IN THE SUPREME COURT OF PAKISTAN
[Original Jurisdiction]

PRESENT:

MR. JUSTICE IFTIKHAR MUHAMMAD CHAUDHRY, CJ
MR. JUSTICE KHILJI ARIF HUSSAIN

HUMAN RIGHTS CASE NO.7734-G/2009 & 1003-G/2010

[Alleged Corruption in Rental Power Plants]

HUMAN RIGHTS CASE NO. 56712/2010

[Fraud in payment of Rental Power Plants detected by NEPRA]

Applicants in person:	Makhdoom Syed Faisal Saleh Hayat, Federal Minister for Housing and Works Khawaja Muhammad Asif, MNA assisted by M/s Mustafa Ramday and Syed Ali Shah Gilani, Advocates
Amicus Curiae:	Mr. M. Anwar Kamal, Sr. ASC

On Court Notice:

For NEPRA:	Syed Najmul Hassan Kazmi, Sr. ASC Mr. M. S. Khattak, AOR Syed Safeer Hussain, Registrar Syed Insaf Ahmad, DG
For PEPCO/GENCOs/ WAPDA & M/o W & P:	Kh. Ahmed Tariq Rahim, Sr. ASC Mr. Abbas Mirza, ASC Mr. Moazzam Ali Rizvi, ASC Syed Zafar Abbas Naqvi, AOR Mr. Arshad Ali Ch. AOR assisted by Mr. Ijaz A. Babar, Finance Director, PEPCO Barrister Asghar Khan, SML, PPIB Mr. Hamid Ali Khan, Addl. Secy. M/o W&P Mr. Masood Akhtar, GM NPCC Mr. Mansoor Ali Khan, CE, WPPO Rana Muhammad Amjad, GM, WPPO Rana Asif Saeed, Chief Legal Advisor Mr. Salman Iqbal, Executive Directed (Legal) Mr. Abdul Jabbar Memon, CRRO, WAPDA, KHI Mr. Anisuddin Alvi, DD, CRRO Mr. Razi Abbas, former CFO Mr. Abdul Jabbar Shaikh, DM, LPGCL

	Mr. Faizullah Dahri, FD, LPGCL Mr. Muhammad Anwar Brohi, CEO, LPGCL Mr. Sultan Muhammad Zafar, CEO, GENCO-III
For Raja Pervez Ashraf Former Minister W&P:	Mr. Wasim Sajjad, Sr. ASC Mr. M. S. Khattak, AOR assisted by Mr. Idrees Ashraf, Advocates
For Karkey :	Mr. Muhammad Akram Sheikh, Sr. ASC Mr. Azid Nafees, ASC assisted by Syed Ahmad Hassan Shah, Ms. Natalia Kamal and Sajeel Shehryar, Advocates
For Gulf & Sialkot Power:	Syed Ali Zafar, ASC Raja Zafar Khaliq, ASC Raja Abdul Ghafoor, AOR
For Techno Sahuwal & Techno E Services:	Raja M. Anwar-ul-Haq, ASC
For Walters Power:	Mr. Shahid Hamid, Sr. ASC Mr. M. S. Khattak, AOR
For Pakistan Power:	Dr. Parvez Hassan, Sr. ASC Mr. M. S. Khattak, AOR
For Reshma Power & Kamoki Energy:	Mr. Abdul Hafeez Pirzada, Sr. ASC Mr. Sikandar Bashir Mohmand, ASC Mr. Mehmood A. Sheikh, AOR assisted by M/s Hameed Ahmed and Mustafa Aftab Sherpao, Advocates.
For Young Gen Power:	Sh. Zamir Hussain, Sr. ASC
For M/o Finance:	Mr. Muhammad Iqbal Awan, Addl. Secy
For FBR	Mr. Salman Siddique, Chairman FBR
Dates of hearing:	26-28 & 31 October, 1-4, 14-17 & 21-24 November and 12-14 December, 2011

...

JUDGMENT

IFTIKHAR MUHAMMAD CHAUDHRY, CJ – The Constitution of the Islamic Republic of Pakistan mandates that State shall exercise its powers and authority through chosen representatives of the people. A democratic order in place, through the representatives of people, being the members of Parliament, obligates the elected representatives to fulfill their commitments bestowed upon them under the Constitution, and in their representative capacity, they are bound to perform their functions honestly, to the best of their ability, faithfully, in accordance with the Constitution and the law as well as the Rules of the Assembly, and always in the interest of sovereignty, integrity, solidarity, well being and prosperity of Pakistan. Such a binding force of the Constitution commands them to ensure well being and prosperity of Pakistan, so whenever they feel threat to the well being of the people of Pakistan for any reason, they are bound to preserve the same.

2. Makhdoom Syed Faisal Saleh Hayat, one of the Parliamentarians of PML(Q) and its parliamentary leader in the National Assembly, now holding the office of Federal Minister for Housing & Works, through a press statement published in Daily "Nation" dated 8.9.2009, urged this Court to take action in respect of Rental Power Projects (RPPs) which, according to him, was just another name of corruption. He said that he had raised the issue of corruption in the award of RPPs before every forum, including the National Assembly of Pakistan, but his voice was not attended to, therefore, he had approached the Supreme Court for initiating *suo motu* proceedings against all those who were involved in this massive scam of US$ 5 billion, which was being skimmed from the pockets of innocent people of this country. Makhdoom Syed Faisal Hayat was asked to furnish evidence in support of allegations for further examination of the matter. He submitted a detailed application dated 26.9.2009, wherein reiterating the allegations of corruption, he relied upon certain documents of the PEPCO, GENCOs, WAPDA and Ministry of Water & Power to prove his assertions. Thereafter, para-wise

comments were called from WAPDA, which were submitted by M.D. PEPCO, denying the allegations/charges of corruption. However, it was emphasized that due to acute shortage of electric power in the country, short term measures in the shape of RPPs for three to five years were adopted pursuant to Rental Power Policy approved by Economic Coordination Committee (ECC) of the Cabinet, Government of Pakistan from time to time, *inter alia*, *vide* case No.ECC 135/9/2006 dated 16.8.2006. Similarly, the other stakeholders denied the allegations of corruption.

3. When the petition was pending for hearing, another eminent Member of the National Assembly, namely, Khawaja Muhammad Asif belonging to PML(N), *vide* CMA No.3100/2010, joined the proceedings w.e.f. 21.10.2010.

LAW RELATING TO GENERATION AND TRANSMISSION OF ELECTRICITY

4. In 1994, the Private Power and Infrastructure Board (PPIB) was created as “One Window Facilitator”, *inter alia*, with a view to promote private sector participation in the power sector of Pakistan and to facilitate investors in establishing private power projects and related infrastructure, execute implementation agreements with project sponsors and issue sovereign guarantees on behalf of Government of Pakistan. On 16.12.1997, to provide for the regulation of generation, transmission and distribution of electric power and matters connected therewith and incidental thereto, the Regulation of Generation, Transmission and Distribution of Power Act, 1997 (hereinafter referred to as the “the Act, 1997”) was promulgated. Subsections (vi), (xi) and (xxvi) of section 2 of the Act, 1997, respectively, define “Distribution”, “Generation” and “Transmission” Companies. In 1998, Pakistan Electric Power Company (PEPCO) was

incorporated under the Companies Ordinance, 1984 with a view to improve the efficiency of the power sector, to meet customers' electric energy requirements on a sustainable and environmental friendly basis, to stop load shedding, to construct new grid stations, to reduce line losses, to minimize tripping and theft control, to revamp generation units and to improve customer services, and develop an integrated automated power planning system for generation, transmission and distribution to ensure system stability, fault isolation and upgrade relying, metering and tripping system at the level of National Transmission and Distribution Company (NTDC) as well as Distribution Companies (DISCOs).

5. It may be stated that in Pakistan, electricity is produced from hydel, oil, gas, coal and nuclear sources. Hydel and thermal power generation was previously under the control of WAPDA. To augment the generation capacity to meet demand and eliminate inefficiencies due to WAPDA's growth, demand suppression and high tariff policy and proliferated theft, WAPDA's Power Wing was restructured/segregated into twelve (12) distinct autonomous entities under the Companies Ordinance 1984, viz., three generation, one transmission and eight distribution corporate entities. Thus, electricity generation from thermal sources is under the control of Generation Companies (GENCOs) carved out of WAPDA, which are exclusively owned by the Government of Pakistan. These companies have long term projects called IPPs, spreading over a period of 25 to 30 years. The electric power generated by GENCOs is delivered to NTDC, which in turn, delivers the same to DISCOs. The DISCOs then sell it to the consumers under the contracts of electric powers on specified terms.

6. It is to be noted that the most significant aspect of the generation, transmission and distribution of the electricity is the determination of tariff, which is done by a Regulatory Authority in accordance with the provisions of the Act, 1997 and the Rules made thereunder, as well as the Policy Guidelines issued by the Government of Pakistan under section 31 of the Act, 1997 from time to time. Importantly, the Policy should not be inconsistent with the Act, 1997. Therefore, WAPDA, in principle, has no power to interfere with the affairs of RPPs.

7. Under section 3 of the Act, 1997, National Electric Power Regulatory Authority (NEPRA) consisting of a Chairman and four members, one from each province, to be appointed by the Federal Government, was established. Section 7 of the Act, 1997 prescribes powers and functions of the Authority as under: -

> *“<u>Powers and functions of the Authority:</u> (1) The Authority shall be exclusively responsible for regulating the provision of electric power services.*
> *(2) In particular and without prejudice to the generality of the foregoing power, only the Authority, but subject to the provision of sub-section (4), shall,*
> *(a) grant licences for generation, transmission and distribution of electric power;*
> *(b) prescribe procedures and standards for investment programmes by generation, transmission and distribution companies;*
> *(c) prescribe and enforce performance standards for generation, transmission and distribution companies;*
> *(d) establish a uniform system of accounts by generation, transmission and distribution companies;*
> *(e) prescribe fees including fees for grant of licences and renewal thereof;*
> *(f) prescribe fines for contravention of the provisions of this Act; and*
> *(g) perform any other function which is incidental or consequential to any of the aforesaid functions.*
> *(3) Notwithstanding the provisions of sub-section (2) and without prejudice to the generality of the power conferred by sub-Section (1) the Authority shall,*
> *(a) determine tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution*

companies and recommend to the Federal Government for notification;

(b) review organizational affairs of generation, transmission and distribution companies to avoid any adverse effect on the operation of electric power services and for continuous and efficient supply of such services;

(c) encourage uniform industry standards and code of conduct for generation, transmission and distribution companies;

(d) tender advice to public sector projects;

(e) submit report to the Federal Government in respect of activities of generation, transmission and distribution companies; and

(f) perform any other function which is incidental or consequential to any of the aforesaid functions.

(4) Notwithstanding anything contained in this Act, the Government of a Province may construct power houses and grid stations and lay transmission lines for use within the Province and determine the tariff for distribution of electricity within the Province.

(5) Before approving the tariff for the supply of electric power by generation companies using hydro-electric plants, the Authority shall consider the recommendations of the Government of the Province in which such generation facility is located.

(6) In performing its functions under this Act, the Authority shall, as far as practicable, protect the interests of consumers and companies providing electric power services in accordance with guidelines, not inconsistent with the provisions of this Act, laid down by the Federal Government.

In terms of sections 15, 16 and 20 of the Act, 1997, licenses for "Generation", "Transmission" and "National Grid" are also to be granted by the NEPRA. Under section 7 of the Act, 1997, NEPRA has been empowered, *inter alia*, to establish uniform system of accounts in respect of generation, transmission and distribution companies and to determine tariff through competitive process in terms of the Guidelines for Determination of Tariff for IPPs issued by the Ministry of Water and Power in the month of November, 2005.

INSTALLED CAPACITY TO GENERATE ELECTRICITY BEFORE INTRODUCING RPP

8. Makhdoom Syed Faisal Saleh Hayat pointed out that as per brochure on "Solicitation For Fast Track IPP and Rental Power Projects

through International Competitive Bidding" issued in pursuance of the decision taken in the Special Cabinet meeting in case No.59/08/2008 dated 14.05.2008, presently the total installed electricity generation capability in the country was shown about 19478 MW, whereas as per PEPCO supply and demand position for the year 2009 it is 12074 MW and 17102 MW respectively in the months of March and September 2009 out of total generation against the peak demand of 14686 and 18110 MW as it has been shown in the chart presented by him along with his petition. The stand taken by the petitioner has been controverted by Khawaja Ahmad Tariq Rahim, learned counsel for the respondents as according to him the projected demand of electricity for the period 2010-2013 ranges between 19352 MW to 24126 MW. To substantiate his plea, he has also relied upon the ADB report.

9. It is important to note that the learned counsel for the respondents has not disputed the contents of chart showing electricity generation position as prepared in the year 2009. Similarly, the figures quoted from ADB report about the higher demand on the growth production would be 8% in 2009 to 7.5% in the year 2013. The figures from the ADB report are as follows: -

2010	21838
2011	23476
2012	25185
2013	26978

As far as above noted figures are concerned, there is no need to comment on the same because the contents of up to date generation position have been prepared by PEPCO for the year of 2008-2009 and onward whereas the projection of the increased demand by the ADB, which is also not disputed relates to the year 2010 and onward. What is important is that after having launched RPPs when there were objections from all and sundry about the corruption in the matter, which were being adhered to, the Government of Pakistan in the month of September, 2009 decided for the Rental Power Review by means of the process of 3rd Party Audit and the assignment was entrusted to ADB. It goes to establish that in the Special Cabinet meeting held on 14.05.2008, a decision based on the presentation of different Secretaries was taken. Summary of the meeting available on this file does not show that the then Secretary, Water & Power, who was primarily responsible under the Rules of Business, 1973 had put up the case after doing proper homework. Thus, initially there was a need of thorough probe into the RPPs by soliciting opinion of the experts on the subject and also having taken into consideration the benefit of the past experience relating to the year 2006 when the Rental Power Projects were initiated by the then Government at the locations known as Bhikki and Sharaqpur. Primarily, both these projects could not prove a success.

10. The Government/Executive being the custodian of the national resources on behalf of the nation is bound to preserve and protect the same by strictly adhering to the relevant laws, conventions, experiences and have no authority to compromise with the resources, which fall within the definition of property in terms of constitutional provisions, belonging to general masses falling within the ambit of Article 24 of the Constitution.

11. Makhdoom Syed Faisal Saleh Hayat, with the assistance of the charts which he had appended with his petition, persuaded us to believe that without “Rental Power Plants” to generate additional electricity, the existing generation capacity was sufficient to cater for the current requirements, but without properly exploiting its existing resources with a *mala fide* intention, process of RPPs were

commenced. He referred to the energy policy issued in the year 2002 and stated that in the years 2004 to 2007, Letters of Intent (LOIs) have been issued in respect of 34 out of 48 different projects for generating electricity i.e. Hydel-13, Oil-5, Gas/Dual Fuel-10 and Coal-6 approximate capacity of each type of project being 2962, 1100, 1864, 3550 (total 9476 MW); and again in the years 2005 to 2007, LOIs were issued for Oil-7, Gas/Dual Fuel-7 with expected capacity to produce 1231, 1359 (total 2590 MW). In this way, capacity was to be increased by 12066 MW (9476+2590).

12. Learned counsel for the respondents, however, insisted that on account of projected increase in the demand, the existing capacity was not considered sufficient, therefore, to meet urgent demand Rental Power Projects were considered to be the solution to reduce day-to-day load-shedding. The argument so made by him might be very convincing, but due to non-denial of the quoted facts and figures relating to different projects and capability of generating more electricity, it cannot be denied that PEPCO has sufficient capability to increase its generation of electricity to meet the requirements. Admittedly, the figures shown on the PEPCO website, reference of which has been made during hearing of the case, were against the stand taken by learned counsel for the respondents. Perhaps the Authority finding no answer to the query raised by the Court from time to time about the generating capability of electricity stopped up-loading the figures of generation of electricity from different sources i.e. Hydel, GENCOs, IPPs, etc. and for such reason on 06.10.2010 following order was passed by making the direction to the IT In-charge of the PEPCO: -

> *"Petitioner Makhdoom Syed Faisal Saleh Hayat, during arguments has pointed out that in the petition/letter sent*

> *to this Court he has quoted important figures downloaded from official website of PEPCO in the year 2009 but later on such figures have been removed from the website of PEPCO. This statement so made by him seems to be true as per our own I.T. system which has been confirmed in Court by a responsible officer. Prima facie we are of the opinion that the PEPCO for the reasons known to its authority has removed these figures but retrieving of the same is important for the just decision of the case, therefore, we direct to the I.T. In-charge of the PEPCO to appear in person in Court and place on record authentic documents in respect of the entries mentioned in the application copy of which is available with the learned counsel for PEPCO and if readily is not available then he should retrieve the same from the master server."*

Subsequent thereto the case remained pending but the figures were not retrieved from the main server as per the report, which we have obtained from the IT Department of this Court. The report of Data Processing Manager is reproduced hereinbelow:-

> *"It is submitted that information regarding Power Generation & Generation contribution i.e. Hydel, PEPCO, Thermal, IPPS & Rental is 19.05.2011 no such information is available.*
>
> *There is no detail regarding the generation of electricity by PEPCO so far."*

At the same time, in view of the non-availability of the information regarding generation of electricity by PEPCO on its website (www.**pepco**.gov.pk*)*, on 16.3.2012 the Registrar was directed to procure the following information: -

(i) Total generation capacity (Hydel, IPP, RPP, etc.);
(ii) Total electricity generated for the last one year (Hydel, IPP, RRP, etc.), if shortage, assigned reasons;
(iii) Detail of IPPs, which are generating and not generating electricity and the reasons for the same;
(iv) Monthly/weekly average of production of each RPP;
(v) Net demand of electricity for each month during the last one year; and
(vi) As to why PEPCO website is not being updated?

In response to above query, following details about the total installed generation capacity and dependable capacity have been received:-

MONTH	1	2				
	Total Generation Capacity /Installed Capacity (MW)	DEPENDABLE CAPACITY (MW)				
		HYDEL	IPP'S	GENCO'S	RENTAL	TOTAL
SCP Requirement # (i)	**(i)**					
Mar-11	20686	3850	8305	3580	323	**16058**
Apr-11	21021	4068	8295	3580	594	**16537**
May-11	21030	5519	8297	3580	594	**17990**
Jun-11	21030	5142	8300	3580	594	**17616**
Jul-11	21030	5649	8300	3580	594	**18123**
Aug-11	21030	6437	8300	3580	594	**18911**
Sep-11	21030	6673	8300	3580	594	**19147**
Oct-11	21030	6437	8300	3580	594	**18911**
Nov-11	21030	4240	8300	3580	594	**16714**
Dec-11	21030	4926	8300	3580	594	**17400**
Jan-12	21030	4255	8300	3580	594	**16729**
Feb-12	21030	5030	8300	3580	594	**17504**

Similarly, the detail of total electricity generated, viz., the net demand and shortfall/load management was provided as under:-

MONTH	3					4	5
	Total Electricity Generated (MW) SCP Requirement # (ii)					Net Demand of Electricity / Peak System Demand (MW)	Shortfall/ Load Management (MW)
	HYDEL	IPP'S	GENCO'S	Monthly Av. Production of RPPs	TOTAL		

SCP Requirement # (i)				(iv)		(v)	
Mar-11	3454	4741	1789	61	**10045**	**14981**	**4936**
Apr-11	4216	5923	1377	88	**11604**	**15796**	**4192**
May-11	5228	6931	1462	103	**13724**	**17302**	**3578**
Jun-11	5145	6790	2000	112	**14047**	**18511**	**4464**
Jul-11	5224	5636	1793	143	**12796**	**18860**	**6063**
Aug-11	5657	6632	1859	67	**14215**	**18677**	**4462**
Sep-11	5995	5197	1256	119	**12567**	**18544**	**5977**
Oct-11	4359	4109	1268	153	**9889**	**17554**	**7665**
Nov-11	3993	6647	1547	215	**12402**	**14156**	**1754**
Dec-11	3784	3760	1701	135	**9380**	**14475**	**5095**
Jan-12	2472	5498	1708	134	**9812**	**13685**	**3873**
Feb-12	4923	4830	1587	83	**11423**	**14691**	**3268**

Detail of power generated by IPPs under 1994 Power Policy during the period from March 2010 to February 2012 is given below:-

SCP's Requirement # (iii), Detail of IPPs, which are generating not generating electricity and the reasons for the same ***(Part-1)***

Power Generated by IPPs under 1994 Power Policy
For the Period Mar, 2011 to Feb, 12

Sr. No.	Plant Name	Fuel Type	Installed Capacity (MW)	Dependable Capacity (MW)	Mar-11	Apr-11	May-11	Jun-11	Jul-11	Aug-11	Sep-11	Oct-11	Nov-11	Dec-11	Jan-12	Feb-12	Average Total
1	KAPCO	RFO-Gas-HSD	1,638	1,342	746	636	751	847	631	746	438	808	696	580	555	534	**664**
2	HUBCO	RFO	1,292	1,200	884	1,083	1,032	1,064	879	1,107	679	789	728	811	1,159	841	**921**
3	KEL	RFO	131	124	108	96	93	105	87	105	98	91	60	58	58	65	**85**
4	Lalpir Power (Pvt.) Limited	RFO	362	350	112	260	152	247	248	211	202	284	56	140	189	163	**189**
5	Pak Gen Power Limited	RFO	365	349	248	60	212	246	286	278	246	204	193	178	100	-	**188**
6	SEPCOL	RFO	117	110.47	46	24	40	39	40	42	50	42	29	32	28	20	**36**
7	Habibullah Coastal	Gas	140	129.15	64	96	105	76	55	51	106	84	71	69	19	38	**69**

8	FKPCL	Gas	157	151.20	135	126	142	142	144	144	98	106	152	155	154	144	**137**
9	Rousch	Gas	450	395	312	316	370	358	372	378	372	394	311	380	414	378	**363**
10	Saba	RFO	134	125.55	14	27	15	20	21	21	25	21	0	28	3	7	**17**
11	Japan Power	RFO	135	107.00	34	42	47	41	31	59	42	48	45	25	36	31	**40**
12	Uch Power	Gas	586	551.25	535	524	516	490	499	505	507	525	292	492	562	410	**488**
13	Altern Energy	Gas	31	26.54	26	25	28	26	27	26	26	29	29	0	-	0	**20**
14	Liberty Power	Gas	235	211.848	-	114	188	185	185	166	165	187	185	175	186	101	**153**
Sub. Total			**5,773**	**5,172**	**3,263**	**3,429**	**3,691**	**3,885**	**3,506**	**3,841**	**3,052**	**3,610**	**2,848**	**3,122**	**3,463**	**2,732**	**3,370**
15	CHASNUPP-I	Nuclear	325	300	300	282	289	273	288	20	-	238	263	302	301	299	**238**
16	CHASNUPP-II	Nuclear	340	300	-	134	216	233	270	227	289	275	294	206	284	303	**227**
17	Tavanir, Iran		-	39	30	32	32	30	32	30	31	31	31	29	28	29	**30**
Total			**6,438**	**5,811**	**3,594**	**3,876**	**4,227**	**4,421**	**4,096**	**4,118**	**3,372**	**4,155**	**3,435**	**3,659**	**4,077**	**3,363**	**3,866**

The reasons assigned for power shortages are as under:-

Requirements as per Serial Nos (ii) and (iii) of the of the Directions of Hon'able Supreme Court of Pakistan

(ii) Total electricity generated for the last one year (Hydel, IPP, RPP, etc.) if shortage, assigned reasons.
(iii) Detail of IPPs, which are generating and not generating electricity and the reasons for the same

<u>Operational Constraints of the Power Generation & Distribution System</u>

1. Diversion of gas, reduced power generation and increased cost of generation whereas no tariff increase allowed from FY 2003 to FY 2007, despite steep increase in generation cost due to surge in oil prices.
1. Overdue rehabilitation of distribution network and Public Sector Generation Companies (most of the plants have been outlived) due to time and financial constraints causing increase in distribution and generation losses.
2. Increased non payment of bills (collection issues, including extra ordinary stay by the courts) and Kunda Culture
3. Mismatch between cost of supply and tariff triggered birth of circular debt and adversely affected fuel supplies to IPPs and GENCOs plants.
4. IRSA releases water from dams exclusively as per cultivation requirement and not for power requirement.

<u>Other Reasons:</u>

5. *Public Sector was not allowed to add new capacity in thermal since long time resulting in no capacity additions during 2003-2008*
6. *Quantum jump in power demand (7% to 14%) due to:*
   - ❖ *Consumption led growth strategy of 2002-2008 – influx of millions of household appliances.*
   - ❖ *Continuous increase in rural electrification since 2002 onwards*
   - ❖ *Increased demand for agri-tubewell loads – over 80,000 new connections.*
7. *Extra high Load growth in urban areas (20%)*
8. *Air-conditioning load exceeds 5000 MW and is being added each year.*

Following reasons were given by the PEPCO/PITC for not updating the website: -

1. *PITC has been updating the information on website on the basis of information provided by concerned departments.*
2. *Last information regarding news & media was provided to PITC on September 2010 and uploaded accordingly.*
3. *The information regarding power situation has been provided by PEPCO media cell to PITC on 19/05/2011 which was instantly updated. Since then PITC has not received any information.*
4. *Information regarding power produced by IPPs & Rental power is being provided by WPPo & CPPA and updated till June 2011 (Cumulative July 10-June 11).*
5. *PITC will make all efforts to get the updated information from concerned departments and upload on regular basis.*

Besides the figures noted hereinabove, PEPCO provided following information of power generation capability for Hydel plants, GENCOs IPPs, to the ADB: -

PEPCO SUPPLY & DEMAND POSITION: 2008-2012
UPDATED IN MARCH 2009

		2008-09				2009-10					
	Description	Mar	Apr	May	Jun	Jul	Aug	Sep	Oct	Nov	Dec
A.	Committed Generation Capability										
(i)	Hydel	3295	3863	4793	5035	5657	6026	5979	5036	5545	4183
(ii)	GENCOs	4314	4512	4660	4689	4788	4788	4792	4796	4861	4916
(iii)	IPPs	6181	6197	6204	6615	6618	7205	7570	7763	7750	8402
	Total (A)	13790	14572	15657	16339	17063	18019	18341	17595	18156	17501
B.	Forced Outages	889	913	931	960	972	1007	1029	1041	1048	1094
C.	Maintenance Reserves	827	589	303	154	18	105	210	1178	3364	2431
D.	Firm	12074	13070	14423	15225	16073	16907	17102	15376	13744	13976

	Generation Capability (A-B-C)										
E.	*Peak Demand*	*14686*	*15899*	*17004*	*17824*	*17898*	*17936*	*18110*	*16453*	*14777*	*14931*
F.	*Surplus/Deficit Generation (+/-)*	*-2612*	*-2829*	*-2581*	*-2599*	*-1825*	*-1029*	*-1008*	*-1077*	*-1033*	*-955*

The above chart with the updated information about the supply and demand position from 2008 to 2012 reproduced hereinabove and latest information supplied during the hearing of the case suggest a noticeable difference supplied by the PEPCO on different occasions. Thus, no other inference can be drawn except that correct facts are being concealed by the respondent PEPCO without any justifiable reason. However, it strengthens the viewpoint of petitioner Makhdoom Syed Faisal Saleh Hayat that RPPs have been introduced without any feasibility study and it has left a big question mark on the transparency of the project.

13. It is to be noted that updated data so far received from time to time, as is evident from the perusal of above documents, makes it abundantly clear that no authentic and acceptable information is available, therefore, the argument so raised by Makhdoom Syed Faisal Saleh Hayat gets strengthened that without undertaking any feasibility study, RPPs were launched in a haste. A perusal of ADB report establishes that ever since the present Government came into power in the month of March, 2008, country is facing shortfall of electricity because of increase in number of consumers of electricity day by day as the population is increasing, but instead of pursuing long term projects like strengthening the already existing sources of electricity generation including hydel, thermal through GENCOs and IPPs through PEPCO, to meet the shortfall, the idea of RPPs was resorted to. The statistics provided by PEPCO *vide* letter dated 16.3.2012, reproduced hereinabove, also disclose the

reasons on account of which IPPs are not generating/functioning to their full capacity for the reasons noted hereinabove. Therefore, the Government instead of launching Rental Power Projects, could have conveniently strengthened the IPPs, which are already working and the IPPs and hydel projects, which were likely to commence generation of electricity in the year 2009-2010 as per following details: -

Project Name	Capacity in MW	Completion Date
Attock Gen Power Project	165	7th April, 2009
Zorlu Wind Power Project	50	19th April, 09
Orient Power Project	225	May, 09 (delayed)
Atlas Power Project	225	June, 09 (Delayed)
Muridke (Sapphire)Power Project	225	July, 09 (Delayed)
Fauji Mari Power Project	202	August,09 (Delayed)
Nishat Power Project	200	Nov, 09
Engro Power Project	227	Dec, 09
Total	1519	

A cursory glance at the above comparative table shows that with the interest and encouragement of PEPCO in the month of December, 2009, 1519 MW was likely to be available. Statedly, a good number of hydel plants are likely to generate electricity. It is not known as to whether any attention is paid by the PEPCO for the completion of the same or not. Another important aspect, which can be gathered from the data/statistics provided subject to authenticity of the same, at present following RPPs are functioning:-

Monthly Average Production of Each RPP

SCP Requirement # (iv)

MONTH	KARKEY 231.8 MW COD	GULF 62 MW COD	NAUDERO-I 51 MW COD	Reshma 201 MW COD	Techno E-Power 150 MW COD	Total Production (MW)
	MW	MW	MW	MW	MW	
Mar-11	0	61	0	0	0	61
Apr-11	31	57	1	0	0	88
May-11	41	61	1	0	0	103

Jun-11	43	61	8	0	0	112
Jul-11	54	60	30	0	0	143
Aug-11	65	2	0	0	0	67
Sep-11	43	56	20	0.43	0	119
Oct-11	75	54	0	24	0	153
Nov-11	81	58	12	63	0	215
Dec-11	54	62	19	0	0	135
Jan-12	61	54	19	0	0	134
Feb-12	32	51	0	0	0	83

POLICY FOR RPPs

14. We have inquired from the learned counsel of PEPCO, GENCOs and WAPDA as well as worthy former Minister for Water & Power, Raja Parvez Ashraf as to whether any policy was formulated while adopting the phenomenon of rental power plants to generate electric power, they pointed out that the concept and the rationale behind the scheme of introducing Rental Power Plants in the country was floated by the previous Government as a quick way to address impending power shortages. References have been made by them to the Cabinet decision bearing No.ECC-135/9/2006 dated 16.08.2006. They also pointed out that the justification put forward by the then Government in installing the plants was that "the rental plants are expensive, however, given the urgency to have additional power capacity before next summer as per WAPDA's demand projections and the long gestation period for new plants, renting of plant(s) appears to be the only short term solution if shortfalls are to be met". And the summary of ECC dated 12.08.2006 was submitted to the Cabinet for approval, which reads as under:-

> "6. Following policy guidelines are proposed for approval:-
>
> (i) Allow renting of power plant/plants by WAPDA/NPGCL as an emergency measure, subject to

acceptance of tariff by NEPRA, and that WAPDA should only rent as much power as is absolutely necessary and which would be utilised with high load factor for economic utilisation of capacity;

(ii) Approve proposal at para 5 for provision of gas to rented plant/plants; and

(iii) Nearest possible location to the load centres of Gujranwala, Faisalabad or Lahore to install the plant. However, if it is necessary to locate the plant at Multan then it should be ensured that there are no transmission bottlenecks.

… …

8. Proposal at para 6 above be approved. Suggestion of Planning Division should also be taken into account by WAPDA/NPGCL."

They were also of the opinion that under Rule 16(F) any case pertaining to the generation of electricity and laying of inter-provincial transmission lines was to be placed before the Cabinet and no sooner it was approved, it would become the policy of the Government on a particular subject, therefore, any decision taken in that behalf would be deemed to be the policy. Learned counsel for WAPDA, PEPCO, GENCOs, etc., has already referred to certain decisions of ECC and the Cabinet, which have been reproduced hereinabove, however, the ECC in its meeting dated 10.09.2008 directed that in case any of the approved projects failed to achieve crucial milestones towards timely project implementation as per agreements, then the projects would be immediately cancelled with penalties and that the deficit power generation capacity be expeditiously arranged through addition of IPPs/RPPs, both solicited and unsolicited on fast track basis. Guidelines by the ECC incorporated in this decision are reproduced herein below:-

a. Proposals for rental power plants would be based on dual fuel (Gas and RFO)/single fuel RFO and would be implemented in shortest possible time.

b. Rental Power Plants would be arranged for a period of 3+1 years.

c. Efforts would be made that the tariff of rental power plants is lower than the tariff allowed to IPPs based on similar technology for their first ten years.

d. Mandatory storage of oil for rental power plants would be for ten days.
e. PEPCO would revaluate the sites for the rental power plants on the basis of space for oil storage, transportation of oil to the site, environmental aspects and power evacuation etc.
f. PEPCO would prepare a mid term revised forecast for demand and supply of power and PPIB would provide necessary input/data to PEPCO in respect of prospective IPPs.
g. Secretaries of Finance and Water & Power along with Managing Director, PPRA would review the mechanism of procurement to ensure that future delay is avoided and Public Procurement Rules, 2004 are observed in letter and spirit.

Above guidelines by the ECC along with other decisions of the ECC referred to hereinabove, if for the sake of arguments are considered to be the policy of the Government, then emphasis should be that such guidelines (policy) have to be implemented in letter & spirit. Exception to above guidelines is also possible to the extent of unsolicited RPPs, which cast duty upon the Secretaries of Finance and Water & Power along with Managing Director of PEPRA to review mechanism of procurement to ensure that future delay is avoided and Public Procurement Rules, 2004 are observed in letter & spirit.

POWERS OF JUDICIAL REVIEW TO INTERFERE IN THE GOVERNMENT POLICIES

15. It is to be clarified that the Government of the day under Article 29 read with Article 2A of the Constitution is bound to formulate policies for the promotion of social and economic well being of the people, which includes provision of facilities to the citizens for work and adequate livelihood with a reasonable rest and leisure, etc. Energy/electricity is essentially one of the significant facilities required by the citizens for manifold purposes, namely, uplifting of their social and economic status. Non-supply of electricity to the citizen regularly, is tantamount to depriving them of one of the essentials of the life including the security of economic activities, which are relatable to

their fundamental rights protected under Articles 9 and 14 of the Constitution. In the cases of *Bank of Punjab v. Haris Steel Industries* (PLD 2010 SC 1109), *Liaqat Hussain v. The Federation of Pakistan* (Constitution Petition No.50/2011), *In Re: Human Rights Case regarding fast food chain in F-9 Park* (PLD 2010 SC 759), *In Re: SMC No.13/2009 (Case regarding Multi-Professional Housing Schemes)* (PLD 2011 SC 619) and *Shehla Zia v. WAPDA* (PLD 1994 SC 693), Article 9 has been interpreted and its scope has been enlarged to each and every aspect of human life. Therefore, whenever a policy is framed with reference to uplifting the socio-economic conditions of the citizens, object should be to ensure enforcement of their fundamental rights.

16. The Courts are not required to examine the policy as it has been rightly urged by Raja Parvez Ashraf, former Minister of Water & Power during whose tenure, in the meeting held on 27.03.2008, decision was taken in the Cabinet for solicitation of Fast Track Power Generation Projects to overcome the gap of 2200 MW between the production and demand of electricity in the system till April, 2009. Reliance on the case of *BALCO Employees Union (Regd.) v. Union of India* (AIR 2002 SC 350) has rightly been placed by him. A 9-Member Bench of this Court had also decided in the case of *Watan Party v. Federation of Pakistan* (PLD 2006 SC 697) regarding power of Court to examine the polices of Government. Relevant Paras therefrom are reproduced hereinbelow: -

> *"57. The next question is in respect of the judicial review of the policies of the Government. It is well settled that normally in exercise of the powers of judicial review this Court will not scrutinize the policy decisions or to substitute its own opinion in such matters as held in Messrs Elahi Cotton Mills ibid. Likewise in the case of Balco Employees ibid, the Supreme Court of India observed as follows:--*

> *"Process of disinvestments is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, the Courts would decline to interfere. In matters relating to economic issues, the Government has while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority."*

This view is in line with this Court's view as given in Elahi Cotton ibid. Similar view was taken by the Indian Supreme Court in Delhi Science Forum v. Union of India (AIR 1996 SC 1356).

58. The parameters of judicial review were graphically commented upon in Associated Provincial Picture Houses Ltd. ibid which has been relied upon by counsel for both sides where in the concluding paragraph the Court came to the conclusion in the words of Lord Somervell as under: -

> *"I do not wish to repeat what I have said, but it might be useful to summarize once again the principle; which seems to me to be that the court is entitled to investigate the action of the local authority with a view to seeing whether it has taken into account matters which it ought not to take into account, or, conversely, has refused to take into account or neglected to take into account matters which it ought to take into account. Once that question is answered in favour of the local authority, it may still be possible to say that the local authority, nevertheless, have come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in it. "*

This view was further reiterated and the principle laid down therein was followed in Nottinghamshire County Council v. Secretary of State for the Environment [(1986) 1 All ER 199] wherein the Court observed as follows:

> *"The law has developed beyond the limits understood to apply to judicial review as practiced by*

the courts in 1947. The ground on which the courts will review the exercise of an administrative discretion by a public officer is abuse of power. Power can be abused in a number of ways: by mistake of law in misconstruing the limits imposed by statute (or by common law in the case of a common law power) on the scope of the power; by procedural irregularity; by unreasonableness in the Wednesbury sense; or by bad faith or an improper motive in its exercise. A valuable, and already 'classical'; but certainly not exhaustive analysis of the grounds on which courts will embark on the judicial review of an administrative power exercised by a public officer is now to be found in Lord Diplock's speech in Council of Civil Service Unions v. Minister for the Civil Service [1984] 3 All ER 935, [1985] AC 374."

There is no cavil to the proposition being espoused by learned Attorney General with reference to Peter Can's "An Introduction to Administrative Law" 2nd Edition that the Court while exercising power of judicial review may not express opinions on polycentric issues requiring technical expertise and specialized knowledge. In the instant case, however, we are seized not with a polycentric issue as such but with the <u>legality, reasonableness</u> and <u>transparency</u> of the process of privatization of the project under consideration i.e. PSMC. These are well established basis for exercise of judicial review. Thus it is held that, in exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter. However, action taken can always be examined on the well established principles of judicial review."

In the light of the above dictum, there could be no cavil with the proposition that as far as transparency in the implementation of the policy, if available, the process of awarding contract is concerned, it squarely falls within the jurisdiction of this Court available to it under the Constitution and the power of judicial review. Reference may be made to the cases of <u>*Iqbal Haider v. Capital Development Authority*</u> (PLD 2006 SC 394), <u>*Pakistan Steels*</u> (PLD 2010 SC 759), <u>*HRC No. 4688/06*</u> (PLD 2001 SC 619), <u>*Ramana Dayaram Shetty v. International Airport Authority of India*</u> [(1979) 3 SCC 489]; <u>*Tata Cellular v. Union of India*</u> [(1994) 6 SCC 651] = (AIR 1996 SC 11); <u>*Raunaq*</u>

International Ltd. v. I.V.R. Construction Ltd. (AIR 2004 SC 4299) = [(1999) 1 SCC 492]; *Air India Ltd. v. Cochin International Airport Ltd.* [(2000) 2 SCC 617]; *Reliance Energy Ltd. v. Maharashtra State Road Development Corp. Ltd.* [(2007) 8 SCC 1] and judgment dated 24.08.2009 of the Andhra Pradesh High Court in *Nokia Siemens Networks Pvt. Ltd. v. Union of India*.

TRANSPARENCY OF CONTRACTS

17. It is important to note that all the executive authorities are bound to enter into contracts for supplies at the least expense to the public exchequer. Most significant consideration for every department of the Government must be the best economical mode of meeting the public needs. Agreements for pecuniary considerations are against public policy, as such, are void. Reference in this behalf may be made to the case of *Tool Company v. Norris* [69 U.S. (2 Wall.) 45 (1864)], wherein the Supreme Court of United States, as back as in 1864, has held that *all contracts for supplies should be made with those, and with those only, who will execute them most faithfully, and at the least expense to the government. Considerations as to the most efficient and economical mode of meeting the public wants should alone control, in this respect, the action of every department of the government. No other consideration can lawfully enter into the transaction, so far as the government is concerned. Such is the rule of public policy, and whatever tends to introduce any other elements into the transaction is against public policy. That agreements, like the one under consideration, have this tendency is manifest. They tend to introduce personal solicitation and personal influence as elements in the procurement of contracts, and thus directly lead to inefficiency in the public service and to unnecessary expenditures of the public funds.*

… … … it is sufficient to observe generally that all agreements for pecuniary considerations to control the business operations of the government, or the regular administration of justice, or the appointments to public offices, or the ordinary course of legislation, are void as against public policy, without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country. Every action taken by the Government must be in public interest and its action would be liable to be invalidated on the touchstone of reasonableness and public interest and if it fails to satisfy either test, it would be unconstitutional and invalid. Reference in this behalf may be made to the case of *R.D. Shetty v. International Airport Authority of India* (AIR 1979 SC 1628). Further, in the case of *Nagar Nigam, Meerut v. Al Faheem Meat Exports (Pvt.) Ltd.* [(2007) 1 Supreme 704] it has been held as under:-

> "The law is well-settled that contracts by the State, its corporations, instrumentalities and agencies must be normally granted through public auction/public tender by inviting tenders from eligible persons and the notification of the public-auction or inviting tenders should be advertised in well known dailies having wide circulation in the locality with all relevant details such as date, time and place of auction, subject-matter of auction, technical specifications, estimated cost, earnest money Deposit, etc. The award of Government contracts through public-auction/public tender is to ensure transparency in the public procurement, to maximize economy and efficiency in Government procurement, to promote healthy competition among the tenderers, to provide for fair and equitable treatment of all tenderers, and to eliminate irregularities, interference and corrupt practices by the authorities concerned. This is required by Article 14 of the Constitution. … … In our opinion this is an essential requirement in a democracy, where the people are supreme, and all official acts must be actuated by the public interest, and should inspire public confidence."

In the case of *Ramana Dayaram Shetty vs The International Airport Authority of India* (AIR 1979 SC 1628), the Court has held as under:-

> "... ... dealing with the public, whether by way of giving jobs or entering into contracts or issuing quotas or licences or granting other forms of largess, the Government cannot act arbitrarily at its sweet will and, ... its action must be in conformity with standard or norms which is not arbitrary, irrational or irrelevant. The power or discretion of the Government in the matter of grant of largess including award of jobs, contracts, quotas, licences etc., must be confined and structured by rational, relevant and non-discriminatory standard or norm and if the Government departs from standard or norm in any particular case or cases, the action of the Government would be liable to be struck down, unless it can be shown by the Government that the departure was not arbitrary, but was based on some valid principle which in itself was not irrational, unreasonable or discriminatory."

In the case of *Ram & Shyam Co. v. State of Haryana* (AIR 1985 SC 1147), the Indian Supreme Court has held as under:-

> "... ... disposal of public property partakes the character of a trust in that in its disposal there should be nothing hanky panky and that it must be done at the best price so that larger revenue coming into the coffers of the State administration would serve public purpose viz. the welfare State may be able to expand its beneficent activities by the availability of larger funds. ... ... where disposal is for augmentation of revenue and nothing else, the State is under an obligation to secure the best market price available in a market economy."

In the case of *Haji T.M. Hasan vs. Kerala Financial Corpn.* (AIR 1988 SC 157), the Court observed that: -

> "It is needless to state that the Government or public authorities should make all attempts to obtain the best available price while disposing of public properties. They should not generally enter into private arrangements for the purpose."

As it has been noted hereinabove that no feasibility study was undertaken by the previous Government during whose period unsolicited RPPs were awarded to Alstom at Bhikki and General Electric Power at Sharaqpur, inasmuch as, no material/documents have been produced on record to show that both the Governments introduced the phenomenon of RPPs after due diligence. From reply submitted on behalf of GENCOs as well as the former Minister for Water & Power, impression is gathered that they have outrightly accepted the proposal of RPPs without examining its merits and de-merits. In this behalf the first special meeting of the Cabinet was held on 14.5.2008 wherein the decision was taken for Fast Track Implementation of Power Generation Projects to meet the demand and supply gap. As per the decision contained in Package-B, Rental Power Plants of 200 to 300 MW were approved. On the basis of said decision, advertisements were made wherein bids were invited for setting RPPs, details whereof have been mentioned hereinabove. Had there been due diligence before approving above package, it would have seen the implication of the billions of rupees by increasing down payment from 7% to 14%. As per above advertisement, GENCO who had licence to generate electricity and then to supply it to NTDC was not party in inviting bids.

18. Internationally, the following factors have been considered key features in procurement of public contracts: -

(1) Upholding competition among firms;
(2) Promoting best value for money;
(3) Encouraging more firms to bid on work;
(4) Maintaining openness and transparency in the bidding process;
(5) Executing contracts quickly;
(6) Ensuring quality of goods and services; and
(7) Meeting other obligations required for federal procurement.

19. In this regard, it is to be noted that in section 5 of the Public Procurement Regulatory Authority Ordinance, 2002, the functions and the powers of the Authority have been defined, according to which the Authority may take such measures and exercise such powers as may be necessary for improving governance, management, transparency, accountability and quality of public

procurement of goods, services and works in the public sector. The words 'transparency' and 'accountability' are of high importance and cast a duty upon the Authority who had invited the bids to ensure openness of the transaction without withholding any information. The competition to establish transparency between the interested parties is in fact the theme of the PEPRA Ordinance as well as the Rules framed thereunder (Public Procurement Rules, 2004). The bidders have to compete with each other by filing their respective bids, therefore, while making procurement of an item like electricity through RPPs the Authority is required to fix a reserved price while quoting lump sum Rental Charges, Rental Rate and Reference Fuel Cost Components. In absence of such reserved prices, there would not be transparent competition and accountability of the bidders and procurers. In the case of *McManus v. Fortescue* [(1907) 2 KB 1], it has been held by Court of Appeal that in a sale by auction, subject to reserve price, every offer/bid and its acceptance is conditional; the public is informed by the fact, that the sale is subject to a reserve price; the auctioneer has agreed to sell for the amount which the bidder is prepared to give only in case that amount is equal to or higher than the reserve price; the reserve price puts a limit on the authority of the auctioneer and he cannot accept a price below the upset/reserve price. In the instant case, neither the reserved price has been mentioned in the publication, in pursuance whereof the bids were invited, nor such reserve price has been disclosed in RFP. Inasmuch as, in advertisement made by PPIB, except mentioning Rental Power Projects of 200 MW cumulative capacity near Karachi, neither the sites were indicated nor the type of fuel or technology of plant was mentioned for this purpose. As far as unsolicited RPPS are concerned, there was no bidding process, therefore, following chart has been prepared regarding solicited RPPs:-

A. ICB conducted by PPIB

Name of RPP	***Site specification***	***Fuel type/ Technology***	***Make & type of machinery***	***Reserved price***
Karkey	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Gulf Rental Power	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Independent Power (Pvt.) Ltd.	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Sialkot Rental Power	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Reshma Power	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Premier Energy (Pvt.) Ltd.	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Ruba Energy	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Consortium of Tapal	*Not provided*	*Not specified*	*Not specified*	*Not provided*
Walters Power International	*Not provided*	*Not specified*	*Not specified*	*Not provided*

B. ICB conducted by PEPCO

Name of RPP	***Site specification***	***Fuel type/ Technology***	***Make & type of machinery***	***Reserved price***
Techo E. Power, Sammundri Road, Faisalabad	*Yes, but changed later on*	*Yes*	*No*	*Not provided*
Techno Energy (Pvt.) Ltd. Sahuwal, Sialkot	*Yes*	*Yes*	*No*	*Not provided*
Guddu	*Yes*	*Yes*	*No*	*Not provided*
Young Gen	*Yes*	*Yes*	*No*	*Not provided*

The detail of RPPs regarding payment of advance, COD and present status is given below: -

Name of RPP	***Advance payment***	***COD***	***Advance returned or not***	***Present status of RPP***

ICB CONDUCTED BY PPIB				
Karkey	*Yes*	*Not achieved within time*	*No*	*Functioning*
Gulf Rental Power	*Yes*	*Not achieved within time*	*No*	*Functioning*
Independent Power (Pvt.) Ltd.	*No*	*Not achieved within time*	----	*No Machinery at site*
Sialkot Rental Power	*No*	*Not achieved within time*	----	*Not functioning*
Reshma Power	*Yes*	*Not achieved within time*	*Yes*	*Functioning*
Premier Energy (Pvt.) Ltd.	*No*	*Not achieved within time*	----	*Not functioning*
RUBA Energy	*No*	*Not achieved within time*	----	*Not functioning*
Consortium of Tapal	*No*	*Not achieved within time*	----	*Not functioning*
Walters Power International	*No*	*Not achieved within time*	----	*Not functioning*
ICB CONDUCTED BY PEPCO				
Techo E. Power, Sammundri Road, Faisalabad	*yes*	*Not achieved within time/ Partial COD*	*No*	*Not functioning*
Techno Energy (Pvt.) Ltd. Sahuwal, Sialkot	*yes*	*Not achieved within time*	*yes*	*Not functioning/ No Machinery at site*
Guddu	*yes*	*Not achieved within time*	*yes*	*Not functioning*
Young Gen	*yes*	*Not achieved within time*	*yes*	*Not functioning*
UNSOLICITED				
Techo E. Power, Sammundri Road, Faisalabad (Extension)	*No*	*Not achieved within time*	----	*Not functioning/ No Machinery at site*

Karkey (Extension)	*No*	*Not achieved within time*	----	*Not functioning/ No Machinery at site*
Naudero-I	*yes*	*Not achieved within time*	*No*	*Functioning*
Naudero-II	*yes*	*Not achieved within time*	*yes*	*Not functioning*
Abbas Steel Group	*No*	*Not achieved within time*	----	*Not functioning/ No Machinery at site*

Thus, it is held that quoting the reserve price, allocating the sites, down payments, etc., were the crucial factors to ensure competitive bidding. Since, these were not mentioned in the advertisements, the bidding process were rendered questionable. Resultantly, all the transactions lacked transparency.

UNSOLICITED RENTAL POWER PROJECTS

20. As per information provided by NEPRA, initially NTDC/CPPA approached NEPRA for obtaining license to purchase power from RPPs. NEPRA allowed this power purchase arrangement to NTDC/CPPA *vide* letter No. NEPRA/R/PAR-11/CPPA-2006/6213-15 dated 27.07.2006. Subsequently, NEPRA vide letter No.NEPRA/R/PAR-11/CPPA-2006/6920-22 dated 09.10.2006 decided to withdraw the power acquisition permission granted to CPPA for procurement of power from RPPs and advised NPGCL as under: -

(i) NPGCL to file an application for modification in their license under NEPRA's Application Modification Procedure Regulations 1999.

(ii) NPGCL to execute their PPA with CPPA in respect of the current power generation and also include the provision of additional power from rented power plant.

(iii) NPGCL to file their tariff petition in respect of additional generation.

Based on above advice of NEPRA, NPGCL approached NEPRA for modification in generation license and signed RSCs, including assignment, if any, with the RPPs.

21. It has been admitted on behalf of PEPCO and GENCOs that phenomenon of rental power projects to overcome the shortage of electric power was introduced by the Government for the first time in the year 2006, considering it to be a short term measure. Two unsolicited rental contracts were executed with M/S Alstom for 136 MW at Bhikki and M/S General Electric Power for 150 MW at Saharanpur respectively. The contract of Bhikki was awarded to Alstom, and later on said company assigned it to M/S Pakistan Power Resources (PPR) in pursuance of agreement dated 17.01.2007. Details of the Bhikki project are as under: -

<u>"BHIKKI POWER PROJECT</u>

Place:	*Bhikki, District Sheikhupura*
Capacity:	*136MW (gas based)*
Rental term:	*36 months*
Contract amount:	*USD 103,015,476*
Mobilization Advance:	*USD 7,211,083*
Agreement date:	*18 September, 2006*
Rental revenue received:	*USD 68,024,477*
Rental revenue loss:	*USD 34,990990*
Date of Assignment	*17 January, 2007*
Effective Date	*23 February 2007*
COD Scheduled	*23 June 2007*
Achieved	*Unit III 19 December, 2007* *Unit II 22 January 2008* *[Unit I 02 April 2008]*
Expiry of Agreement:	*22 June 2010"*

22. It is stated that the Bhikki and Sharaqpur RPPs were approved by the ECC on 16.08.2006, which perhaps is not correct statement of fact because ECC examined the matter *vide* case No.ECC-135/9/2006 dated 16.08.2006 in respect of 150 MW power plant at Piranghaib, Multan on rental basis and decided as under: -

<u>Case No.ECC-135/9/2006</u> *Dated: 16.08.2006*	*<u>150 MW POWER PLANT AT PIRANGHAIB MULTAN ON RENTAL</u>*

	BASIS

DECISION

*The Economic Coordination Committee (ECC) of the Cabinet considered the summary dated 12th August 2006, submitted by the Ministry of Water and Power on "**150 MW Power Plant at Piranghaib Multan on Rental Basis**" and approved the proposals at para 6 and 8 of the Summary.*

The above decision was considered and approved by the Cabinet on 26.08.2006 and was conveyed by the Ministry of Water & Power, Government of Pakistan to Chairman WAPDA, Lahore *vide* letter No.PL-9(3)/2006.

23. It may be noted that NPGCL sought permission from NEPRA to enter into rental arrangements for three years commencing from 100 days of the signing of contract between the parties for enhancing installed generating capacity by 150 MW at Sharaqpur and 136 MW at Bhikki and further specified the rates of sale of electricity. The NEPRA recorded its decision dated 15.12.2006 in Case No.NEPRA/TRF-63/NPGCL-2006/7951-53, which is reproduced hereinbelow in extenso: -

"Subject: Decision of the Authority w.r.t. Tariff Petition filed by Northern Power Generation Company Ltd. (NPGCL) for Determination of Tariff for Power Plants on Rental Basis from GE Energy/Alstom Power (Case No.NEPRA/TRF-63/NPGCL-2006)- Intimation of Decision of Tariff pursuant to Section 31(4) of the Regulation of Generation, Transmission and Distribution of Electric Power Act (XL of 1997)

Dear Sir,

Please find enclosed the decision of the Authority (4 pages) in Case No.NEPRA/TRF-63/NPGCL-2006.

2. The determination is being intimated to the Federal Government for the purpose of notification of Generation, Transmission and Distribution of Electric Power Act (XL of 1997) and Rule 16(11) of the National Electric Power Regulatory Authority Tariff (Standards and Procedure) Rules, 1998.

3. Please note that only Order of the Authority at para 9 of the determination relating to the Reference Tariff and allowed adjustments & indexation needs to be notified in the official gazette. The Order is reproduced for the purpose of clarity and is attached herewith.

DA/AS above.

Sd/- 15.12.2006
(Mahjoob Ahmad Mirza)"

Keeping in mind the fact that in respect of Rental Power Projects, subsequent to issuance of guidelines, the NEPRA was practically made ineffective to determine the electric charges as it was directed to follow Paragraphs 1.9 and 1.10 of the Guidelines issued by the Federal Government in the year 2005 in respect of IPPs. As far as question of determination of tariff is concerned, it was noted in a summary put up to the ECC on 07.02.2008 that efforts be made that the tariff of the RPPs is in line with the tariff determined in respect of the IPPs based on similar technology for their first 10 years, but it appears that the tariff of the RPPs was much higher than that of the IPPs. The aforesaid Paragraphs are reproduced hereinbelow: -

"1.9 Tariff through competitive process
The bidding process may be structured on either of the following two options;

a) bidding for a tariff
b) Offering an up-front benchmark tariff and bidders to quote a discount on the benchmark price.

1.10 It is proposed that once a tariff has been arrived at through competitive biddings based on either of the processes mentioned at Para 1.9 above, the bidding process be structured and administered by PPIB (Ministry of Water and Power) in consultation with the power purchaser (WAPDA/NTDC), Ministry of Finance and NEPRA. The bidding documents (including various formula, formats, etc.) along with evaluation criteria, be also finalized by PPIB in consultation with the same agencies. The lowest evaluated levelized tariff would be recommended to the GOP for acceptance."

24. Despite restriction on determining the tariff by NEPRA, as it has been noted hereinabove, fuel cost charge of Rs.2.7194 per kWh delivered at Inter connection Bas bar in respect of Sharaqpur as well as Bhikki was determined. As per above calculation, the Government

had already paid approximately US $ 2.161 million (Rs.18.63 billion) to these two RPPs as capacity and fuel charges. Thus, NPGCL (GENCO-III) suffered huge losses in the years 2007, 2008 and 2009, with regard to the RPPs in Block-I and Block-II, details whereof are given hereinbelow: -

			Annex-3
NORTHERN POWER GENERATION COMPANY LIMITED (GENCO-III)			
Financial Impact on Account of CCP Tariff Determined Vs CPP Tariff Demanded			
CALCULATION OF CAPACITY CHARGE	***2007***	***2008***	***2009***
Dependable Capacity (MW)	*261.46*	*261.46*	*261.46*

Capacity Purchase Price

Escalable Component:

Fixed O&M Cost:

____Mln. Rs.____

Rent for Rented Block-I	*2,272.40*	*2,272.40*	*2,272.40*
Rent for Rented Block-II	*2,060.31*	*2,060.31*	*2,060.31*
Guaranteed Heat Rate Bonus	*261.54*	*261.54*	*261.54*
Gas Pipelines Installations	*83.12*	-	-
General Establishment Cost	*3.50*	*3.68*	*3.86*
Administrative Cost	*100.00*	*100.00*	*100.00*
M&I/Overhauls	-	-	-
MEPRA Fees	*8.50*	*2.30*	*2.30*
Insurance	-	-	-
Depreciation (for ROA)	-	-	-
Duties etc.	*442.00*	-	-
Total Fixed O&M Cost	*5,231.3670*	*4,700.2240*	*4,700.4078*
CPP-FOM charge (Rs./kW/Month)	*1,667.3318*	*1,498.0469*	*1,498.1055*
CPP Determined By NEPRA (Rs./kW/Month)	*1,283.4851*	*1,283.4851*	*1,283.4851*
CPP Tariff Difference (Rs./kW/Month)	*383.8467*	*214.5618*	*214.6204*
Projected Loss per Month due to less CPP Tariff Determined (Mln Rs)	*100.3621*	*56.1002*	*56.1155*
Projected Loss per Year due to less CPP Tariff Determined (Mln Rs)	*1,204.3452*	*673.2022*	*673.3860*

25. It is also to be noted that as the natural gas was to be used for both these RPPs as the fuel and availability factors of both the plants were 92% and both the projects i.e. GE-Sharaqpur 150 MW and Alstom-Bhikki 136 MW, NPGCL generated (MKWH) 1515 and 816 respectively on account of plant factor average 39% and 26%

comparing to availability factor 92%. Similarly, above facts and figures show financial impact on account of CPP tariff determined by NEPRA (Rs./kW/Month) and CPP-FOM charge (Rs./kW/Month). The availability factor efficiency is fully evident from the chart reproduced hereinabove. In a nutshell, due to tariff determination by the NEPRA according to the available formula, considerable losses occurred to NPGCL. Therefore, while going for further RPPs, the concerned authorities ought to have taken into consideration that since these two projects had already caused losses to the public exchequer, therefore, it was not advisable to opt for generating electric power through RPPs.

26. Raja Parvez Ashraf has placed on record a copy of summary of ECC dated 17.08.2009 wherein it is stated that the Ministry of Water & Power received a few unsolicited proposals offering a reasonable tariff, which were compatible with the average RPPs' tariffs received through ICBs and compliant with the ECC guidelines. The efficiency and available standards for these power plants and the financial models also matched the ICB projects. The detail of the unsolicited proposals, attached with the said summary, is given hereinbelow: -

Sr. No.	Description of project	Fuel	Capacity (MW)	Rental Charges demanded by Sponsor Cents/kwh	Proposed Rental Charges Cents/kwh	Remarks
1	Naudero-I	Gas	50	4.46	4.46	• Phase I financing arranged and project already inaugurated by the President. • Hard Area. • Medium size plant. • Overall Tariff lesser as compared to RFO plants in the ICB mode.
2	Naudero-II	Gas	51	4.46	4.00	
3	Sammundri Road	RFO	150	3.90	3.75	• Phase I being completed on

	Extension					30.9.2009. • Proximately to load centre and economy of size.
4	Karkey upgradation	RFO	222	5.98	5.60	• Higher Project cost being power ship/ barge mounted and different technology. • Very relevant for Karachi

The Minister authorized the Secretary (Mr. Shahid Rafi) to submit the summary, which sought approval of the ECC as under: -

> (i) Payment of 14% mobilization to IPP and GoP sovereign guarantee as proposed at para-4 ante (not relevant as far as the case in hand is concerned).
> (ii) Installation of 473 MW of unsolicited projects as proposed at Para-5 ante.

In respect of Naudero-II, noted hereinabove, a petition for tariff determination was filed by the CPGCL before NEPRA on 20.04.2010. The NEPRA considered that the petitioner was guilty of non-compliance of its directions, inasmuch as plant machinery was shifted from Guddu to Naudero without prior approval of the Authority; the generation tariff of RPP at Guddu was determined on lower side, while higher tariff was claimed on the same machinery to be installed at Naudero; advance payment had already been made against Guddu, which was not returned; and again advance payment of 14% was made on 06.04.2010 against proposed new Naudero-II for the same machinery. Therefore, the petition was declined by NEPRA.

27. Naudero-II was sponsored by Walters Power International, whereas Guddu Rental Power Project was sponsored by Pakistan Power Resources, which had not so far been signed off. During the hearing of the case, it was noticed that the total rental value in respect of Guddu plant was determined at US$ 72.48 million against which 14% down payment equal to US$ 10.15 million, 7% on 17.03.2008 and 7% on

12.03.2009 had been made. But, when the plant was shifted from Guddu to Naudero, again for the second time 14% advance payment was made on 06.04.2010 to M/S Walters Power International. *Prima facie*, it is a criminal act of extracting money from GENCOs on one pretext or the other, otherwise knowing well that Pakistan Power Resources had already obtained 14% advance payment, therefore, in all fairness, the GENCOs' authorities ought to have pointed out in clear terms that as the said plant was not being installed at Guddu, therefore, the advance payment of 14% ought to be returned. Be that as it may, this Court, taking notice of this aspect of the matter, *vide* order dated 08.12.2010 directed as under: -

> *"In response to order of this Court dated 07.12.2010 final statements have been made on behalf of Pakistan Resources (P.P.R.) and Walters Power International. The documents being the negotiable instruments have been filed for effecting the recovery of the outstanding amount mentioned in the statements. Learned counsel states that amount mentioned in the above statement has been arranged and shall be returned to Central Power General Company Ltd. During course of the day. It is to be noted that according to learned counsel, the original amounts have been paid by both the companies along with markup upto date i.e. 08.12.2010.*
>
> *2. Mr. Abdul Malik Memon, C.E.O. of the GENCO is present and he is required to conduct an inquiry/probe and submit a report on the next date of hearing fixing responsibility upon the officers/officials or the persons on whose instructions GENCO agreed to make the payment to both the companies without keeping facts and circumstances of the case in front of them."*

However, the requisite report after fixing responsibility upon the concerned persons was not submitted.

28. As far as unsolicited RPP of Techno E. Power, Sammundri Road, Faisalabad is concerned, the same was allowed to continue in view of the recommendations made in ADB's report. As the machinery

of Karkay-II (extension) was not brought at site and when NEPRA proposed to take action because of non-achieving of COD, it was informed that basically this project of 222 MW was to be installed at Korangi, Karachi. Since the sponsor did not respond, therefore, neither LOA was issued nor any RSC was signed. It may also be noted that there was yet another unsolicited RPP known as Abbas Steel Group and as there was no machinery at site and as no response was given by the sponsor to the GENCO, therefore, LOA was not issued. The advance payment in respect of Naudero-II sponsored by Walters Power International had been recovered whereas no advance payment had been made to Karkey-II as well as Abbas Steel Group.

29. As far as Naudero-I is concerned, it is sponsored by Walter Power International for a 5-year rental term, the location of the project is in Sindh, its capacity is 51 MW, rental value has been determined at US$ 80.42 million and 14% advance payment equal to US$ 11.26 million was made on 16.11.2009. This project could not achieve COD, therefore, GENCO (CPGCL) encashed the performance guarantee of US$ 255,000.

30. Khawaja Muhammad Asif vehemently contended that the unsolicited RPPs were awarded without adhering to the PPRA Rules. The In-charge Minister of WAPDA and the Secretary, who had agreed to accept the offer of the sponsors to allow them to generate electricity without following rules in the year 2006 and subsequent thereto had acted without jurisdiction and illegally and caused loss to the public exchequer. Since the object for which the RPPs were allowed to be installed was not achieved, therefore, not only the concerned authorities who re-negotiated terms with them, but at the same time the functionaries including the Ministers and others, who had allowed

advance payments ought to be dealt with in accordance with the law and the amounts be recovered from them with mark-up.

31. Raja Parvez Ashraf, former Minister and his counsel Mr. Wasim Sajjad, learned Sr. ASC admitted that during his tenure, Naudero-I was installed pursuant to an unsolicited proposal in view of the decision of ECC. He, however, explained that although procedure of ICB was not followed, but complete evaluation of the project and its technical and financial parameters on cost-plus basis were examined, inasmuch as the NEPRA had determined tariff under section 7 of the Act, 1997. Khawaja Ahmad Tariq Rahim, learned counsel supported the contention raised by Mr. Wasim Sajjad, learned Sr. ASC on behalf of former Minister.

32. Mr. Shahid Hamid contended that the Authority had decided in the first week of September, 2010 to sign off Guddu Power Project. In the meantime, machinery had been imported, therefore, on the request of WPI and PPR, this machinery was shifted to Naudero for installation at WPI's Naudero-II with permission of CPGCL. The sponsor had offered to determine some reasonable rental rate, but such request was turned down unlawfully. The WPI in good faith made offer to install the machinery at Naudero-II within a period of six months without receiving any payment till the COD was achieved. When the review petition filed by GENCOs (CPGCL) was declined by NEPRA vide order dated 10.03.2011 on the ground that the machinery was more than 10 years old, WPI offered to install absolutely new machinery at Naudero-II Project and also proposed revised amended contract with CPGCL with no advance till COD was achieved and installation of new machinery, to be purchased by WPI from GEP in Austria. As far as acceptance of unsolicited proposal for Naudero-I is concerned, he

contended that in view of the facts and circumstances, PEPRA Rule 42(c) permits direct contracting without adhering to follow the rules of ICB, etc.

33. Dr. Parvez Hassan, learned ASC appeared for Pakistan Power Resources and argued that all the unsolicited proposals for RPPs like Bhikki, Sharaqpur and Naudero-I are covered under Rule 42(3), particularly, in view of the fact that NEPRA was authorized to determine the rental value strictly in accordance with section 7, and for such reason, no prejudice was likely to be caused to the general public. Thus, legally it would be presumed that all unsolicited proposals were transparent and in accordance with the Rules. Guddu Power Project was awarded on the basis of ICB to the PPR. There were certain defaults on the part of the CPGCL under the rental services contract, thus liability for achieving COD entirely lies on CPGCL/NEPRA. As gas to be used for the project was not available, therefore, it was decided that the project should be signed off. Although the advance payment has been returned, but to settle other disputes, a mediator has been appointed. He categorically denied the allegations of corruption and undue influence in obtaining the unsolicited RPPs. He stated that the allegations made in this behalf by Mr. Faisal Saleh Hayat and Khawaja Asif are false, frivolous, scandalous, vexatious and *mala fide*.

34. We have considered the arguments put forward by the learned counsel for the parties. As it has been pointed out time and again, with a view to achieving the goal of transparency in awarding contract or in making procurement, open competition is prerequisite under the PPRA Rules. The justification put forward by Mr. Wasim Sajjad, Sr. ASC in his arguments noted hereinabove is that as the

decisions have been taken by the ECC for awarding contract without following the PPRA Rules, therefore, no *mala fide* or element of corruption can be attributed to the parties to the contracts or to the official functionaries. Suffice it to say, that since the ECC enjoys Constitutional status, one of its functions is to review from time to time the energy requirements, its effects and production and investment. Essentially, ECC is bound to act in accordance with the law of the land and the Rules. Thus, in presence of PEPRA Rules, it was incumbent upon the Minister and the Secretary, Water and Power as well as other functionaries not to have put up such a case before the ECC in violation of the PEPRA rules. In the summary dated 17.3.2009, it has not been mentioned that without following PEPRA rules, unsolicited projects cannot be allowed. However, Mr. Shahid Hamid stated that such procurement is covered under Rule 42(c) of the PPRA Rules, which is reproduced hereinbelow:

> *"42. <u>Alternative methods of procurements</u>.- A procuring agency may utilize the following alternative methods of procurement of goods, services and works, namely:-*
>
> *...*
>
> *(c) direct contracting.- A procuring agency shall only engage in direct contracting if the following conditions exist, namely:-*
>
> *(i) the procurement concerns the acquisition of spare parts or supplementary services from original manufacturer or supplier:*
>
> *Provided that the same are not available from alternative sources;*
>
> *(ii) only one manufacturer or supplier exists for the required procurement:*
>
> *Provided that the procuring agencies shall specify the appropriate fora, which may authorize procurement of proprietary object after due diligence; and*
>
> *(iii) where a change of supplier would oblige the procuring agency to acquire material having different technical specifications or characteristics and would*

result in incompatibility or disproportionate technical difficulties in operation and maintenance:

Provided that the contract or contracts do not exceed three years in duration;

(iv) repeat orders not exceeding fifteen per cent of the original procurement;

(v) in case of an emergency:

Provided that the procuring agencies shall specify appropriate fora vested with necessary authority to declare an emergency;

(vi) when the price of goods, services or works is fixed by the government or any other authority, agency or body duly authorized by the Government, on its behalf, and

(vii) for purchase of motor vehicle from local original manufacturers or their authorized agents at manufacturer's price."

35. A perusal of the above rule suggests that the provision for direct procurement without following procedure of fair competition was not applicable in the case of unsolicited proposal for RPPs. As far as the claim of learned counsel justifying the shifting of machinery from Guddu to Naudero is concerned, no document/material has been placed on record to indicate that permission for the same was granted. Similarly, with regard to other unsolicited proposals for RPPs, no material has been brought on record to canvass that there was no *mala fide*. Therefore, having been left with no option except to believe the arguments raised by Makhdoom Syed Faisal Saleh Hayat and Khawaja Muhammad Asif that on account of such unsolicited proposals, PEPCO and the concerned GENCOs had indulged in corruption.

ROLE OF NEPRA

36. The object and purpose of introducing NEPRA was to regulate the provision of electric power services and to determine tariff, rates, charges and other terms and conditions for supply of

electric power services by the generation, transmission and distribution as per section 7 of the Act, 1997, which has been reproduced in the preceding paragraphs. However, neither the process was undertaken with due diligence nor the policy already in vogue since 2006 onwards introduced by the previous Government for running power plants to cater the requirements of shortage of electricity was followed.

37. It may be observed here that the NEPRA did not play its due role in the process of RPPs, firstly for the reason, that bids were invited on the basis of reference tariff of the fuel; secondly, the NEPRA was directed to follow the guidelines already issued in respect of IPPs (guidelines 1.9 and 1.10), which have already been reproduced hereinabove, but in our opinion NEPRA being an independent regulatory body had to perform its functions according to law. As per prescribed procedure, NEPRA could not be oblivious of its duty of determining tariff in accordance with the mandatory provisions of the Act, 1997. It may be noted that as per section 7(3)(a) of the Act, 1997, NEPRA is exclusively responsible for determining tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend to the Federal Government for notification. One of the most important aspects of the case is that under section 7(6) of the Act, 1997, the NEPRA is mandated to protect the interests of consumers and companies providing electric power services in accordance with the guidelines, not inconsistent with the provisions of the Act, laid down by the Federal Government. Therefore, the NEPRA cannot close its eyes and determine tariff contrary to the provisions of the Act, 1997. Not only that, under section 31 of the Act, 1997 and

Rule 17(2) of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, the NEPRA is required to lay down procedures and standards for the purpose of determination of tariff. One of the objects thereof is that the Authority should allow preference for competition rather than regulation and adopt policy for tariff determination in terms of rule 17(2) & (6) of the NEPRA Rules. The NEPRA has not adopted the aforesaid procedures and standards in the matter of RPPs. In the circumstances, it can only be inferred that the NEPRA has been inoperative and inactive as far as RPPS are concerned. When we inquired from the learned counsel as to why the NEPRA has not asserted its decision in discharge of function assigned to it, he had no satisfactory answer other than stating that in some of the cases including the unsolicited projects, the NEPRA has followed the said procedures and standards in determining tariff. We are not satisfied with the arguments so advanced by him because the data noted hereinabove indicates that in the case of Naudero-I, which was an unsolicited project, apparently rates of electricity were determined on the higher side. However, it might not be possible for the NEPRA to discharge its functions because of the instructions and interference by the Ministry of Water & Power, which had been issuing instructions from time to time, but in any case, instead of following mandatory provisions of the Act, 1997, the NEPRA ought not to have compromised its position.

38. Mr. Kamal Anwar, ASC assisted the Court as *Amicus Curiae*. He submitted that advance payment was made to 9 RPPs, namely, Karkey, Gulf Rental Power, Reshma Power, Techo Sammundri Road Faisalabad, Techno Sahuwal Sialkot, Guddu, Young Gen, Naudero-I and Naudero-II, details whereof have been given

hereinabove. None of them could achieve COD within time, on account of which their contracts were signed off. Statedly, the bank guarantees furnished on behalf of all the bidders have also been encashed. Out of said RPPs, the advance payment was returned by Reshma, Techo Sammundri Road Faisalabad, Techno Sahuwal Sialkot, Guddu, Young Gen and Naudero-II. However, Karkey (231.8 MW), Gulf (62 MW), Naudero-I (51 MW) and Reshma (201 MW), which are still functioning, had achieved delayed COD. Mr. Muhammad Akram Sheikh, learned counsel for Karkey contended that Karkay is the only foreign company of brotherly country Turkey, which had invested in this country, but when we inquired from him as to why favour was shown to the bidder by making 7% advance payment prior to the decision of the Cabinet, he had no answer.

Similarly, learned counsel appearing for Karkey could not answer regarding the non-achieving of COD in time. He stated that on account of *force majeure*, barge-mounted ship could not reach Karachi within time. Without prejudice to the case so put up by the learned counsel, we may point out that we do have respect for the brotherly country, but as far as commercial activities between any bidder and the Government owned companies are concerned, the matter is to be examined strictly in the light of the relevant provisions of the Constitution and the law. No plausible evidence has been brought on record to substantiate the plea. In addition to it, the case of Karkay also suffers from the irregularities and illegalities, which have been noted in respect of all other cases. We, therefore, hold that the contract was awarded to Karkey in a non-transparent manner.

39. In all, 19 Rental Power Projects, namely, Pakistan Power Resources, Guddu; Pakistan Power Resources, Piranghaib, Multan;

Techno, Sammundri Road, Faisalabad; Techno Project, Sahuwal, Sialkot; Young Gen, Faisalabad; Gulf Rental Power, Gujranwala; Independent Power Limited; Kamoki Energy Limited; Karkey Karadeniz, Karachi (Karakey-I); Premier Energy; Reshma Power Generation, Manga-Raiwind Road; Ruba Power Generation, Manga-Raiwind Road; Sialkot Rental Power, Eminabad; Walter Power International, Karachi; Abbas Steel; Karkey Karadeniz, Karachi (Karkey II); Techno-E-Power (Pvt.) Limited, Sammundri Road, Faisalabad-II; Walter Power International, Naudero-I; and Walters Power International, Naudero-II were proposed.

REPORT OF AUDITOR GENERAL

40. The Auditor General of Pakistan, in the Audit Report on the Accounts of Water and Power Development Authority for the Audit Year 2009-2010 observed a number of illegalities and irregularities, including pointing out that ECC in its decision bearing No.121/15/2009 approved the following four unsolicited projects: -

Sr.No.	Description of Project	Fuel	Capacity	Rental charges demanded by sponsor Cents/kwh	Proposed rental charges cents/kWh
1	Naudero-I	Gas	50 M.W	4.46	4.46
2	Naudero-II	Gas	51 M.W	4.46	4.00
3	Sammundri Road Extension	RFO	150 M.W	3.90	3.75
4	Karkey Up-gradation	RFO	222 M.W	5.98	5.80

These projects were required to obtain approval of their proposed tariff from NEPRA within minimum period prescribed.

THIRD PARTY EVALUATION BY ADB

41. Admittedly, report was submitted by ADB wherein the process of awarding contracts to supply the electric power to the sellers, partially was not found transparent. Therefore, the Government of Pakistan, through Ministry of Water and Power

accepted this report, which means accepting the omissions and commissions, irregularities, illegalities, and negligence both civil and criminal, committed during the process of award of RPPs at different points of time. Thus, in view of objection of ADB, to whom the Government itself appointed for the purpose of third party evaluation, 8 RPPs (1257 MW) were ordered to be vigorously pursued and 6 RPPs were ordered to be reviewed in the light of the legal provisions before proceeding further, whereas 5 RPPs not yet approved/signed were ordered to be discontinued *vide* order dated 27.01.2010. The said 19 projects were reduced to 9 projects as per decision of the ECC/Cabinet in the light of the ADB report, detail of which, as per the report of Asian Development Bank (ADB) is as follows: -

Rental Power Project Status

No.	RPP Name	Net Capacity (MW)	Fuel Type	Rental Period (Months)	Rental Tariff at 60% Plant Factor (Cents/ kWh)	Estimated COD	Down Payment Disbursed	Contracts status
PEPCO ICB Projects								
1	Pakistan Power Resources, Guddu	110	Low BTU gas	36	8.44	10-Feb	14%	Effective
2	Techno Rental Power Project-I, Sammundri, Faisalabad	150	RFO	36	18.64	10-Jun	14%	Effective
3	Techno Rental Power Project-II, Sahuwal, Sialkot	150	RFO	48	18.7	10-Jun	7%	Effective
4	Young Gen Power, Faisalabad	200	RFO	36	15.59	10-Jun	14%	Effective
PPIB ICB Projects								
5	Gulf Rental Power, Gujranwala	62	RFO	60	17.82	10-Feb	14%	Effective
6	Karkey Karadeniz, Karachi (Karakey 1)	232	RFO	60	22.36	10-Apr	14.16%	Effective
7	Reshma Power Generation, Manga-Raiwind Road	201	RFO	60	20.26	10-Mar	14%	Effective
Unsolicited Projects								
8	Walter Power International,	51	Gas	60	9.5	10-Jun	14%	Effective

	Naudero-I							
9	Walters Power International, Naudero-II	50	Gas	60		10-Jun	NIL	Under Process

The petitioners have vehemently contended that the process of award of RPPs contracts was fraught with grave illegalities and irregularities whereas the learned counsel appearing for the Government/ WAPDA/GENCOs have submitted that the GENCOs had been implementing the policies of Government to overcome the load-shedding in the country on fast track basis as per approval of ECC as well as the Federal Cabinet. In this regard, a detailed analysis of some of the RPPs is undertaken hereinafter.

SOLICITED RPPs

DISCUSSION OF EFFECTIVE RPPs

(1) GUDDU

42. With regard to 110 MW Guddu Rental Power Plant, advertisement dated 07.07.2007 was floated. The eligibility criteria provided in the advertisement were having similar experience for minimum of 3 locations and net worth of not less than US$ 30 M (for last 3 years). M/s Pakistan Power Resources (PPR) and M/s Progas Pakistan Ltd. (PPL) offered tenders/bids. Both the bidders failed to meet US$ 30 million net worth criterion. As such, the PEPCO, *vide* letter dated 03.11.2007, rejected the same and ordered for re-advertisement. The fresh advertisement was published on 11.11.2007, wherein following deviations from first advertisement were made: -

(1) Capacity of 100 MW was changed to 100-125 MW with minimum efficiency of 33%.
(2) Period 2 years was changed to 2, 3 or more.
(3) Eligibility condition of having similar experience for minimum of 3 locations was removed.
(4) Condition of depositing Security of Rs. 10 M or $ 0.17 M, was deleted.

(5) Condition of Penalties for non-availability, delay in installation & commissioning or variation in heat rate, was deleted.
(6) Condition of providing Operational Guarantee worth 10% of Base Load Operation Cost for 2 years by the bidder was deleted.
(7) Process of price evaluation was changed.
(8) Bidder's responsibility to the extent of Operation and Maintenance of equipment and Trouble free base load supply of electricity was eliminated.
(9) Bidder's responsibility to the extent of Transportation of equipment to and from the site was eliminated.
(10) Guarantee for providing 92% of gas fuel was provided.

Subsequently, by a corrigendum/advertisement, the condition of security deposit of Rs.10 million or US$ 0.17 million was inserted in the advertisement dated 11.11.2007, and by yet another corrigendum/advertisement dated 30.11.2007, the bid opening date was changed from 01.12.2007 to 10.12.2007. Pursuant to the above advertisements, 12 parties made requests for supply of sample agreement, however, following three parties tendered their bids: -

(a) M/s Progas Pakistan Ltd.,
(b) M/s Pakistan Power Resources, and
(c) M/s Pak Oman Investment Company Karachi.

The Evaluation Committee, through its report dated 01.01.2008, gave the following recommendations: -

- On the basis of evaluation criteria, the bid offered by M/s Progas Pakistan Ltd. as Option-I (125 MV) is lowest in tariff, on the basis of Lump sum Contract Price, Rental Charges and Fuel Cost Component.
- Only M/s Pak Oman Investment Company qualifies the minimum US$ 30 million Net Worth, while others do not.
- M/s Progas has offered 125 MW at reduced load operation, with other option of 135 MW at full load offering an incentive in Rental Rates.
- Rental Service Contract may be awarded to M/s Progas Pakistan Ltd. for installation of 135 MW net capacity on three rental years against their guaranteed availability at 92% on gas fuel at proposed site of TPS Guddu at 132 KV level.
- In this connection, it is proposed to relax minimum criteria of US$ 30 million Net Worth.

The bid offered by M/s Pakistan Power Resources was accepted on 03.02.2008 as under: -

- Based on rental charges & guaranteed heat rates offered by the bidders, the overall cost (US Cents 7.640 per kWh) offered by M/s Pakistan Power Resources is lower as compared to the offer (US Cents 7.974 per kWh) of the next higher bidder.
- The rental value offered by M/s Pakistan Power Resources, at (US 2.717 per kWh) was 13%, which was lower than that of the rental (US Cents 3.133 per kWh) for units of GE at Sheikhupura and PPR at Bhikki, already in operation.
- A penalty clause be included in the contract agreement to penalize PPR for failing to achieve the specified/required COD.
- It was unanimously agreed that offer by M/s Pakistan Power Resources was the best offer and was accordingly approved. LOA may be issued and the matter submitted to PEPCO, BOD for ratification.

Vide letter dated 06.08.2008, the offer of M/s PPR for setting up of 150 MW Rental Power Station was accepted and Advance Payment Guarantees were provided to the seller. *Vide* letter dated 11.03.2008 permission was accorded to M/s Pakistan Power Resources, LLC to enlarge/expand and continue operation of its Branch Office at Lahore. On 23.02.2008, rental agreement was executed between Pakistan Power Resources, LLC and Central Power Generation Company Ltd. (CPGCL). On 11.12.2008, an amendment was made to the Rental Agreement to the following effect: -

- Changes were made in the mode of payment through LC.
- The CPGCL have no right to cancel the contract within initial 8 months.
- In case of termination of the agreement by CPGCL, the buyer shall be entitled to outstanding rent of 36 months.
- Maximum drawdown on SBLC during any one calendar month will not exceed a sum of US$ 1,872,466.

On 05.03.2009, second amendment was made to the Rental Agreement to the whereby following effect: -

- Requirement of confirmation of SBLC by a Financial Institution in UK or USA in terms of clause 4.5(d) was waived.
- The seller waived the right to call the SBLC on account of defaults of the Buyer, which had occurred prior to issuance of SBLC.
- Amount of SBLC as mentioned in section 4.5 was reduced from 93% (US$ 67,408,766) to 86% (US$ 62,334,988) of the contract price.
- Down payment was increased from 7% to 14 %.
- Some amendments were made in the capacity/operation of Units.

(2) PIRANGHAIB, MULTAN & SAHUWAL, SIALKOT

43. For setting up a 250-300 MW RPP at Piranghaib, Multan on base load operation for 2 years, advertisement was published on 11.10.2007. The eligibility criteria provided in the advertisement were having similar experience for minimum of 3 locations; and Net worth of not less than US$ 30 M (for last 3 years). By corrigendum dated 24.10.2007, the eligibility criterion requiring experience of providing similar Rental Power facilities for minimum of three locations was deleted. Later on, another corrigendum dated 29.10.2007 was issued whereby bid submission/tender opening date was extended to 07.11.2007. The tenders were opened on 22.11.2007 wherein three parties, namely, M/s Techno Engineering (Pvt.) Ltd., M/s Progas Pakistan Ltd. and M/s Pakistan Power Resources submitted proposals. The Rental Power Projects had to run on RFO and gas fuels. It was the responsibility of buyer to provide gas when available, whereas, seller was bound to arrange for RFO fuels. Specifications provided by Techno Engineering Services Ltd. (Sahuwal, Sialkot) were S50MC-C7 MN B&W; and by M/s Pakistan Power Resources (Piranghaib, Multan) were 192 MW (net) at mean site conditions based on GE Gas Turbines Generating Sets operable on RFO and gas fuels, of appropriate Make & Size and configuration acceptable to the Buyer. The proposals were

evaluated by an Evaluation Committee, which by means of its report dated 11.12.2007 recommended for award of contract to M/s Techno Engineering Services (Pvt.) Ltd. as Option-I. A Scrutiny Committee constituted to scrutinize the bids, *vide* its report dated 04.01.2008 found that all the three bidders for the plant were financially non-responsive because they had failed to meet US$ 30 million net worth criterion. On re-invitation, fresh proposals were received from M/s Techno Engineering Services and M/s Pakistan Power Resources. On 17.03.2008, the Board of Directors of PEPCO decided to split up the project as under: -

- 150 MW RPP at Sahuwal, Sialkot
- 192 MW RPP at Piranghaib, Multan

Accordingly, on 24.03.2008, the Letters of Award were issued to M/s Techno Engineering Services Islamabad and to M/s Pakistan Power Resources respectively. RSCs were signed between the sellers and the buyer. Subsequently, RPP at Piranghaib was signed off on 14.09.2010. Extracts from such document have been reproduced in CMA 3992/11, which are as follows: -

> "<u>4. Signing Off of Project</u>
>
> (1) As per the minutes of the meeting held on 14 September 2010 in the Ministry of Water and Power, the decision was taken at 5(vi) that Rental Power Multan is allowed to be signed off "on mutually acceptable condition between CPGCL and the sponsors".
>
> (2) In its over-all settlement, PPR seeks the return of its Advance Payment Guarantee, Performance Guarantee and payment of US$1,001,771 in reimbursement of (a) its cost of US$ 451,746 on Project engineering, (b) US$ 5,328 on Performance Guarantee Charges, (c) US$ 77,143 on Advance Payment Guarantee, (d) interest of US$ 267,494 on Performance Guarantee Charges and (e) US$ 200,000 paid to Bank Islami as advisory and management fee."

44. In addition to that, the contract was signed between M/s Techno Engineering Services (bidder) and Northern Power Generation Company (NPGCL) being a licence holder for the generation of electricity, although it had never invited bids for the supply of electric power. Whereas, a contract being a bilateral document has to be reduced into writing by means of an agreement enforceable by law between the person who had made the proposal and the one who had accepted the same, or those who had made an offer to do a particular thing and accepted the same. Reference in this behalf may be made to section 2(g) of the Contract Act, 1872, which provides that an agreement enforceable by law is a contract. It seems that originally Rental Power Project of Piranghaib was unsolicited, but subsequently certain steps were taken purportedly to give an impression that it was a solicited project based on ICB. The expression ‘unsolicited’ has been used because while entering into contract with these companies, the procedure laid down in the Public Procurement Rules, 2004 (PPR) was not followed. Thus, requirements of International Competitive Bidding (ICB) were not completed. Following further irregularities have been committed in the award of the contract: -

(1) The advertisement was contrary to Rule 12 of the Public Procurement Rules, 2004, *inter alia*, for following reasons:-

  (i) No advertisement was made on the Authority’s website in the manner and format specified by regulation by Authority from time to time;

  (ii) No advertisement was made on the website of PEPCO.

(2) The original 250-300 MW RPP at Piranghaib, Multan was split up for two different sites, one at Piranghaib, Multan and the other at Sahuwal, Sialkot, which were awarded to two different companies without any advertisement and bid.

(3) As per section 4.5(a) of the Rental Services Contracts (Sahuwal, Sialkot), executed between NPGCL and Techno Engineering Services Ltd, the seller was eligible to obtain in advance a down payment amounting to 7% of lump sum contract price, however, a major change was brought about *vide* amendment dated 11.06.2009 by increasing the down payment to 14%. Similarly, the additional 7% advance was also paid to M/s Pakistan Power Resources (Piranghaib, Multan).

(4) As per section 4.5(a) *ibid*, the seller was eligible to obtain in advance the Down Payment amounting to 7 % of lump sum contract price for the term of rental services contract on submission of bank guarantee valid until 30 days after the target commercial operation date. The provision of bank guarantee of just 30 days for the whole rental term is inadequate for in case of default by the seller the buyer could get only that amount of total 7 % of which the seller has furnished bank guarantee. Beyond the period of 30 days from the target operation date, the buyer could not recover any amount as there was no bank guarantee for the same.

(5) As per clause (c) of section 4.5 *ibid*, the buyer was bound to deliver to the seller an irrevocable letter of credit in the amount equal to 36 monthly rental services fee payments, however, *vide* amendment No. 2 dated 24.11.2009, the SBLC was replaced with Government of Pakistan Guarantee with a view to giving maximum benefit to the seller.

(6) As per LOA and the contract, the Seller were paid 7% Advance before COD. In case of Techno E. Services Ltd. Sahuwal, 7% advance amounting to US$11,550,000 and in case of M/s Pakistan Power Resources (Piranghaib, Multan), US$14,584,990 were paid. Bank guarantees were obtained before making the payment. It was not covered by the terms of the advertisement. Likewise, the provision of standby letter of credit in favour of the seller was also not in accordance with the advertisement.

(7) According to the Act, 1997, the bidders i.e. Techno E. Power and Pakistan Power Resources were bound to obtain generating licences, but it was decided that the buyers would obtain said licences.

It is to be kept in mind that as far as the capacity charges are concerned, the same were to be determined on the basis of bids, and if there was no competition, then likelihood of quoting highest capacity charges could not be overruled without knowing that what was the efficiency of the machinery although *vide* letter dated 13.04.2009 NEPRA had stated that its life should not be more than 10 years.

45. Apart from the signing off of Piranghaib RPP's contract, the fact remains that both these projects were handled by the concerned authorities negligently, on account of which a huge loss had been caused to the public exchequer. Detailed discussion regarding unsolicited RPPs shall be undertaken subsequently, but primarily, examination of these RPPs reveals how casually PEPCO and NPGCL had dealt with the matter without considering their powers and jurisdiction, which ultimately cast a burden on the citizens, individually and collectively.

(3) NISAHATABAD/SAMMUNDRI ROAD, FAISALABAD

46. For setting up RPP of above 50 MW at Nishatabad, Faisalabad, initially for two years, extendible for further one year, advertisement dated 11.10.2007 was issued by Northern Power Generation Company Ltd. (NPGCL), laying down the eligibility criteria of having experience of providing similar Rental Power Facilities for minimum of 3 locations and net worth of not less than US$ 30 million (for last 3 years). Guaranteed availability of 88% on RFO fuel (aggregate during the term) was required in the advertisement and the date of commissioning was mentioned as 15.05.2008.

47. *Vide* corrigendum/advertisement dated 24.10.2007, the eligibility criteria requiring “experience of providing similar rental power facilities for minimum of 3 locations” was deleted from the advertisement dated 11.10.2007. *Vide* corrigendum/advertisement dated 29.10.2007, the date for submission/opening of bids was extended to 07.11.2007. *Vide* order dated 03.11.2007 and corrigendum/advertisement dated 04.11.2007, the date for submission/opening was extended to 21.11.2007. In response to said advertisements, 20 parties made requests for supply of sample agreement, which was supplied. However, the following three parties submitted their Bids:-

(a) M/s Techno Engineering (Pvt.) Ltd., Islamabad,
(b) M/s Progas Pakistan Ltd., Karachi, and
(c) M/s Pakistan Power Resources, Lahore.

The Evaluation Committee gave its report on 01.01.2008 wherein following recommendations were made: -

- On the basis of evaluation criteria, the bid offered by M/s Techno Engineering Services (Pvt.) Ltd. as Option-I (MAN B&W) equipment is lowest in Total Tariff, on RFO fuel, on the basis of Lump sum Contract Price, Rental Charges and Fuel Cost Component.
- Value of Total Tariff and Rental Charges remain same for 3 and 4 years, therefore, 3 years Rental term is recommended, which may be extended to 4th year as per PEPCO power requirement.
- The above Tariff components are worked out on the basis of guaranteed availability, while the plant factor on RFO operation is expected around 60% in a year.
- All the bidders are not qualifying the minimum US$ 30 million Net Worth.
- The bidder may be asked to achieve Commercial Operation Date by 15.05.2008, otherwise the Rental Period would be reduced.
- Proposal of bidder for shifting of site from Nishatabad, Faisalabad to Eminabad, Gujranwala may be considered because there will be saving of 1.93% of Lump Sum Contract Price, while power is also required in Gujranwala region.
- Award of Rental Services Contract is recommended at the above Quoted Lump Sum Contract Price, for installation/operation of 150 MW net capacity, on 3

rental years basis, at proposed site of Eminabad, Gujranwala at 132 kV voltage level.

Letter of Award (LOA) was issued to M/s Techno E. Services (Pvt.) Ltd. on 22.01.2008 and amended LOA was issued on 22.01.2008. Advance payment guarantees were provided to the seller, which were extended for further periods through separate amendments. Approval for amendment in sample rent agreement and authorization to sign contract was obtained on 14.02.2008. Till 14.02.2008, the main site area was mentioned as Nishatabad, Faisalabad, but for the first time on 14.02.2008, while seeking approval for amendment in sample rent agreement and authorization to sign contract, it was mentioned as Sammundri Road, Faisalabad. After discussing the ADB Audit Report, the project was approved by the Cabinet.

(4) KARKEY KARADENIZ ELEKTRIK

48. To set up RPPs of 200 MW cumulative capacity near Karachi, advertisement dated 17.05.2008 was issued by PPIB following the ICB procedure. Two bidders, namely, Karkey Karadeniz Elektrik Uretim A.S. and Walters Power International fulfilled the requirements of the RFP. Tariff determination was done on 21.10.2008, RSC was signed on 05.12.2008 and advance payment of US$ 79.05 million was made on 12.05.2009. The original COD was fixed as 14.08.2009, which was first revised to 08.12.2009 and then to 07.04.2010. However, since the RSC did not come into effect, no obligations or rights accrued to either party thereunder. Amended & restated RSC was signed on 23.04.2010 for a rental term of 5 years.

49. In the invitation for bids published by the PPIB, the bidders were required to quote rental charges and fuel cost component on delivery of energy at reference fuel prices. In some of the advertisements, exact location/sites were mentioned. For reference,

the relevant portion of the advertisement dated 20.05.2015 in pursuance whereof contract was awarded to Karkey Karadeniz is reproduced hereinbelow: -

"Venture into Secure, Profitable & Promising Power Sector of Pakistan
INVITATION FOR BIDS
1200 MW Fast Track Private Power Projects

"Package B:
Rental Power Project(s) of 200 MW cumulative capacity near Karachi.

Capacity:
Rental power project(s) including barge-mounted plants of 200 MW cumulative power generation capacity can be offered by the bidder(s). One or more project proposals/bids will be considered, until the limit of 200 MW is attained.

Fuel/Type:
The bidders may offer projects of any multiple fuel (Residual Fuel Oil/Gas/Liquified Natural Gas/Liquified Petroleum Gas), technology and type.

Site: Near Karachi

Project commissioning:
Project(s) are required to be operational within six (06) months from issuance of Letter of Award (LOA).

Term of Project(s):
The term of the project(s) would be 3-5 years.

Project Agreement:
The project agreement/contract for these projects would be in accordance with those earlier executed by PEPCO for Rental Projects.

Evaluation Criteria:
For evaluation of bids and award under this package, similar approach as that for Package-A would be followed, until cumulative capacity of 200 MW is reached.

Bidding Process Roadmap:
- *The interested party/parties will be registered with PPIB after paying US$ 100 (or Pak Rs. 7000) for each Package and purchase Request for Proposal (RFP) after making a non-refundable payment of US$ 2,000 (Pak Rs.140,000) for each Project. The registration process and sale of RFP will be completed from 20th May to 19th June 2008.*
- *The interested party/parties will submit complete bid in accordance with the RFP along with a refundable Bid Bond @ US$ 1,000 per megawatt (MW) of proposed Gross (ISO) Capacity of the Project and non-refundable bid evaluation fee of US$ 20,000.*
- *Payments to be made through Demand Draft/Pay Order drawn in favour of PPIB, payable at a bank branch in Islamabad Pakistan or through wire transfer.*
- *PPIB reserves the right to reject any or all bids without assigning any reason thereof."*

The bidders gave their respective bids for rental charges and fuel cost component on Proformas XII/XIII. In this behalf, contents of Proformas No. XII & XIII, submitted by M/s Karkey are reproduced hereinbelow: -

"ANNEX – B

Attachment 12 to the Bid Letter

Proforma XII

Bidder's Offered Reference Tariff Table

Rental Power Project
Reference Tariff Table for Ranking Purpose

Year	*Fuel (¢ per kWh) x 1.2*	*Rental Rate (¢ per kWh)*	*Total (¢ per kWh)*
1.	*10,2323 x 1.2*	*6,3500*	*18,6288*
2.	*10,2323 x 1.2*	*6,3500*	*18,6288*
3.	*10,2323 x 1.2*	*6,3500*	*18,6288*
4.	*10,2323 x 1.2*	*6,3500*	*18,6288*
5.	*10,2323 x 1.2*	*6,3500*	*18,6288*

Note:

1. *The calculation of Fuel Cost Component and Rental Rate will be made according to the Proforma XIII*
2. *For conversion of Fuel Cost Component from Pak Rs. To US Cents, the conversion rate of 1 US$ = 62 Pak Rs. Shall be used."*

"*Attachment 13 to the Bid Letter*

Proforma XIII

Pricing - Lump Sum Rental Charges, Rental Rate and Reference Fuel Cost Component

a) *Pricing – Lump Sum Rental Charges for 60 Months Rental Term.*

Description	***Duration (Months)***	***Lump Sum Rental Charges (US$)***
Rental Services of the Equipment including but not limited to SELLERS'S responsibilities mentioned in the Rental Services Contract: Transport to/from Company Site Mobilization and de-mobilization Installation and commissioning Operation and maintenance.	*60 Months (as per applicable Rental Term)*	*$ 599.575.966,20 (US Dollars Five Hundred Ninety-nine Million Five Hundred Seventy Five Thousand Nine Hundred Sixty-six and twenty cents only)*

b) Rental Rate
The Rental Rate 6,3500 US Cents/kWh based on the Lump Sum Rental Charges given in the Table above is calculated using the following formula:

Rental Rate (Cents/kWh) =
Lump Sum Rental Charges in US Dollars x 100
Net Capacity in MW x 1000 x Rental Term in years x number of hours in year x Guaranteed Availability

Where:

Net Capacity of Rental Plant: 231.8 MW (net) at Mean Site Conditions
Guaranteed Available of Equipment: 93%
No. of Hours in a year: 8760"

50. The above rental charges for supply of energy per kWh were quoted on the basis of reference value. It is pertinent to mention that a buyer should always be interested to get installed a power plant, which can produce more electricity. Obviously, the charges were quoted purely on presumptive basis, as at the time of submitting bid documents, no plan was available. Thus, there was no competition between bidders as the competition would be possible, if the buyer had fixed the reserved price and had also specified the make, model and life of the plant. In view of such situation, NEPRA *vide* letter dated 13.04.2009, which is reproduced hereinabove, notified that old plants having life of more than 10 years or plants which had completed 60000 operating hours would not be acceptable.

(5) GULF, EMINABAD, GUJARANWALA and INDEPENDENT POWER (Pvt.) Ltd., GOJRA, FAISALABAD

51. To set up a 100 MW IPP or above 50 MW RPP at any site in Pakistan, advertisement dated 26.09.2008 was issued by PPIB. There were no specific conditions regarding the capacity, type of fuel, technology of plant, site, etc. In response to the said advertisement, the following parties submitted bids: -

> (a) ALSTOM Power Rentals for 200 MW project near 220 kV Ludewala - Sargodha Grid Station.
>
> (a) Gulf Rental Power for 80.5 MW project adjacent to 132 kV Eminabad - Gujranwala Grid Station.
>
> (b) Independent Power Pvt. Ltd. for 220.97 MW project near 132 kV Gojra - Faisalabad Grid Station.

The PPIB in its meeting held on 20.12.2008 approved processing of Letter of Award (LOA) to Gulf. The NEPRA approved the tariff of Gulf on 13.04.2009. LOA was issued to M/s Gulf Rental Power on 27.04.2008. Advance Payment Guarantees were provided to the seller as such Advance payment was made on 19.09.2009. Original commercial operation date (COD) was 31.12.2009 which was revised to 29.04.2010 and the Project was commissioned on the said date.

52. The Ministry of Water & Power *vide* letter dated 24.01.2009 forwarded the summary on fast track rental power projects through ICB with respect to Gulf. NEPRA *vide* letter dated 18.02.2009 communicated its response. Relevant Para is given hereunder: -

> "(iii) However, it has been observed that due to poor response from IPPs, PPIB is accepting more rental power plants, which have considerably lower efficiencies. NEPRA therefore recommends as follows:
>
> (a) The induction of rental power projects on furnace oil with very lower thermal efficiency should be discouraged. The present induction should be allowed for a limited time and further additions in the system be made through life-cycle investment analysis of the projects. This is extremely critical in

view of the fuel cost component which forms a major component of overall tariff.

(b) While developing RFP for any future induction of IPPs under ICB, the regulator should be kept on board.

(c) During evaluation of bids, NEPRA's earlier tariff determinations should be considered as a reference."

53. The PPIB *vide* letter dated 24.01.2009 declared the above-referred RPPs as qualified bidder, which was arrived at through ICB and was advised to approach NEPRA for approval of the approved tariff. Ministry of Water & Power *vide* letter dated 20.02.2009 advised NEPRA to approve the approved tariff. The Authority considered that:

(i) Acute power shortage in the country and recognizes the importance of fast track projects and supports the endeavor of the Ministry of Water & Power for induction of additional power.

(ii) Poor response from IPPs regarding bidding process due to which PPIB had to accept more rental power plants with lower efficiencies.

(iii) Rental Tariff was accepted by GOP and denying approval in the instant case would result in further delay the additional power and would give wrong signal to the private investors.

While granting approval of these rental projects on 13.04.2009 NEPRA gave its observation in the said decision that though tariff arrived at through competitive bidding is not subject to further review by NEPRA, but the Authority still needs to consider the provisions of section 31(2)(a),(c)&(d) of the NEPRA Act, which require NEPRA to protect consumers against monopolistic prices; to encourage efficiency in licensees operations and quality of service and to encourage economic efficiency in the electric power industry. Hence at the time of granting the tariff in question, the NEPRA *vide* letter dated 13.04.2009 recommended that in future:-

(i) The induction of rental power projects on furnace oil with very low thermal efficiency should be discouraged. This becomes even more critical in view of the fuel cost component, which forms a major component of overall tariff.

(ii) Before initiating ICB, the RFP should be got approved by NEPRA.

(iii) During evaluation of bids NEPRA's earlier tariff determinations be considered as reference.

(iv) The rental power plants more than 10 years old or more than 60,000 operating hours may not be accepted.

As per GENCO, the RSC with IPL was not signed and in the light of the Cabinet decision dated 27.01.2010, the project was discontinued.

54. From a perusal of the above facts, it is evident that following grave irregularities were committed in the award of the contract: -

(1) No specific conditions were provided in the advertisement regarding the capacity, type of fuel, technology of plant, site, etc. The bidders were to finalize sites in coordination with PEPCO. The project was to be commissioned within 6-8 months from issuance of Letter of Award (LOA).

(2) Eligibility criteria, as provided in the advertisements by PRPCO, such as, having similar experience for minimum of 3 locations and Net worth of not less than US$ 30 M (for last 3 years), was not provided.

(3) The seller was eligible to obtain in advance a down payment amounting to 7% of lump sum contract price, however, a major change was brought about and additional 7% advance was paid to Gulf Rental Power.

(4) As per section 4.5(a) *ibid*, the seller was eligible to obtain in advance the Down Payment amounting to 7 % of lump sum contract price for the term of rental services contract on submission of bank guarantee valid until 30 days after the target commercial operation date. The provision of bank guarantee of just 30 days for the whole rental term is inadequate for in case of default by the seller the buyer could get only that amount of total 7 % of which the seller has furnished bank guarantee. Beyond the period of 30 days from the target operation date, the buyer could not recover any amount as there was no bank guarantee for the same.

(5) As per clause (c) of section 4.5 *ibid*, the buyer was bound to deliver to the seller an irrevocable letter of credit in the amount equal to 36 monthly rental services fee payments, however, *vide* amendment No. 2 dated 24.11.2009, the SBLC was replaced with Government of Pakistan Guarantee with a view to giving maximum benefit to the seller.

(6) Tariff determination was done on 13.04.2009 and payment of 7% advance in the sum of US$ 11.9 million was made on 19.02.2009 before COD.

(7) The original Commercial Operation Date was 31.12.2009 but the COD cannot be achieved as such the same was revised to 29.04.2009 when COD was achieved.

(8) The Project was to run on RFO and the NEPRA advised that the induction of rental power projects on furnace oil with very low thermal efficiency should be discouraged.

(9) Rental tariff was approved by NEPRA on the ground that tariff had already been accepted and denying approval would result in further delay the additional power and would give wrong signal to the private investors.

(6) RESHMA, RAIWIND ROAD, LAHORE

55. To set up above 50 MW RPP capacity at any site to be finalized in coordination with PEPCO, advertisement dated 23.12.2008 was issued by PPIB following the ICB procedure. Ten bidders participated in the bidding out of whom eight bidders were recommended by the Evaluation Committee. The Committee also observed that there was room for tariff reduction, hence quoted tariffs may be negotiated with the bidders. The bid of Reshma Power was approved on 14.04.2009. Tariff determination was done on 29.05.2009. RSC was signed on 06.09.2009. Advance payment of US$ 55.27 million was made on 03.10.2009. The COD was fixed as 31.12.2009, which was not achieved, therefore, the advance payment was returned. However, after the project achieved partial COD,

permission was sought from the NEPRA, but the same was declined as the proposal was against the agreed contractual terms.

LIFE OF RPPs

56. Unfortunately, NEPRA specifications in respect of the life of the power plants were not adhered to strictly. For example, the machinery to be installed at Naudero, which was sought to be removed from Guddu after it had been signed off was admittedly more than 10 years old, as such NEPRA had declined to grant necessary permission. Similarly, in respect of Karkay power plant, Mr. Muhammad Akram Sheikh, Sr. ASC asserted that 60% of the plant machinery was brand new whereas the remaining 40% was only 3 years old. In addition to it, during arguments it was pointed out that the said machinery was more than 25 years old. Thus, contention raised by Makhdoom Syed Faisal Saleh Hayat that no technical qualification/pre-condition was in place to ascertain the quality, efficacy and optimum performance of the imported plants as per international standards is correct.

UNIT COST PER KWh

57. It is to be seen that RPPs are mostly based on RFO (Residual Fuel Oil), HSFO and Gas. As far as RFO is concerned, its prices are increasing day-by-day and the bidders were allowed to get reference fuel price for RFO equal to Rs.26,000/- per metric ton ex-Karachi without inland transportation cost and sales tax. The bidders would workout inland transportation costs and base its fuel cost component in the bid on delivered fuel price on site (Pak Rs.26,000/- inland transportation cost) as well as fuel adjustment as per contract and perhaps due to this reason, power plants based on RFO produced electricity at a higher cost. To demonstrate this aspect of the case, we may point out that during hearing of the case, respondents were called

upon to submit details of RPPs operating at the relevant time to ascertain unit cost per kWh. Accordingly, a chart was placed on record for our perusal showing per unit cost, being charged from the Government by Gulf, Karkay, Reshma and Walters Power (Naudero-I). The details of each of the power plants are as under: -

		Gulf Rental Power	**Karkey Karadeniz**
		1	**2**
i	**Contracted Capacity-MW**	**62**	**231.8**
ii	**Contracted Availability-MW**	**92%**	**93%**
iii	**Commercial Operation Date-COD**	**26.04.2010**	**13.4.2011**
iv	**Guaranteed Net Electric Output-kWh, per Month of 30 Days**	**40,176,000**	**155,213,280**
v	**Daily guaranteed Net Elect Output**	**1339,200**	**5,173,776**
vi	**Total Rent for 5 Years-USD**	**85,000,000**	**564,640,043**
vii	**Monthly Rent-USD**	**1,415,667**	**9,410,667**
vii	**Daily Rent-USD (30.42 Days in Month**	**46,570**	**309,358**
ix	**Cents-Per kWh**	**3.4778 Rs-3.03**	**5.98 Rs-5.20**
x	**RFO Price-Rs Per Kg (dated 11.10.11 applicable to nearest IPP and Genco) including transportation cost of each**	**68.00**	**61.66**
xi	**xi RFO Consumption-per Kwh-grams**	**234.99**	**244.00**

Days	**Date**	**kWh**	Rs **Rent-kWh**	Rs **Fuel-kWh**	Rs **Unit Cost-kWh**	**kWh**	Rs **Rent-kWh**	Rs **Fuel-kWh**	Rs **Unit Cost-kWh**
1	26.10.11	1,245,466	3.253	15.98	19.23	2,762,600	9.74	15.05	24.79
2	25.10.11	1,246,261	2.251	15.98	19.23	3,035,900	8.87	15.05	23.91
3	24.10.11	1,248,457	3.245	15.98	19.22	3625,000	7.42	15.05	22.47
4	23.10.11	1,105,938	3.664	15.98	19.64	**3,682,500**	**7.31**	**15.05**	**22.35**
5	22.10.11	**1,096,070**	**3.696**	**15.98**	**19.68**	3,398,800	7.92	15.05	22.96
6	21.10.11	1,197,786	3.383	15.98	19.36	2,102,400	12.80	15.05	27.85
7	20.10.11	1,229,730	3.295	15.98	19.27	1,698,600	15.84	15.05	30.89
8	19.10.11	1,1150,542	3.521	15.98	19.50	1,62,000	16.54	15.05	31.59
9	18.10.11	1,245,197	3.254	15.98	19.23	932,300	28.87	15.05	43.91
10	17.10.11	1,219,752	3.322	15.98	19.30	897,200	30.00	15.05	45.04
11	16.10.11	1,230,098	3.294	15.98	19.27	850,100	31.66	15.05	46.71
12	15.10.11	1,126,913	3.595	15.98	19.57	785,500	34.26	15.05	49.31
13	14.10.11	1,222,272	3.315	15.98	19.29	822,600	32.72	15.05	47.76
14	13.10.11	1,262,320	3.210	15.98	19.19	864,600	31.13	15.05	46.17
15	12.10.11	1,201,690	3.372	15.98	19.35	911,500	29.53	15.05	44.57
16	11.10.11	1,198,484	3.381	15.98	19.36	876,500	30.71	15.05	45.75
17	10.10.11	1,101,726	3.678	15.98	19.66	849,100	31.70	15.05	46.74
18	09.10.11	1,218,411	3.325	15.98	19.30	832,900	32.31	15.05	47.36
19	08.10.11	1,291,849	3.136	15.98	19.18	846,000	31.81	15.05	46.86
20	07.10.11	1,476,273	2.744	15.98	18.72	885,900	30.38	15.05	45.43
21	06.10.11	**1,479,693**	**2.738**	**15.98**	**18.72**	2,454,000	10.97	15.05	26.01
22	05.10.11	1,476,375	2.744	15.98	18.72	919,100	29.28	15.05	44.33
23	04.10.11	1,471,224	2.754	15.98	18.73	1,722,400	15.63	15.05	30.67
24	03.10.11	1,393,148	2.908	15.98	18.89	1,207,700	22.29	15.05	37.33
25	02.10.11	1,372,433	2.952	15.98	18.93	1,109,700	24.25	15.05	29.30
26	01.10.11	1,387,320	2.920	15.98	18.90	787,700	34.17	15.05	49.21

27	30.09.11	1,410,694	2.872	15.98	18.85	**714,300**	**37.68**	**15.05**	**52.72**
28	29.09.11	1,174,616	3.449	15.98	19.43	839,600	32.06	15.05	47.10
29	28.09.11	1,265,478	3.202	15.98	19.18	723,500	37.20	15.05	52.24
30	27.09.11	1,241,496	3.263	15.98	19.24	769,500	34.98	15.05	50.02
		37,987,712				**43,534,500**			
Average- MW Produced		**52.76**				**60.45**			
Average-MW Required		**52.76**				**215.57**			
31	26.09.11	1,410,222	2.873	15.98	18.85	**793,700**	**33.91**	**15.05**	**48.95**
32	25.09.11	**1,473,520**	**2.750**	**15.98**	**18.73**	991,300	27.15	15.05	42.20
33	24.09.11	1,452,493	2.789	15.98	18.77	970,900	27.72	15.05	42.77
34	23.09.11	1,466,412	2.763	15.98	18.74	1,219,000	22.08	15.05	37.12
35	22.09.11	1,220,807	3.3188	15.98	19.30	918,600	29.30	15.05	44.34
36	21.09.11	1,278,875	3.168	15.98	19.15	907,900	29.64	15.05	44.69
37	20.09.11	1,270,950	3.188	15.98	19.17	1,244,100	21.63	15.05	36.68
38	19.09.11	1,263,907	3.206	15.98	19.18	1,153,200	23.34	15.05	38.38
39	18.09.11	1,332,039	3.042	15.98	19.02	1,328,200	20.26	15.05	35.31
40	17.09.11	1,266,455	3.199	15.98	19.18	1,354,700	19.87	15.05	34.91
41	16.09.11	1,131,801	3.580	15.98	19.56	,1,290,600	20.85	15.05	35.90
42	15.09.11	1,210,123	3.348	15.98	19.33	1,031,300	26.10	15.05	41.14
43	14.09.11	1,293,702	3.132	15.98	19.11	1,020,600	26.37	15.05	41.42
44	13.09.11	1,285,529	3.152	15.98	19.13	1,232,400	21.84	15.05	36.88
45	12.09.11	1,455,252	2.784	15.98	18.76	1,236,500	21.77	15.05	36.81
46	11.09.11	1,502,209	2.697	15.98	18.68	1,561,000	17.24	15.05	32.29
47	10.09.11	1,468,461	2.759	15.98	18.74	1,282,300	20.99	15.05	36.03
48	09.09.11	1,467,458	2.761	15.98	18.74	1,300,000	20.70	15.05	35.75
49	08.09.11	1,412,664	2.868	15.98	18.85	1,183,400	22.74	15.05	37.79
50	07.09.11	1,440,554	2.813	15.98	18.79	1,065,900	25.25	15.05	40.30
51	06.09.11	1,462,116	2.771	15.98	18.75	921,200	29.22	15.05	44.26
52	05.09.11	1,418,116	2.857	15.98	18.84	856,400	31.43	15.05	46.47
53	04.09.11	1,421,350	2.851	15.98	18.83	813,000	33.10	15.05	48.15
54	03.09.11	**1,146,095**	**3.535**	**15.98**	**19.51**	843,200	31.92	15.05	46.96
55	02.09.11	1,318,673	3.072	15.98	19.05	861,200	31.29	15.05	46.33
56	01.09.11	1,313,364	3.085	15.98	19.06	813,900	33.07	15.05	48.11
57	31.08.11	1,400,965	2.892	15.98	18.87	844,100	31.89	15.05	46.93
58	30.08.11	1,418,241	2.857	15.98	18.84	1329,800	20.24	15.05	35.28
59	29.08.11	1,375,102	2.946	15.98	18.93	1,684,800	15.97	15.05	31.02
60	26.09.11	1,457,481	2.780	15.98	18.76	**2,113,000**	**12.74**	**15.05**	**27.78**
		40,834,936				**34,165,200**			
Average- MW Produced		**56.71**				**47.45**			
Average-MW Required		**55.80**				**215.57**			

	Assumption	
1-	Exchange Rate	**1USD=87**
2-	**Average Days in a Month for the calculation of Rent in Cents**	**30.42 Days**

	Reshma Power	**Water Power Naudero-I**
	3	**4**
i. Contracted Capacity-MW	201.3	51
ii. Contracted Availability-MW	90%	92%
iii. Commercial Operation Date-COD		14.7.2011
iv. Guaranteed Net Electric Output-kWh, Per Month of 30 Days	130442400	33782400
v. Daily Guaranteed Net Elect Output	4348080	1126080
vi. Total Rent for 5 Years-USD	394778489	80420000 NEPRA approved
vii. Monthly Rent-USD	6579641	1340333
viii. Daily Rent-USD (30.42 Days in Month)	216293	44061
ix. Cents-Per kWh	4.975 Rs-4.32	3.91 Rs-3.40 Vs RSA ~ 4.46/Rs-3.88
x. RFO Price-Rs Per Kg (Dated 11.10.11	65.86	447 Gas-SPS Faisalabad

applicable to nearest IPP and Genco) including transportation cost of each									
xi. RFO Consumption-per kWh-grams		238.53				9949 BTU/kWh-Heat Rate			
			Rs.	Rs.	Rs.		Rs.	Rs.	Rs.
Days	**Date**	**kWh**	**Rent-kWh**	**Fuel-kWh**	**Unit Cost-kWh**	**kWh**	**Rent-kWh**	**Fuel-kWh**	**Unit Cost-kWh**
1	26.10.11	1319664	0	15.71	15.71		3833300	4.45	3833305
2	25.10.11	501712	0	15.71	15.71		3833300	4.45	3833305
3	24.10.11	184657	0	15.71	15.71		3833300	4.45	3833305
4	23.10.11	478675	0	15.71	15.71		3833300	4.45	3833305
5	22.10.11	483842	0	15.71	15.71		3833300	4.45	3833305
6	21.10.11	414615	0	15.71	15.71		3833300	4.45	3833305
7	20.10.11	524012	0	15.71	15.71		3833300	4.45	3833305
8	19.10.11	608000	0	15.71	15.71		3833300	4.45	3833305
9	18.10.11	693000	0	15.71	15.71		3833300	4.45	3833305
10	17.10.11	618280	0	15.71	15.71		3833300	4.45	3833305
11	16.10.11	631310	0	15.71	15.71		3833300	4.45	3833305
12	15.10.11	852830	0	15.71	15.71		3833300	4.45	3833305
13	14.10.11	722340	0	15.71	15.71		3833300	4.45	3833305
14	13.10.11	677043	0	15.71	15.71		3833300	4.45	3833305
15	12.10.11	780632	0	15.71	15.71		3833300	4.45	3833305
16	11.10.11	1032500	0	15.71	15.71		3833300	4.45	3833305
17	10.10.11	912000	0	15.71	15.71		3833300	4.45	3833305
18	09.10.11	519000	0	15.71	15.71		3833300	4.45	3833305
19	08.10.11	71000	0	15.71	15.71		3833300	4.45	3833305
20	07.10.11		0	15.71	15.71		3833300	4.45	3833305
21	06.10.11	64190	0	15.71	15.71		3833300	4.45	3833305
22	05.10.11	25415	0	15.71	15.71		3833300	4.45	3833305
23	04.10.11		0	15.71	15.71		3833300	4.45	3833305
24	03.10.11		0	15.71	15.71		3833300	4.45	3833305
25	02.10.11		0	15.71	15.71		3833300	4.45	3833305
26	01.10.11		0	15.71	15.71	357585	10.72	4.45	15.17
27	30.09.11	88000	0	15.71	15.71	500451	7.66	4.45	12.11
28	29.09.11		0	15.71	15.71	427360	8.97	4.45	13.42
29	28.09.11	34812	0	15.71	15.71	475348	8.06	4.45	12.51
30	27.09.11		0	15.71	15.71	501588	7.64	4.45	12.09
		12237529				**2262332**			
Average MW-Produced		**17.00**				**3.14**			
Average MW-Required		**181.17**				**47**			
			Rs.	Rs.	Rs.		Rs.	Rs.	Rs.
Days	**Date**	**kWh**	**Rent-kWh**	**Fuel-kWh**	**Unit Cost-kWh**	**kWh**	**Rent-kWh**	**Fuel-kWh**	**Unit Cost-kWh**
31	26.09.11		0	15.71	15.71	502584	7.63	4.45	12.07
32	25.09.11		0	15.71	15.71	329600	11.63	4.45	16.08

33	24.09.11		0	15.71	15.71	505900	7.58	4.45	12.02
34	23.09.11		0	15.71	15.71	505940	7.58	4.45	12.02
35	22.09.11		0	15.71	15.71	499614	7.67	4.45	12.12
36	21.09.11		0	15.71	15.71	505968	7.58	4.45	12.02
37	20.09.11		0	15.71	15.71	505604	7.58	4.45	12.03
38	19.09.11		0	15.71	15.71	500992	7.65	4.45	12.10
39	18.09.11	152000	0	15.71	15.71	500116	7.57	4.45	12.02
40	17.09.11		0	15.71	15.71	259308	14.78	4.45	12.23
41	16.09.11		0	15.71	15.71	506320	7.57	4.45	12.02
42	15.09.11	34000	0	15.71	15.71	382276	10.03	4.45	14.47
43	14.09.11		0	15.71	15.71	443744	8.64	4.45	13.09
44	13.09.11		0	15.71	15.71	506260	7.57	4.45	12.02
45	12.09.11		0	15.71	15.71	482388	7.95	4.45	12.39
46	11.09.11		0	15.71	15.71	484192	7.92	4.45	12.36
47	10.09.11		0	15.71	15.71	502372	7.63	4.45	12.08
48	09.09.11		0	15.71	15.71	323168	11.86	4.45	16.31
49	08.09.11		0	15.71	15.71	506080	7.57	4.45	12.02
50	07.09.11		0	15.71	15.71	506204	7.57	4.45	12.02
51	06.09.11		0	15.71	15.71	506094	7.57	4.45	12.02
52	05.09.11		0	15.71	15.71	412550	9.29	4.45	13.74
53	04.09.11		0	15.71	15.71	498544	7.69	4.45	12.14
54	03.09.11		0	15.71	15.71	505920	7.58	4.45	12.02
55	02.09.11		0	15.71	15.71	505920	7.58	4.45	12.02
56	01.09.11		0	15.71	15.71	505752	7.58	4.45	12.03
57	31.08.11		0	15.71	15.71	499174	7.68	4.45	12.13
58	30.08.11		0	15.71	15.71	331256	11.57	4.45	16.02
59	29.08.11		0	15.71	15.71		3833300	4.45	3833305
60	28.08.11		0	15.71	15.71		3833300	4.45	3833305
		186000				**13029840**			
Average MW-Produced		**0.25**				**18**			
Average MW-Required		**181.17**				**47**			

12423529 Saving Rs.53.669 M

A perusal of the above chart shows that unit cost per kWh of electricity procured from RPPs is exorbitantly on the high side and the electricity so generated by above RPPs is then to be transmitted to NTDC, which is responsible for its further supply to the consumers after adding charges of overhead transmission and dispatch.

58. The learned counsel appearing for Reshma stated that after signing off the project, matter is under consideration of the Cabinet to allow the sponsors to operationalize the project because they have made a huge investment and the plant is producing electricity without charging even fuel cost so far. However, it may be observed that since we have examined the case of RPPs on the basis of broad principle, therefore, in our considered opinion, the case of Reshma also suffers from the same illegalities and irregularities on the

basis of which it is not possible to conclude that the contract was awarded in a transparent manner.

59. As far as production of Karkay and Reshma is concerned, it is evident from the table prepared by PEPCO, which is reproduced hereinabove, that both plants are presently producing 48.33 & 14.57 MW against the agreement of producing 231 & 201 MW of electricity respectively.

60. It is to be noted that despite the fact that rental tariff is to be determined by NEPRA, but it failed to discharge its functions in terms of section 7 of the Act, 1997, inasmuch as there were clear directions that tariff should be fixed at par with that of the IPPs, but the tariffs of both the categories i.e. solicited and unsolicited were fixed on the higher side.

RECOVERY FROM SAHUWAL, SIALKOT/SUMMUNDRI ROAD, FAISLABAD

61. Not only in the unsolicited RPPs, but also in some of the other cases the sponsors of the RPPs had received the down payment but in spite of that they had failed to achieve COD. In this behalf, reference may be made to various cases, particularly, the case of Techno-E Power Sahuwal, Sialkot, facts whereof have already been mentioned hereinabove. Precisely, at this stage, it is to be noted that without inviting fresh bids/following ICB procedure, 150 MW RPP at Sahuwal, Sialkot, which was carved out of 250-300 MW RPP at Piranghaib was dolled out to Techno E Power for four years at a rental value of US$ 165 million and advance payment of US$ 11.55 million. It was reported that no machinery was available on the site. Therefore, vide letter No. CEO/MZG/Rental/13481-84 dated 24.12.2010 NPGCL informed NEPRA that the RSC was not effective, therefore, the GENCO should have recovered 7% advance payment already made along with

further penalties prescribed in RSC. Similarly, in respect of another RPP awarded by PEPCO following the ICB procedure to Techno-E Power, Sammundri Road, Faisalabad for a period of three years, rental value whereof was determined at US$ 135 million, 14% advance payment of US$ 18.9 million was made 7% on 26.02.2008 and 7% on 01.04.2009, tariff was determined on 30.10.2009 and the COD was 135 days from LOA, which was revised to partial COD 30.06.2009 and full COD 30.07.2009, and only partial COD for 60 MW was reportedly achieved on 11.06.2010, but the NEPRA declined to recognize said COD. It is further to be noted that in respect of M/s Techno E Power Sahuwal, Sialkot, which had failed to import machinery, following order was passed: -

> "Therefore, Techno Sahuwal, whose case is also identical with these three RPPs, is directed to deposit advance amount with markup by tomorrow otherwise case shall be registered with the F.I.A. because after receiving the money for about more than two years no progress has been shown and such practice cannot be allowed to continue in the national interest. For this purpose case is adjourned to 14th January, 2011 when the proprietor/Chief Executive Officer of the said project is directed to remain in attendance. Manager Askari Bank Blue Area Islamabad, with whom guaranties are lying be also directed to attend this Court along with record of load/advance granted to Techno Sahuwal on the said date."

62. On 14.01.2011, Raja Anwar-ul-Haq, learned ASC appeared and filed a statement that by 17.01.2011 advance money received by Techno E. Power, Sahuwal would be returned with mark-up. On the next date of hearing, learned counsel submitted that the payment was to be made through a Pay Order, which was in the clearance process, as such, case was adjourned to 18.01.2011, on which date, Raja Anwar-ul-Haq handed over two Pay Orders (No.171838 for

Rs.781,357,500/- and No.1701839 for Rs.300,892,500/-) to Ghulam Mustafa Tunio, Chief Executive, GENCO.

63. Raja Anwar-ul-Haq subsequently filed two miscellaneous applications, i.e. CMAs No. 5002/2011 and CMA No. 4781/2011 with the same prayer which reads as under: -

> "Under the circumstances it is most respectfully prayed that this August Court may graciously be pleased to pass appropriate orders based on facts mentioned in the body/grounds of instant petition and Site Status of the plant/machinery submitted by NPGCL and may pass direction to NPGCL/WAPDA to refund the Advance money with markup received 7% Additional amount as per facts beside payment of remained 7% Additional amount as per RSC/Amendment and also to comply with notice of default and to fulfill all terms and conditions of the contract in order to enable that petitioner company to generate and smooth functioning of the plant to produce and supply electricity in Public interest.
>
> Further prayed to Declare that the submitting of false statement contrary to the facts regarding import of machinery and plant in the name of NPGCL and storage at WAPDA warehouse at site, is a case of abuse of official powers and exercise of authority arbitrarily and with ulterior motives and the concerned responsible of NEPRA succeeded in obtaining favorable order from this August Court on 13.01.2011 which caused heavy injury and loses to the Petitioner Company and resulted in heavy Miscarriage of justice and have been prima-facie guilty of abusing of the process of this Court and are liable to be prosecuted."

64. We have examined the pleas in both the applications and subject to the illegalities and irregularities, which have been noticed in the RPPs' contracts, we are not inclined to issue contempt notice. It is evident from the orders passed on different dates that at that time the sponsors had not resisted the return of the down payment. Moreover, without prejudice to the case of GENCOs or the Techno E. Power, suffice it to observe that contempt proceedings are always drawn when there is a violation of the Court order, or the authority of the Court is undermined or ridiculed, etc. Thus, in absence of any such allegations, both the applications are dismissed.

65. In respect of Techno E. Power, another CMA has been filed, which indicates that a writ petition is pending on behalf of the applicant (sponsor) before the High Court. This project has been examined on the touchstone of the above illegalities and irregularities in awarding the contract, and we are of the opinion that this transaction has also not been undertaken transparently, therefore, subject to all just exceptions, no order in favour of the applicant (sponsor) can be passed.

RECOVERY FROM M/S YOUNG GEN

66. It is to be noted that Khawaja Ahmed Tariq Rahim stated that after the recovery of advance payment from Guddu and Naudero-II, PEPCO had recovered US$ 1.26 billion from Ms Young Gen (a solicited RPP) by getting encashed its bank guarantee during the pendency of these proceedings on account of its failure to achieve COD within the stipulated time.

FEASIBILITY STUDY

67. The necessity in introducing the concept of RPPs is apparent from the facts that in the year 2006 when the then Government decided to adopt the phenomenon of rental power projects, no feasibility study was carried out which is crucial because study is based on the input of the experts on the subject to determine whether or not the implementation of the project is advisable. It is well known that feasibility study is based on the extensive research to ascertain that what would be the impact of such a project in terms of costs of the project, its results, future prospects, operational implications, advantages and disadvantages, keeping in view the situation like alleged shortage of electricity. The Government had formulated energy policies in the years 1994-2002 on the basis

whereof IPPs were installed, therefore, had the Government allowed the experts on the subject of electric energy/power to examine merits and demerits of introducing the RPP regime, it would have helped in implementing the Rental Power Projects in a highly transparent manner. It is a fact that during the previous regime, Rental Power Projects were installed at Sharaqpur and Bhikki on the recommendation of WAPDA. Though it is stated that tender notices were issued in the newspapers, but no response was received, however, copies of such notices have not been made available on record. Further, it is alleged that decision to install RPPs was based on the recommendations of ECC dated 16.08.2006 in the case No.ECC-135/9/06, contents whereof have been reproduced hereinabove, but it pertained to 150 MW at Piranghaib, Multan, and subsequent thereto another project on the same site for 192 MW was approved contrary to the PPRA Rules (detailed discussion has been made hereinabove) and the same was signed off, which caused considerable loss to the public exchequer.

68. It is to be noted that when incumbent regime came into power, a meeting was held in the Prime Minister Secretariat on 27.03.2008 wherein it was decided, *inter alia*, that PEPCO would arrange installation of fast track Rental Power Projects of up to 1067 MW, which were subsequently increased to 2257 MW, but according to the report of ADB, it was reduced to 1257 MW. Apparently, this decision was taken without any feasibility study.

69. When we talk about the importance of the feasibility study it also includes that the Government would have ascertained as to whether there is any necessity of rental power projects to enhance its capacity when allegedly PEPCO already possessed sufficient capability

to generate electricity as per existing installed capacity, from other sources.

FINANCIAL ASSISTANCE

70. Makhdoom Syed Faisal Hayat and Khwaja Muhammad Asif, petitioners seriously questioned the transparency in awarding the projects of RPPs and vehemently agitated that in terms of clause 2.3 of Request For Proposal (RFP) of Fast Track Rental Power Projects through ICB, the bidders/sponsors were solely responsible for financing of the projects, whereas, while issuing Letter of Award, they were made eligible to obtain, in advance, a down payment in US dollars equal to 7% of the lump sum contract price for the term of Rental Services Contract on submission of a bank guarantee. This condition was reiterated in clause 4.5(a) in Rental Services Contract. In addition to it, another concession of provision of Standby Letter of Credit in the amount equal to 36-60 monthly rental services fee payments, as the case may be, in a form acceptable to the seller was made and the term of the same was to be started with the commercial operation date. Due to this reason, original terms and conditions had changed financial situation in favour of sellers and without getting the required results huge amount has been dolled out to them.

71. Khwaja Ahmad Tariq Rahim, learned Sr. ASC and Raja Parvez Ashraf, former Minister for Water & Power and his counsel Mr. Wasim Sajjad, as well as other learned counsel, i.e., M/s Muhammad Akram Sheikh, Ali Zafar and Raja Anwar-ul-Haq submitted that PEPRA Rules were duly followed in awarding the projects to the sponsors and the Asian Development Bank had not pointed out any violation of the same. They further contended that as far as increase in down payment from 7% to 14% is concerned, it is a norm and practice in

international commercial contracts i.e. FIDIC, ICE, ENAA, etc. They also explained that the previous Government had floated the idea of RPPs to overcome the difficulties of the shortage of electricity, using the same as a strategic tool and the present Government also considered the same useful for the purpose of catering the requirement of electricity for the general public.

72. Khwaja Ahmad Tariq Rahim, Sr. ASC as well as the former Minister further contended that as per Rental Service Contract the power generation companies (GENCOs) were to deliver to the seller an irrevocable Standby Letter of Credit (SBLC) for rental period of 36 to 60 months and subsequently it was realized that the foreign banks were not willing to provide SBLC unless charges amounting to 35% of total rental value for 5 years' term were paid to the banks. Therefore, Ministry of Water & Power in consonance with the RSC submitted summary dated 11.10.2008 urging the Government to provide SBLC for the Rental Projects, but the Ministry of Finance expressed its inability to accept the proposal because of the financial constraints of the Government at that time and financial meltdown worldwide. For such reason, the Ministry of Finance headed by Mr. Shaukat Tareen replaced the provision of SBLC with additional 7% mobilization advance, which, after COD, was recoverable from the rental charges each month to be paid to the consultants and under the circumstances 7% advance was secured by advance payment guarantee in the equivalent amount, additional 7% was disbursed through security and financial arrangements made by the Ministry of Finance through banking consortium set up by them. Since the advance payments were arranged by obtaining loans repayable with mark up, as such, a huge amount has to be returned. Thus, argument of savings made by the

Government on this account, as has been quantified at Rs.26 billion, therefore, the step was clearly in the national interest is not acceptable.

73. It is to be seen that in view of the above discussion on the question of responsibility of making arrangements by the bidders and succeeding therein without altering the terms & conditions of the advertisement, 7% down payment on the total rental value of 36 to 60 months was subsequently increased to 14% for extending financial facilities, thus what would be its financial impact on the projects? It may be noted that it was the responsibility of the sellers to finance the projects at their own and also to pay withholding tax, customs duty etc. to the Government on the import of the machinery in accordance with law. However, the machinery was imported in the name of the GENCOs/Government. In addition to it, payment of 6% withholding tax was also deferred and in this manner, benefit of 14% + 6% = 20% was given to the bidders without any legal justification. Similarly, the machinery was allowed to be imported temporarily subject to getting exemption from payment of customs duty. All these conditions, if incorporated in the invitation for bids, would have encouraged more competition amongst the bidders to come forward and participate in the bidding process. Thus, in absence of competition between the bidders, public exchequer sustained huge losses and was likely to continue to suffer further losses in future, if curative measures are not adopted.

74. Surprisingly, RFP along with LOAs were issued by the PPIB, whereas RSCs were executed between by GENCOs. As per Para 2.3 of RFP, the bidders/sponsors were solely responsible for the financing of the project and no incentive of down-payment was given on behalf of

GENCOs. For the first time in the LOA incentive of 7% of down payment was divulged by PPIB. In this very context, it is to be noted that as per Paras 5.3 and 5.4 of the RSC, following extraordinary facilities were also extended to the sellers:-

> "4.5 *Payment Terms and establishment of Letter of Credit-*
>
> *a. the SELLER is eligible to obtain in advance a Down Payment amounting to US$ [_______] i.e. 7% of Lump Sum Contract Price for the Term of the Rental Services Contract (the "Down Payment"), on submission of a bank guarantee valid until 30 days after the Target Commercial Operations Date, in a form "A". the aforesaid Down Payment amount of US$[________]shall be deducted, in [36-60] equal installments of US$ [_______] each, from the monthly rent payable to the SELLER by the Buyer. Buyer shall release 7% Down Payment to be paid within ten (10) Days after submission of Advance Payment Bank Guarantee by the SELLER within five (5) days from the date of signing of this Contract.*
>
> *b. The Lump Sum Contract Price as defined in Section 4.1 less the 7% Down Payment will be divided into [thirty six –sixty] (36-60) equal installments (the "**Monthly Rental Services Fees"**) . From and after the occurrence of Commercial Operation Date, the SELLER shall submit an invoice to BUYER for Monthly Rental Service Fee payment, on the 15th Day of each Rental Month. Upon confirmation by BUYER of the amount payable against such invoice net of any disputed amount, if any, to the operating bank issuing the 'Letter of Credit' the SELLER shall draw on the 'Letter of Credit', for such confirmed amount as anytime on 30th Day or next business Day thereafter, following the Day the invoice is delivered to BUYER."*

75. Initially, 7% down payment had to be made on contract price for the term of Rental Service Contract, i.e. 36 to 60 months, against a bank guarantee. We have to observe that transparency of contract is not limited to the extent of following the PPR Rules as at the same time it is also to be seen whether an unusual financial concession is being given to the bidders due to which whole complexion of the contract would be changed. Interestingly, as per LOA issued by PPIB, there is no indication that which agency will advance down payment of 7% as ultimately GENCOs had to arrange this amount from banks on the basis of mark up. Legally GENCOs could not be bound down to arrange payment of 7% down payment,

as bids were not invited by GENCOs. No such concession was agreed by GENCOs; inasmuch as the GENCOs had not issued LOA. Similarly, in RFP on behalf of GENCOs such assurance was never given. Thus, imposing such condition on GENCOs to accommodate bidders is against the transparency of the contract. As far as status of GENCOs is concerned, it is a government company but has its own entity and perpetual seal, thus, inescapable conclusion can be drawn that concession of financial assistance under the circumstances to bidder is nothing but a favour which had made bid process as non-transparent.

76. According to the report of Federal Board of Revenue, the Ministry of Water & Power requested for exemption of customs duty on temporary import of power generation plants and the request so made by WAPDA was approved by the Cabinet. Subsequently this concession was incorporated as part of the Financial Bill, 2008. Accordingly, the machinery for Power Generation Plants was exempted from whole of the customs duty by adding Entry No.49 in exemption notification namely SRO No.567(1)/2006 dated 05.06.2006. In view of above notification WAPDA has got cleared following Power Plants on availing the concession of consumption on duty and taxes:-

(1) Sammundri Rental Power Project (RPP).
(2) Reshma Rental Power Project (RPP).
(3) Gulf Rental Power Project (RPP).
(4) Guddu Rental Power Project (RPP).
(5) Naudero-I Rental Power Project (RPP).
(6) Sahuwal Rental Power Project (RPP)
(7) Karkay Rental Power Project (RPP).
(8) Sheikhupura Rental Power Project (RPP) (Re-exported).
(9) Bhikki Rental Power Project (RPP) (Re-exported.)

As per summary, the amount to be paid on the above plants comes to approximately Rs.410,163,668/-, which includes customs duty, CED/FED as well as taxes. It has never been heard that in the business of providing motorcars/machinery, etc., on rent, the providers are extended the concession to the extent noted hereinabove. Not only the above concession, but as it has been noted during reply of the arguments made on behalf of above respondents that the Finance Minister due to non-providing Standby Letter of Credit, unilaterally increased 7% down payment in the name of mobilization advance.

77. It is to be noted that when the bidder has been made responsible to make an arrangement for the finances, in absence of any commitment, during the contracting period, what was the necessity to increase 7% of Rental Value on the pretext that no foreign bank was agreeing to issue Standby Letter of Credit. Providing of Standby Letter of Credit, in fact, is making the payment in advance of Rental Services Charges/fee which was to be adjusted for the whole period, for which contract has been executed. It clearly indicates that such clauses were incorporated with no intention except to extend maximum financial benefit to the bidders. Raja Parvez Ashraf, former Minister, however, explained that foreign banks were not willing to confirm SBLC unless charges amounting to 35% of the total Rental Value for 5 years term were paid to them. Arguments on behalf of the respondents that in the interest of nation the conditions of the contract were changed and under the advice of the then Finance Ministry headed by Mr. Shaukat Tareen, the initiative for substitution of SBLC with additional 7% mobilization advance, recoverable/adjustable from the Rental Charges for each month was taken, seems to be unfounded. As it has been explained hereinabove, bidders while submitting bids as per the contents of RFP are required to furnish as many as 13 Proformas in Envelopes I and II. A careful perusal thereof indicates that bidders never demanded for the concessions, which had been extended to them voluntarily.

78. Next question for consideration is that how much amount was paid to sponsors by way of 7% + 7% = 14%. Since there were a lot of complaints of corruption in awarding contracts of RPPs against all concerned, individually and collectively, therefore, Ministry of Finance went for 3rd Party Evaluation/Audit and to achieve the object, ADB was appointed to do the needful. The ADB report reveals that enhancement of down payment from 7% to 14% could not be allowed without inviting fresh biddings and changing the terms of the contract with a view to ensuring fair competition amongst the bidders. We have already emphasized on this aspect of the case, and we see no reason to differ with the submission made by the petitioners that there were illegalities committed by Government in making payment of 14% advance to the bidders, particularly, when there was no commitment/agreement at the time of notifying the bids/issuing RFPs. Admittedly, this report was accepted and in pursuance thereof, 9 RPPs were allowed to continue.

79. It is to be seen that 14% advance amount paid to the bidders on the basis of reference value runs into billions of rupees, details whereof are as under: -

Name of RPP	**Amount of advance payment**	**Date of advance payment**
Techno, Sammundri Road Faisalabad	US$ 18.96 M	26.02.2008 (7%) 01.04.2009 (7%)
PPR, Guddu, Sindh	US$ 10.15 M	17.03.2008 (7%) 12.03.2009 (7%)
Techno, Sahuwal Sialkot	US$ 11.5 M	04.06.2008 (7%)
Karkay Karadeniz	US$ 79.05 M	12.05.2009 (14%)
Young Gen, Satiana Road, Faisalabad	US$ 15.56 M	29.05.2009 (7%) 23.06.2009 (7%)
Gulf, Eminabad Gujranwala	US$ 11.9 M	19.09.2009 (14%)
Reshma, Raiwind Road, Lahore	US$ 55.27 M	03.10.2009 (14%)
Walters, Naudero-I	US$ 11.26 M	16.11.2009 (14%)
Walters, Naudero-II	US$ 9.93 M	06.04.2010 (14%)
Total	**US$ 223.58 M**	

80. The petitioners have contended that a meagre amount of electricity is being generated through the medium of RPPs, although billions of rupees have been spent on these projects. The learned counsel appearing for the Government/WAPDA/PEPCO/GENCOs have not been able to rebut the contention raised by the petitioners. It is an admitted position that after spending billions of rupees in the shape of 7% to 14% down payment and exemption from payment of customs duty as well as 6% withholding tax, against average cost of Rs.24/- per unit kWh [Karkey: Rs.35/- to Rs.50/-; Gulf: Rs.18/- to Rs.19/- and Naudero-I: Rs.12/- to Rs.19/-], only 120 MW electricity is being generated by the RPPs and its cost is on a very high side and is not in accordance with the provisions of section 7 of the Act, 1997 whereby NEPRA is required to protect the interests of the consumers. Therefore, RPPs' mode of electricity generation has proved a total failure and incapable of filling the gap in the demand and supply on a short term basis. Further, this cost is not final, rather it is subject to fuel cost component and other charges of overhead transmission payable to NTDC, whereas it is the constitutional requirement that every action of Governmental authorities should be aimed at socio-economic development of the country. In this behalf, a chart showing average production of electricity vis-à-vis the maximum capacity and the advance payment is given below: -

Name of RPP	**Total Rental Value / Rental Term (in Years)**	**Monthly Rental Value (M US$) (in Pak Rs. @ 80)**	**Maximum Capacity**	**Average Price at Maximum Capacity US$**	**Average Monthly Production MW**	**Monthly Price per MW (US$)**
KARKEY 231.8 MW	US$ 564.64 /5	US$ 9.41 M Rs.752.85 M	231 MW	US$ 40,735 Rs.3.26 M	48.33	US$ 2,173,210 Rs.173.85 M
GULF Eminabad, Gujranwala	US$ 85.00 /5	US$ 1.42 M Rs.113.6 M	62 MW	US$ 22,903 Rs.1.83 M	50.08	US$ 28,354 Rs.2.268 M
NAUDERO-I 51 MW	US$ 80.42 /5	US$ 1.34 M Rs.107.2 M	51 MW	US$ 26,274 Rs.2.10 M	9.16	US$ 146,288 Rs.11.70 M
Reshma 201 MW	US$ 394.78 /5	US$ 6.58 M Rs.526.37 M	201.3 MW	US$ 32,687 Rs.2.61 M	14.57	US$ 451,612 Rs.36.13 M

Techno E-Power Sammundri Road, Faisalabad	US$ 135.00 /3	US$ 3.75 M Rs.300.0 M	150 MW	US$ 25,000 Rs.2.0 M	0	--
Guddu 110 MW	US$ 72.48 /3	US$ 2.01 M Rs.161.07 M	110 MW	US$ 18,272 Rs.1.46 M	--	--
Techno Energy (Pvt.) Ltd. Sahuwal, Sialkot	US$ 165 /4	US$ 3.44 M Rs.275.0 M	150 MW	US$ 22,933 Rs.1.83 M	--	--
Naudero-II	US$ 70.96 / 5	US$ 1.18 M Rs.94.61 M	45 MW	US$ 26,288 Rs.2.10 M	--	--
Young Gen 200 MW	US$ 111.15 /		200 MW		--	--
Independent Power (Pvt.) Ltd.	US$ 432.21 /5	US$ 7.20 M Rs.576.28 M	200 MW	US$ 36,000 Rs.2.88 M	--	--
Sialkot Rental Power	US$ 112 /5	US$ 1.87 M Rs.149.33 M	65 MW	US$ 28,789 M Rs.2.30 M	--	--
Premier Energy (Pvt.) Ltd.	US$ 111.86 /5	US$ 1.86 M Rs.149.15 M	57.8 MW	US$ 32,180 Rs.2.57 M	--	--
Ruba Energy	US$ 305.7 /5	US$ 5.09 M Rs.407.60 M	155.5 MW	US$ 32,208 Rs.2.62 M	--	--
Consortium of Tapal	US$ 143.90 /5	US$ 1.87 M Rs.149.33 M	70 MW	US$ 26,714 Rs.2.14 M	--	--
Walters Power International	US$ 325.91 /5	US$ 5.43 M Rs.434.55 M	325.9 MW	US$ 16,667 Rs.1.33 M	--	--
Techo E. Power, Sammundri Road, Faisalabad (Extension)	US$ 135 /3	US$ 3.75 M Rs.300.0 M	150 MW	US$ 25,000 Rs.2.0 M	--	--
Karkey (Extension)	US$ 333 /5	US$ 5.55 M Rs.444.0 M	222 MW	US$ 25,000 Rs.2.0 M	--	--

81. Thus, all the Government functionaries, including the Ministers for Water & Power holding charge from 2006 and onward up to 2008 during whose tenure the RPPs were approved/set up, *prima facie*, violated the principle of transparency, therefore, their involvement in getting financial benefits out of the same by indulging in corruption and corrupt practices cannot be overruled in view of the discussion made hereinabove. Consequently, they are liable to be dealt with under the National Accountability Ordinance, 1999 by the NAB. Similarly, all the functionaries of PEPCO, GENCOs and NEPRA along with sponsors who had derived financial benefits from the RPPs

contracts are, *prima facie*, involved in corruption and corrupt practices, therefore, they are liable both for the civil and criminal action.

82. In conclusion, it may be mentioned that Bhikki RPP was paid Rs.8,698.46 million against 811.605 mkWh electricity whereas Sharaqpur RPP was paid Rs.13,941.82 million against 1520.420 mkWh electricity. As regards the RPPs set up since 2008, out of nine RPPs to whom advance payments were made, six RPPs, namely, Techno Sahuwal, Guddu, Reshma, Young Gen, Naudero-II and Techno Sammundri have returned the advance payments in pursuance of orders passed by this Court from time to time, whereas the advance payments made to Karkey, Gulf and Naudero-I have not so far been returned. Despite down payment of billions of rupees to the RPPs, Karkey is generating 48.33 MW against capacity of 231 MW and Naudero-I is generating 9.16 MW against capacity of 51 MW; whereas, Gulf is generating 50.08 MW against capacity of 62 MW. Pakistan Power Resources (Piranghaib, Multan) did not generate electricity at all although down payment of US$ 14.58 million was made to it, which has not been returned. Though Reshma has returned the down payment, according to learned counsel, yet it is still functioning and generating 15 MW only against capacity of 201.3 MW. Per unit cost of electricity produced by the RPPs is on very high side, e.g., Karkey is ranging from Rs.35/- to Rs.50/-; Gulf from Rs.18/- to Rs.19/- and Naudero-I from Rs.12/- to Rs.19/- whereas as per decision of the ECC dated 10.09.2008, efforts were to be made that the tariff of the RPPs is lower than that of the IPPs based on similar technology for their first 10 years. Thus, in this manner, the decisions of the ECC have also been violated blatantly. All the RPPs are collectively generating just 120 MW of electricity. Huge amount has been paid to Karkey, Gulf and

Naudero-I and if they are allowed to continue for the left over term, further huge amounts would be paid to them at the expense of the public exchequer with no corresponding benefit to the consumers. As already discussed in detail, while awarding contracts to RPPs, particularly Gulf, Karkey, Reshma, Naudero-I, Naudero-II, Bhikki and Sharaqpur grave illegalities and irregularities were committed, and procedural lapses and deviations were made from mandatory legal requirements and the same were entered in a non-transparent manner.

83. In pursuance of the orders passed by this Court from time to time, a sum of Rs.8,689,224,000/- (rupees 8 billion 689 million 224 thousand) has been recovered from the RPPs on account of advance payments and interest, whereas, proceedings for recovery of interest amounting to Rs.445,496,000/- (rupees 445 million 496 thousand) from Young Gen and the interest from Reshma, are still pending, details whereof are given as under:-

S. No	**Name of the RPP/capacity**	**Amount of Advance payment and date**	**Amount recovered and date**	**Interest recovered**
1.	TECHNO, SAHUWAL/ 150 MW	Rs.782000000/- on 04.06.2008	Rs.782000000/- on 18.01.2011	Rs.298000000/-
2.	GUDDU / 110 MW	Rs.301058000/- on 17.03.2008 Rs.405902000/- on 12.03.2009	Rs.301058000/- on 08.12.2010 Rs.405902000/- on 04.12.2010	Rs.120000000/-
3.	RESHMA/ 201.3 MW	Rs.4576272000/- on 03.10.2009	Rs.4576272000/- on 18.11.2011	Notice served
4.	YOUNG GEN/ 200 MW	Rs.628686000/- on 01.06.2009 Rs.630928000/- on 23.06.2009	Rs.628686000/- on 29.12.2010 Rs.630928000/- on	Notice for recovery of Rs.445496000/- served on 08.01.2011
5.	NAUDERO-II/ 50 MW	Rs.930942000/- on 06.04.2010	Rs.930942000/- on 08.12.02010	Rs.15436000/-
Total:			**Rs.8255788000/-**	**Rs.433436000/-**

84. Thus, in the light of the above facts and circumstances, we hold as under: -

(i) Prior to the introduction of RPPs, the system of generation of electricity under the control and management of Ministry of Water & Power, WAPDA, PEPCO, GENCOs, etc., had sufficient potential to produce more electricity, but instead of taking curative steps for its improvement, including clearance of circular debt of the IPPs or resorting to other means of generation of electricity, billions of rupees were spent on **BHIKKI** and **SHARAQPUR** RPPs, which proved complete failure because the object could not be achieved as the shortage of electricity persistently continued, and yet more RPPs were installed;

(ii) The Federal Government/WAPDA/PEPCO/GENCOs had failed to control pilferage of electricity from the system because of bad governance and failure of the relevant authorities to enforce the writ of the Government. Therefore, the Government is required to improve the existing system of generation and transmission of electricity, by taking all necessary steps, including clearing of circular debt, etc., so that electricity can be generated to the maximum capacity;

(iii) The contracts of all the RPPs – solicited and unsolicited, signed off or operational, right from **BHIKKI** & **SHARAQPUR** upto **PIRANGHAIB**, **NAUDERO-I & NAUDERO-II** were entered into in contravention of law/PPRA Rules, which, besides suffering from other irregularities, violated the principle of transparency and fair and open competition, therefore, the same are declared to be non-transparent, illegal and *void ab initio*. Consequently, the contracts of RPPs are ordered to be rescinded forthwith and all the persons responsible for the same are liable to be dealt with for civil and criminal action in accordance with law;

(iv) On accepting the ADB’s report, 9 out of 19 RPPs were allowed to operate, details whereof have been mentioned hereinbefore. Subsequently, 6 out of 9 RPPs were discontinued either having been signed off or having failed to achieve the target COD whereas remaining RPPs, i.e., **KARKEY, NAUDERO-I** and **GULF** are functioning, but they are producing electricity much less than their generation capacity, except **GULF** which is producing electricity close to the agreed capacity. **PPR (Piranghaib, Multan)** has not generated electricity at all, although down payment was made to it, which has not been returned. As far as **RESHMA** is concerned, though it achieved partial COD, but the same was not accepted by NEPRA. **BHIKKI** and **SHARAQPUR** were paid exorbitant rentals in billions of rupees, but generation of electricity was much below the agreed capacity;

(v) The production from the RPPs is far below the maximum capacity agreed between the parties as per the terms of the RSCs, which is evident from the above charts. The cost per unit kWh is also on the very high side. These RPPs have not achieved target COD. The contracts of all these RPPs are not transparent, as it has been discussed hereinabove, therefore, the same are hereby ordered to be rescinded forthwith;

(vi) The Ministry of Finance, WAPDA, PEPCO as well as GENCOs are responsible for causing huge losses to the public exchequer, which run into billions of rupees by making 7% to 14% down payments to, and purchasing electricity on higher rates, from RPPs, therefore, steps are required to be taken to effect recovery of the amounts with mark up outstanding against the RPPs whose contracts have been signed off or who had failed to achieve COD within the stipulated time in terms of the performance guarantees;

(vii) The RPPs mode of generation of electricity has proved a total failure and incapable of meeting the demand of electricity on a short term basis. The cost of electricity so produced is on very high side and is not commensurate with the provisions of section 7 of the Act, 1997. As per latest report, **KARKEY** and **GULF** are producing only **31 to 81 MW** and **51 to 61 MW** at an average cost per unit kWh of **Rs.35/- to Rs.52/-** and **Rs.18/- to Rs.19/-**

rupees respectively, as per information supplied in October/November, 2011, which also are subject to adjustment of fuel cost component and NTDC overhead transmission charges on account of which prices are likely to increase enormously. Thus, it is clear violation of the rights guaranteed to the citizens in terms of Articles 9 & 24 of Constitution and the Regulation of Generation, Transmission and Distribution of Power Act, 1997;

(viii) It is the constitutional requirement that every action of Governmental authorities should be aimed at socio-economic development of the country. In terms of Constitution and Act, 1997, the NEPRA is mandated to safeguard the interests of the consumers, but the concerned officials of NEPRA failed to perform their duties diligently;

(ix) All the Government functionaries, including the Ministers for Water & Power holding charge in 2006 and onward and from 2008 to onward, during whose tenure the RPPs were approved/set up and Minister as well as Secretary Finance holding the charge when the down payment was increased from 7% to 14%, *prima facie*, violated the principle of transparency under Articles 9 & 24 of the Constitution and section 7 of the Act, 1997, therefore, their involvement in getting financial benefits out of the same by indulging in corruption and corrupt practices cannot be overruled in view of the discussion made hereinabove. Consequently, they are liable to be dealt with under the National Accountability Ordinance, 1999 by the NAB;

(x) All the functionaries of PEPCO, GENCOs, PPIB and NEPRA along with sponsors (successful bidders) who had derived financial benefits from the RPPs contracts are, *prima facie*, involved in corruption and corrupt practices, therefore, they are also liable both for the civil and criminal action; and

(xi) The Chairman NAB is directed to proceed against all the persons referred to in subparagraphs (iii), (ix) & (x) above forthwith in accordance with law and submit fortnightly progress report to Registrar for our perusal in Chambers.

85. Before parting with the judgment, we would like to place on record our appreciation of the valuable assistance provided during the hearing of the case by the learned counsel appearing for the parties and learned *Amicus Curiae*.

The role of the petitioners, Makhdoom Syed Faisal Saleh Hayat, Federal Minister for Housing & Works and Khwaja Muhammad Asif, MNA is also laudable; they being the holders of public offices, highlighted the instant scam of corruption and corrupt practices and fulfilled their commitment to the Constitution as well as the general public whose rights enshrined in Articles 9 and 24 of the Constitution were being violated.

CHIEF JUSTICE

JUDGE

Announced in open Court on 2012
at Islamabad.

CHIEF JUSTICE

APPROVED FOR REPORTING