

Form No: HCJD/C-121

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.1592 of 2020

Islamabad Electric Supply Company Limited

Vs.

National Electric Power Regulatory Authority, etc.

Petitioners by : Mr Adil Umar Bandial Advocate.

Respondents by : Mr Salman Akram Raja, Muhammad UmerAkramChaudhry, Syed ShahabQutab, Barrister Asghar Khan, Barrister Ahsan Jamal Pirzada, Malik GhulamSabir, Faisal Atta, AfraIkram, MehrunnissaSajjad, Abuzar Salman Khan Niazi, Aneesa Agha, Mariam Noor, Fatima Amjad, Aisha Naveed, YmnaBaloch**Advocates.**

Syed Muhammad Tayyab, DAG.
Mr M. SaifuallahGondal, AAG.
Mr IrfanUI Haq, Legal Advisor NEPRA.

Date of Hearing : **17-03-2021.**

ATHAR MINALLAH, C.J.- Through this consolidated judgment I will decide the instant petition alongwith W.P. No. 1605/2020, titled "Hyderabad Electric Supply Company Limited v. National Electric Power Regulatory Authority, etc."

2. The Islamabad Electric Supply Company Limited [hereinafter referred to as the "**IESCO**"] and the Hyderabad Electric Supply Company Limited [hereinafter referred to as the "**HESCO**"] [collectively they shall be referred to as the "**Petitioner Companies**"] have invoked the jurisdiction of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 [hereinafter to as the "**Constitution**"], challenging the review determination, dated 28.05.2020 and the determination, dated 31.12.2019. The impugned determinations have been made by the National Electric Power Regulatory Authority [hereinafter referred to as the "**Authority**"].

3. The Petitioner Companies are incorporated juridical persons and were granted respective licenses under section 21 of the Regulation of Generation, Transmission and Distribution of Electric Power Act 1997 [hereinafter referred to as the "**Act of 1997**"]. The Petitioner Companies are licensed to provide, for the period specified in their respective licenses, distribution services and to make sales of electric power to consumers within their respective 'Service Territories'. IESCO was granted the distribution license on 02.11.2001 for a period of twenty years, which will expire on 02.11.2021. Likewise, HESCO was also issued the distribution license on 23.04.2002 and it will expire on 23.04.2022. The terms and conditions of the licenses are the same and, therefore, for ease of reference, the clauses contained in the license granted to IESCO shall be referred to. Article 3 describes the 'Service Territory'. Article

5 provides that the term of the license shall be for a period of twenty years from the date of its issuance. Article 7 is reproduced as follows:

**Article 7
Exclusivity**

Subject to the provisions of Section 22 of the Act the licensee shall, during the term of this License, have the exclusive right to provide distribution service, make sales of electric power, make schemes and engage in incidental activities in the Service Territory, as per provision of Article 3.2(i).

Article 8 defines the expression 'bulk power consumers' for the purposes of the license. Pursuant to the grant of licenses by the Authority, the Petitioner Companies had established their respective infrastructures and allied facilities for rendering the licensed services. Fatima Energy (Private) Limited [hereinafter referred to as the "**Respondent Company**"] was granted a generation license vide determination, dated 31.12.2013, to construct, own and operate a 120 Megawatt thermal power generation plant for a period of thirty years. The Authority, through the first modification/determination, dated 14.09.2015, followed by the second modification/determination, dated 31.12.2019, modified the generation license granted to the Respondent Company for the supply of electricity to 26 'bulk power consumers'. Review petitions were filed by various stakeholders, including the Petitioner

Companies and they were rejected vide the impugned review determination, dated 28.05.2020. The Petitioner Companies are aggrieved because they assert that the Authority has misinterpreted the provisions of the Act of 1997 and, as a consequence, their exclusive vested rights have been impaired.

4. The learned counsels for the parties had argued at length and they have also submitted their respective written arguments.

5. The fundamental argument raised by the learned counsel for the Petitioner Companies is that the vested rights created in favour of the latter at the time of issuance of the licenses were not taken away nor were in any manner impaired when various provisions were amended through the Regulation of Generation, Transmission and Distribution Amendment Act 2018 [hereinafter referred to as the "**Amendment Act of 2018**"] notified in the official gazette on 30.04.2018.

6. It is the case of the Petitioner Companies that the amendments made through the Amendment Act of 2018 had further affirmed that the 'exclusivity' of the rights described under section 21 of the Act of 1997 was to continue for the entire term of their respective licenses. This argument is based on a combined reading of the amendments made in the Act of 1997. The learned counsel has stressed that the operation of the amended provisions is

prospective and does not in any manner take away the substantive rights which they had acquired when the licenses were granted. The learned counsel has also argued that the licenses granted to the Petitioner Companies have not been modified and that the proceedings in this regard were initiated but they are pending before the Authority. It has also been argued on behalf of the Petitioner Companies that the impugned determinations are not sustainable in law because the mandatory requirements prescribed under the National Electric Power Regulatory Authority (Wheeling of Electric Power) Regulations, 2016 [hereinafter referred to as the "**Wheeling Regulations of 2016**"] could not be bypassed or rendered redundant. It is also the case of the Petitioner Companies that the Authority could not have granted the impugned concession to the Respondent Company without complying with the mandatory requirement of the granting of a license under section 23-E of the Act of 1997.

7. The learned counsel for the Respondent Company, on the other hand, has argued that; the argument regarding exclusivity of the rights under the licenses was raised as an afterthought; the intent of the amendments made through the Amendment Act of 2018 was to create a competitive power market; 'Second Tier Supply Authorization' is a phenomenon that has been in existence since a long time; if the argument regarding exclusivity till the expiry of the licenses is accepted then it would not be possible to have a country wide single competitive market before 2033;

reference has been made to a study sanctioned by the World Bank in support of the contention that the legislature intended to introduce corporatization of the power sector in order to achieve growing levels of competition in the power sector; a separate and distinct regime in the case of bulk power consumers existed from the inception of the enactment of the Act of 1997; the Authority has granted several authorizations relating to second tier supply; the insertion of section 50(2) clearly shows that it provides legal cover to the 'second tier supply authorization' granted by the Authority from time to time; the amendments made through the Amendment Act of 2018, by necessary intendment, has taken away the exclusivity of the right which existed under section 21 of the Act of 1997 or the licenses granted to the Petitioner Companies; the amended sections 21, 22 and 50, when read together, clearly shows that the legislature has intended that the amendments will have a retrospective effect; the Wheeling Regulations of 2016 are required to be followed and acted upon pursuant to modification of the generation license granted to the Respondent Company; section 8 of the General Clauses Act 1897 read with Article 7 of the Distribution Licenses granted in favor of the Petitioner Companies establishes that the right claimed by the Petitioner Companies was not exclusive.

8. The learned counsels have been heard and the record has been perused with their able assistance. The learned counsels

have placed reliance on the case law mentioned in their respective written arguments.

9. The Petitioner Companies were granted licenses under section 21 of the Act of 1997 much before the provisions were amended through the Amendment Act of 2018. The licenses were granted for 'distribution services and to make sales of electric power' to consumers in the territories specified in the respective licenses. The licenses were granted for a fixed period. Section 21(2)(a) explicitly acknowledged the 'exclusivity' of the right granted to a licensee under the license. The above reproduced clause of the license had unambiguously affirmed the rights to be 'exclusive'. Though the exclusive right was subject to section 22, but the latter provision was enforced and effective for a period of fifteen years from the date of commencement of the Act of 1997. It is not disputed that the said prescribed period had lapsed when the impugned determinations were made. The amendments made through the Amendment Act of 2018 had omitted the expression 'exclusive right' from section 21(2)(a) of the Act of 1997. The Authority in the impugned determination has interpreted the provisions of sections 21 and 22 in such a manner as if the Petitioner Companies did not have exclusive rights under the licenses even after lapse of the period mentioned in section 22. The Authority has formed such an opinion on the premise that exclusivity was 'subject to the provisions of section 22 of the NEPRA Act as enshrined in terms of Article 7 of the granted distribution license'. The Authority

has also held that the Respondent Company was not required to obtain a license under section 23 E of the Act of 1997. The Authority has further determined that the requirements under the Wheeling Regulations of 2016 are yet to be complied with.

10. It is, therefore, obvious that though the license of the Respondent Company has been modified but the supply or sale of electricity to the Bulk Power Consumers is subject to fulfilling the requirements prescribed under the Wheeling Regulations of 2016. The case of the Petitioner Companies is that they cannot be compelled to enter into a wheeling agreement, particularly when their respective licenses granted under section 21 of the Act of 1997, as it stood at that time, acknowledged that they will enjoy exclusive rights to distribute and sell electricity to consumers within their specified territories. It is also their case that the Authority cannot influence them without their consent to execute an agreement under the Wheeling Regulations of 2016. The Respondent Company, on the other hand, has taken the stance that the modification of its license has created a right in its favor to avail the facility of wheeling and that the rights of the Petitioner Companies under their respective agreements had lost 'exclusivity' pursuant to the amendment of the Act of 1997 through the Amendment Act of 2018. The questions required to be adjudicated upon by this Court are; whether the Authority has correctly interpreted the provisions of the Act of 1997 by holding that the right of the Petitioner Companies under the license was not exclusive; whether the amendments made through

the Amendment Act of 2018 are to operate retrospectively or they are prospective in nature; whether modification of the generation license of the Respondent Company has created a right in their favour to wheel electricity through the Distribution Systems owned, maintained and operated by the Petitioner Companies. In order to answer these questions it would be beneficial to survey the scheme of the Act of 1997 before and after the amendments made through the Amendment Act of 2018.

The relevant provisions before the amendment:

11. The Act of 1997 was promulgated to provide for the regulation of generation, transmission and distribution of electric powers and matters connected therewith and incidental thereto. The relevant provisions for the purposes of adjudication of the petitions at hand, when licenses were granted to the Petitioner Companies, were as follows:

21. Duties and responsibilities of distribution

licensees.—(1) The Authority may, after such inquiry as it may deem appropriate and subject to the conditions specified in this Act and as it may impose, grant a licence for distribution of electric power.

(2) The licensee shall---

(a) Possess the exclusive right to provide for such period as may be specified in the licence, distribution service and to make sale of electric power to consumers in the territory specified in the licence; and to frame schemes in respect of that territory;

Provided that a generation company may make sales of electric power to bulk-power consumers within such territory as the Authority may, subject to section 22, for a period of fifteen years, allow;

(b) be responsible to provide distribution service and make sale of electric power within its territory on a non-discriminatory basis to all the consumers who meet the eligibility criteria laid down by the Authority;"

"22. Sale to bulk power consumers.—(1)

Notwithstanding anything contained in section 21, for a period of fifteen years from the commencement of this Act, the Authority may permit a generation company or a distribution company to sell electric power to bulk-power consumers located in the territory of another

distribution company and such permission shall be granted---

(i) On case to case basis on an application made in writing by a generation company or distribution company; and

(ii) If the bulk-power consumer has not defaulted in previous charges of electric power to any other distribution company.

(2) Where a bulk power consumer intends to stop purchase of electric power from a distribution company, it shall convey its intention by notice in writing three years before such stoppage;

Provided that such consumer shall continue to make payments to the distribution company equal to the amount of cross-subsidy for uneconomic service for which it would otherwise have provided through purchase of electric power by the bulk power consumer."

A combined reading of the above provisions unambiguously shows that the legislature had intended that a license granted under section 21 for distribution of electric power vested an exclusive right for such period as may be specified in the license. The only exception was explicitly mentioned in the proviso to

section 21(2)(a). This exception was subject to section 22. Section 22 was validly effective for a period of fifteen years from the date of commencement of the Act of 1997. Article 7 of the licenses granted to the Petitioner Companies was obviously subject to section 22. The Authority could grant permission to a generation company or a distribution company to sell electric power to bulk power consumers located in the service territory of another distribution company only during the period of validity of section 22, as was explicitly specified therein. Section 22 was in the nature of a sunset provision. A sunset provision or clause is a measure which provides that it shall cease to have effect after lapse of the specified period mentioned therein. Section 22, therefore, had automatically ceased to be effective after fifteen years from the date of commencement of the Act of 1997. In such an eventuality the expression "subject to section 22" had lost its efficacy. The 'exclusive right' under section 21 could not be interfered with nor was the Authority empowered to permit a generation company under section 22 after the specified period mentioned therein had lapsed. Moreover, Article 7 or any other clause of the licenses granted in favour of the Petitioner Companies could not be interpreted in isolation nor in derogation of the statutory provisions.

The expression 'exclusive' has been defined in the 11th Edition of the Black's Law Dictionary as 'Limited to a particular person, group, entity, or thing <exclusive right>; -- whole,

undivided'. The Petitioner Companies possessed exclusive right under section 21(2)(a) while section 22 had ceased to be effective after the specified date explicitly mentioned therein. This exclusive right was incorporated in the licenses and the Authority was not empowered to interfere therewith after section 22 had ceased to become effective and during the validity of the licenses. The exclusive right possessed by the Petitioner Companies was no more subject to section 22 after the latter provision ceased to be effective on expiry of the specified time provided therein.

The relevant provisions after the amendment:

12. The amended provisions are reproduced as follows:

"21. Duties and responsibilities of distribution licensees.— (1) The Authority may, after such enquiry as it may deem appropriate and subject to the conditions specified, grant a licence for the distribution of electric power.

(2) The licensee shall—

(a) possess the right to provide, for such period as may be specified in the licence, distribution service in the [service territory] specified in the licence and to frame schemes in respect of that [service territory]:

Provided that a generation company may make sales of electric power to bulk-power consumers;

(b) be responsible to provide distribution service within its [service] territory on a non-discriminatory basis to all the consumers who meet the eligibility criteria laid down by the Authority:

(c) publicly make available tariff specifying the Authority's approved rates, charges and other terms and conditions for distribution services;

(d) establish, within three months of the issue of its licence for distribution of electric power and make available to the public, the manner and procedure for obtaining its service;

(e) make its transmission facilities available for operation by any other licensee, consistent with applicable instructions established by the system operator;

(f) follow the performance standards laid down by the Authority for distribution and transmission of electric power, including safety, health and environmental protection instructions issued by the

Authority or any Governmental agency [or
Provincial Government;

(g) maintain accounts in accordance with the
manner and procedure laid down by the Authority;
and

(h) develop, maintain and publicly make
available, with the prior approval of the Authority,
an investment program for satisfying its service
obligations and acquiring and selling its assets.

"22. Sale to bulk power consumers. — (1)

Notwithstanding anything contained in section 21, the
Authority may permit the sale of electric power to bulk
power consumers located in the service territory of the
holder of a license under this Act.

(2) Where a bulk power consumer intends to
stop purchase of electric power from a
distribution company, it shall convey its
intention by notice in writing [one year] before
such stoppage."

"50. Savings.- (1) Notwithstanding anything contained
in the Regulation of Generation, Transmission and

Distribution of Electric Power (Amendment) Act, 2018, or any repeal effected thereby, nothing shall affect, or be deemed to affect, anything done or any action taken, or purported to have been taken, including any rule, regulation, notification, determination, order or notice made or issued, any approval, appointment or declaration made, any operation undertaken or direction given, any proceedings taken, or any penalty, punishment or fine imposed under this Act before the commencement of the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2018.

(2) Subject to sub-section (1), any order, rule, notification, regulation, appointment, conveyance, deed, document or direction made, fee directed, determination given, proceedings taken, instrument executed or issued, or thing done under or in pursuance of any provision of the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2018 shall, if in force before the commencement of the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2018, continue to be in force and shall have effect as if made, directed, passed, given, taken, executed, issued or done under or in pursuance of this Act;”

13. A plain reading of the above provisions makes it obvious that the legislature has significantly changed the scheme relating to the "grant of a license" under section 21 and the ensuing rights. It is noted that section 21 is relatable to the grant of a license and does not extend to amending or altering the licenses granted prior to the amendments made through the Amendment Act of 2018. The expression 'exclusive' has been omitted from section 21(2)(a). The right is subject to the exception mentioned in the amended proviso. Likewise, section 22 empowers the Authority to permit sale to a bulk power consumer. The effectiveness of the newly inserted section is not confined to a specified period. A license granted under section 21 does not vest an exclusive right and the Authority may permit the sale of electricity to a bulk power consumer located in the service territory of a holder of a license under the Act of 1997. The permission would be subject to fulfillment of the condition mentioned under section 22(2) and meeting the requirements stipulated under the Wheeling Regulations of 2016. Section 50 has expressly saved anything done or any action taken, including any determination, order, approval, declaration etc. before the commencement of the Amendment Act of 2018. It has been declared that any determination made by the Authority prior to the amendment of the Act of 1997 shall continue to be enforced and to have effect. The proviso has been expressly confined to the rules and regulations. It is, therefore, obvious that the proviso affirms that the licenses which were issued prior to the Amendment Act of 2018 taking effect and all

determinations made by the Authority had been unequivocally saved by the legislature. The language of the above amended provisions undoubtedly shows that the legislature had intended that they would operate prospectively while the rights which had already accrued under a license granted under section 21 were expressly saved. This has also been acknowledged in the written arguments submitted on behalf of the Petitioner Companies. There is no reference in the amended provisions, even remotely, to suggest that the already accrued rights have been affected or interpreted as such on the touchstone of 'necessary intendment'. The proviso to section 50(2) is an affirmation of the legislative intent that licenses granted and saved under section 50 were not required to be modified. The amendments definitely saved the exclusivity of rights of the Petitioner Companies.

Precedent law regarding retrospective legislation:

14. The august Supreme Court, in the case titled "Amin Ullah v. Pannu Ram" [PLD 1967 SC 289], has observed and held that it is an established rule that, subject to any constitutional bar, there is no legal limit to the making and unmaking of laws by the legislature. It has been further held that it is within the domain of the legislature to appoint a date for the commencement of a law made by it, including a date preceding the making of the law. The august Supreme Court has further held that the power of the legislature includes the authority to legislate with retrospective effect. In the case titled

"Khan Asfandiyar Wali v. Federation of Pakistan" [PLD 2001 SC 607] the apex Court has held that the legislature is competent to change, annul, reframe or add to any law made by it. In the case titled "Imtiaz Ahmed Lali v Ghulam Muhammad Lali" [PLD 2007 SC 369] the august Supreme Court has observed and held that the legislature is indeed empowered to promulgate laws with retrospective effect and that such a phenomenon is not alien to the plenary power vested under the Constitution. In the case titled "*Manzoor Ali and 39 others v. United Bank Ltd through President*" [2005 SCMR 1785] it has been held and observed that, in the absence of a stipulation to the contrary, any change in law affecting substantive rights has to be given prospective effect. In the case titled "*Governor, N.W.F.P. v. Gul Naras Khan*" [1987 SCMR 1709] the august Supreme Court has observed and held that retrospective effect is not to be given to a statute so as to impair an existing right unless that effect cannot be avoided without doing violence to the language of the statute. The principle enunciated in the case titled "Senior Member BOR and others v. Sardar Bakhsh Bhutta and another" [2012 SCMR 864] is to the effect that insertion or deletion through an amendment in a statute would be retrospective if it is procedural in nature but, on the other hand, when it affects substantial rights created prior to the amendment the operation would be prospective. In the case titled "The Chief Land Commissioner, Sind and another v Ghulam Hyder Shah and others" [1988 SCMR 715] the august Supreme Court has held that no statute can be construed so as to have retrospective operation affecting vested rights unless by express provision or

necessary intendment it could be given retrospective effect. Reliance is also placed on the cases titled "Water and Power Development Authority, Lahore through Chairman and others v Haji Abdul Aziz and others" [2012 SCMR 965], "The Collector, Customs and Central Excise, Peshawar and others v M/s/ Rais Ltd through Muhammad Hashim" [1996 SCMR 83], "Pakistan Steel Mills Corporation v Muhammad Azam Katper and others" [2002 SCMR 1023], "Molasses Trading & Export (Pvt) Ltd v FOP and others" [1993 SCMR 1905].

In the case titled "The Income Tax Officer (Investigation) Circle, Dacca and another v Sulaiman Bhai Jiwa" [PLD 1970 SC 80] it has been observed and held as follows:

"No rule is more firmly established than the rule with regard to retrospective operation of a statute law. It is a fundamental rule of law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication (see Maxwell on the Interpretation of Statutes, 9th edition, page 221 and Treaties on Statute Law by Craies, 4th Edition, page 329). It follows from this rule that retrospective effect to a statute may be given either by express words or that the same may be inferred from the language employed."

In the case titled "Muhammad Hussain and others v. Muhammad and others"[2000 SCMR 367] the august Supreme Court has observed and held as follows:

"It is a well-settled principle of interpretation that there is a strong presumption against the retrospectivity of a legislation which touches or destroys the vested rights of the parties. No doubt the Legislature is competent to give retrospective effect to an Act and can also take away the vested rights of the parties, but to provide for such consequences, the Legislature must use words which are clear, unambiguous and are not capable of any other interpretation or such interpretation follows as a necessary implication from the words used in the enactment. Therefore, while construing a legislation which has been given retrospective effect and interferes with the vested rights of the parties, the words used therein must be construed strictly and no case should be allowed to fall within the letter and spirit of Act which is not covered by the plain language of the legislation."

It has been further observed:

"We have already stated that while construing a provision, which is retrospective in operation and touches the vested rights of the parties, the words used therein

cannot be stretched to include those cases which do not fall within the plain and unambiguous language of the legislation.”

The above precedent law affirms that it is a settled principle that the Majlis-e-Shoora (Parliament) has plenary powers to legislate either retrospectively or prospectively provided the subject upon which legislation has been made is within its competence. Legislation which affects rights created under an existing law is presumed to operate prospectively. Rights accrued under an enacted law cannot be construed to have been taken away or impaired through subsequent legislation. The legislature indeed is competent to legislate retrospectively, even when it affects or impairs substantive rights or creates obligations but such a consequence cannot be inferred unless the legislative intent has been made obvious through express language or necessary intendment. The question of retrospectivity ought to be obvious from the language and a reading of the provisions as a whole. Every word used by the legislature indicates its intent. It is the duty of this Court to discover the intent of the legislature rather than to legislate or read into the statute something not provided therein.

Interpretation by the Authority:

15. The question whether the Petitioner Companies had an exclusive right under the respective licenses granted under section

21 of the Act of 1997 prior to the amendments made through the Amendment Act of 2018 or whether the latter have prospective or retrospective effect has been dealt with by the Authority in the impugned review determinations as follows:

“The Authority while considering the comments of distribution companies has observed that under their respective licence, exclusive rights have been granted to engage in provision of distribution services or sale of electric power in their respective Service Territory. However, through the Modification the said assurance has been dispensed contrary to its legitimate expectations and settled principles of law. In consideration of the said, the Authority will like to highlight that it is true that distribution companies were granted an exclusive licence however, the same was subject to the provisions of the Section-22 of the NEPRA Act as enshrined in terms of Article-7 of the granted distribution licences. In view of the said, the Authority is of the considered opinion that by allowing the modification of FEL the provisions of the NEPRA Act have been strictly adhered with and therefore, no infringement of exclusive rights of distribution companies has occurred.”

The Authority has definitely misinterpreted the provisions of the Act of 1997. It has been acknowledged that

the rights granted under the licenses were exclusive. However, the Authority fell in error by misinterpreting the provisions of section 22 because it had ceased to be effective after the specified date. It is an admitted position that the impugned determination made by the Authority was after the specified date. Moreover, as noted above, Article 7 of the licenses could not have been applied in isolation nor in derogation of the parent statute i.e. the Act of 1997. The language used by the legislature while amending the said statute through the Amendment Act of 2018 can by no stretch of the imagination be construed as having retrospective effect and thus taking away or impairing the exclusive rights of the Petitioner Companies. After section 22 had ceased to be effective because of lapse of the specified date provided therein, the Authority was no more empowered to permit the sale of electricity thereunder and the consent of the concerned distribution company. It also appears to this Court that the Authority has wrongly assumed that modification of the license granted to the Respondent Company implies that it has become mandatory for the Petitioner Companies to enter into a wheeling agreement under the Wheeling Regulations of 2016. Needless to mention that regulation 20 explicitly attributes to the Authority the role of dispute resolution between the parties. However, it would be appropriate to refrain from making any further observations because the Authority itself has observed in the impugned review determination that the parties have not entered into a

wheeling agreement as yet. It is premature to adjudicate upon the concerns and reservations of the National Transmission and Dispatch Company because the parties have yet to enter into a wheeling agreement under the Wheeling Regulations of 2016. The observations of the Authority in this regard were also premature. The modification of the generation license of the Respondent Company cannot substitute the fulfillment of requirements prescribed under the Wheeling Regulation of 2016. Moreover, since the exclusivity of the right to supply and sell electricity under the licenses granted to the Petitioner Companies has survived the amendment made through the Amendment Act of 2018, therefore, the amended provisions cannot take away or impair the exclusive rights.

Conclusion:

16. In the light of the above discussion, the petitions in hand are **allowed** and the impugned Review Determination, dated 28.05.2020, is hereby **set aside** by holding and directing as follows:

(a) The amendments made in the Act of 1997, through the Amendment Act of 2018, are prospective and do not affect or impair the exclusive rights possessed by the Petitioner Companies under their respective

licenses granted under section 21. The exclusivity of the right is for such period as has been specified under their respective licenses.

(b) The Authority was not empowered to grant permission under section 22 of the Act of 1997 after the said provision had ceased to remain effective due to lapse of the specified period. The amended section 22 cannot be construed to have taken away or impaired the 'exclusive right' which was possessed or acquired by the Petitioner Companies when their respective licenses were granted. The latter continue to enjoy the exclusive right, which cannot be taken away or impaired without their express consent.

(c) The terms and conditions, particularly Article 7 of the respective licenses, are subservient to the statutory provisions and have to be read and construed as such. Article 7, therefore, has to be interpreted in the above terms.

(d) The review petitions filed by the Petitioner Companies shall be treated as pending and decided by the Authority afresh after affording the parties an opportunity of hearing and, inter alia, taking into consideration the interpretation of the relevant provisions as discussed in this judgment.

(CHIEF JUSTICE)

Announced, in open Court, on **08-07-2021.**

(CHIEF JUSTICE)

Approved for reporting.