may be referred which states that:

the Licensee will not expand, modify or extend any PPA with IPPs that it has signed or has been assigned/novated under 2002 license, except to transfer or novate those PPAs to CPPA-G, from the date hereof, provided that (i) as a transitional arrangement, the licensee will sign a Business Transfer



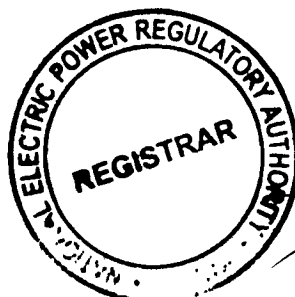
Agreement with CPPA-G transferring the management of the billing and settlement functions of PPAs signed by or novated in favour of NTDC; and (ii) the licensee shall submit every two months a progress and delays, if any, and measurements to be taken to accelerate the process and resolve causes of delays until the transfer/assignment is completed.

12. Article 7 of the approved LPM ensures that PPAs which were signed by NTDC or stood assigned/novated will not be modified except their novation in favour of CPPA-G. It also provides a comprehensive framework for novation of PPAs and the role of CPPA-G during the transition period till novation is completed. The said Article 7 categorically provides that PPAs will be novated to CPPA-G and in this respect NTDC is required to submit every two months a progress and delays, if any, and take measurements to accelerate the process and also to resolve causes of delays until the transfer/assignment is completed.
13. In addition, the said Article 7 also makes it clear that until novation is completed, CPPA-G shall be only managing the billing and settlement functions of PPAs in terms of the Transfer of Business Agreement being entered into with NTDC. Moreover, to ensure a smooth transition to novation and managing the billing and settlement under the PPAs, a separate Administration Agreement is being executed between CPPA-G and NTDC which envisages the role of CPPA-G as an administrator with respect to power purchase agreement entered into by NTDC with power purchasers. Hence, the role of CPPA-G is clarified vis-a-vis existing PPAs till such time that a particular IPP has not entered into a novation agreement with CPPA-G.
14. Parties also raised their concern regarding the Development of Competitive Trading Market and participation of IPPs in such competitive market. It was submitted by some IPPs that in view of their generation licenses, they are not



obligated to participate in the Competitive Trading Arrangement but has the option of continuing with the current structure as provided in their PPAs.

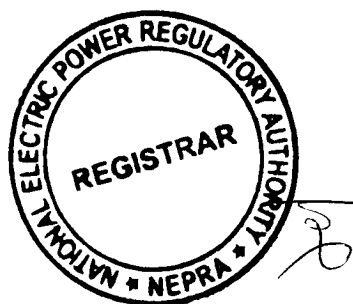
15. The Authority reiterates its view in this regard that the Market Rules and Commercial Code are applicable to all licensees, however, nothing shall derogate from the rights and obligations imposed upon any person under any license or regulations issued by the Authority, or the provisions in their existing power purchase agreement.
16. The power purchaser under the power purchase agreements has the exclusive right to purchase power from the IPPs. The Authority is of the opinion that the power purchase agreements specify the extent and scope of power purchases from IPPs. In view of the binding nature of the agreements and the implications of sovereign guarantees, IPPs cannot be required to participate in the Competitive Trading Arrangement. Nevertheless, there may be a possibility of an agreement between the contracting parties enabling the IPPs to extricate themselves from the contracts to the extent agreed by the other party and participate in the competitive market arrangement.
17. Now coming to the submission of the parties that CPPA-G does not have comparable assets and financial strength for it to be considered sufficiently creditworthy to justify the assumption of the substantial payment obligations under the power purchase agreements. The Authority is of the opinion that as for the financial obligations under the power purchase agreements, IPPs have sufficient sovereign guarantees to safeguard their interests. Further, reference is made to the detailed and secured mechanism laid down in the Commercial Code regarding billing and settlement. Initially, CPPA-G shall follow the same procedures for settlement and billing, as followed by CPPA of NTDC, during the transition period and CPPA-G shall be acting as an administrator of PPAs signed by WAPDA or NTDC. Further to ensure secured payments, an escrow account shall also be



maintained where all collections from distribution companies , subsidy if any, from the Federal Government shall be deposited for payment to generation companies . Further, it is emphasized that CPPA-G shall act in the capacity of agent of distribution companies to procure power from generation companies. Hence, keeping aside comparable assets and financial strength of CPPA-G, there is sufficient secured mechanism available to ensure that CPPA-G fulfils its financial obligations as market operators under the Market Rules.

IV. DECISION


18. In view of above discussion, the Authority is of the opinion that LPM granted to NTDC in respect of its Transmission License through Determination dated 29 May 2015, simply bifurcates the functions of NTDC as system operator and market operator. In this regard, the Authority acknowledges that none of the IPPs has objected on separation of NTDC's functions. In fact, during the hearing parties principally agreed to creation of CPPA-G and the functions assigned to it.
19. In the approved LPM, market operations have been assigned to CPPA-G, and for that reason, the articles of amended Transmission License of NTDC will only deal with the system operations. Whereas for market functions, a comprehensive legal framework has been developed in the form of the Market Rules and the Commercial Code. Therefore, there is no need to modify the granted LPM to add or make any change with respect to any market function which is now covered under the Market Rules or Commercial Code.
20. As for the concerns of the parties regarding assurance of their rights and obligations under existing PPAs and licenses, it has been abundantly made clear that under the new regime of CPPA-G introduced through the NTDC-LPM, the Market Rules, the Commercial Code, nothing shall in any way affect or diminish

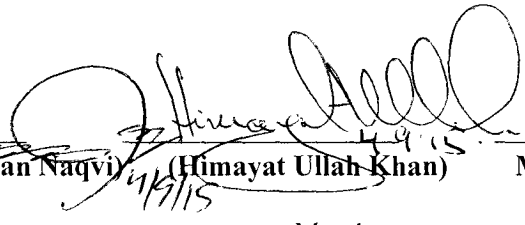


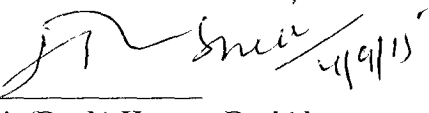
the rights of the generation licensees under their respective licenses and existing PPAs. Hence, the concern of the parties stand resolved.

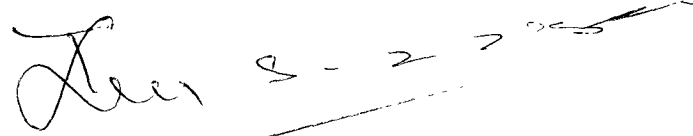
21. Review petitions are disposed of accordingly.

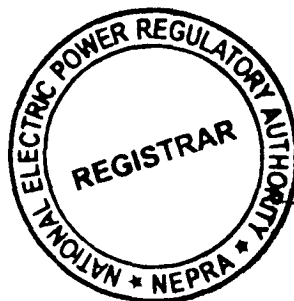
AUTHORITY

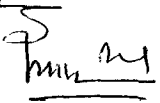

(Syed Masood/Ul Hassan Naqvi) 4/9/15
Member


(Himayat Ullah Khan) 4/9/15
Member


Maj. (Retd.) Haroon Rashid 4/9/15
VC/ Member


(Brig. (Retd.) Tariq Saddozai)
Chairman 4/9/15




04.09.15