



National Electric Power Regulatory Authority
ISLAMIC REPUBLIC OF PAKISTAN
NEPRA Head Office,
Attaturk Avenue (East), Sector G-5/1, Islamabad.
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**Consumer Affairs
Department**

TCD.06/ *S110* -2019
May 08, 2019

1. Chief Executive Officer
Multan Electric Power Company (MEPCO)
MEPCO Complex, WAPDA Colony,
Khanewal Road, Multan.
2. Chief Executive Officer
Central Power Purchasing Agency Guarantee Limited (CPPA-G),
NEECA Building, Sector G-5/2,
Islamabad.
3. Chief Executive Officer
Fatima Energy Limited,
E-110, Khayaban-e-Jinnah,
DHA Boulevard, Lahore Cantt.

Subject: ORDER OF NEPRA CONSUMER COMPLAINTS TRIBUNAL IN THE MATTER OF COMPLAINT FILED BY FATIMA ENERGY LIMITED (FEL) UNDER SECTION 39 OF THE NEPRA ACT, 1997 AGAINST CPPA-G AND MEPCO REGARDING NON-PAYMENT OF DUES FOR DELIVERED ENERGY MEPCO-759/09/2018

Enclosed find herewith Order of the NEPRA Consumer Complaints Tribunal for further necessary action, please.

Encl: As above


(Danish Ali Shah)
Deputy Director
8/5/19

Copy to:

C.E/ Customer Services Director, MEPCO,
MEPCO Complex, WAPDA Colony,
Khanewal Road, Multan.



BEFORE THE
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY (NEPRA)

Consumer Complaints Tribunal

Complaint No. MEPCO-759/09/2018

Fatima Energy Limited **Complainant**
E-110, Khayaban-e-Jinnah, Lahore Cantt,
Lahore

Versus

Central Power Purchasing Agency (Guarantee) Limited **Respondent 1**
ENERCON Building, G-5/2, Islamabad

Multan Electric Power Company **Respondent 2**
MEPCO Complex, Khanewal Road,
MEPCO Colony
Multan

Date of Hearings: 19th September 2018
10th October 2018
30th October 2018
22nd November 2018
2nd January 2019

Date of Decision: May 08, 2019

On behalf of:

Petitioner: 1) Barrister Asghar Khan, Legal Counsel
2) Mr. Faisal Atta, Advocate
3) Mr. Waqas Masood, Commercial Manager FEL
4) Mr. Rafiq Ahmad, Manager Legal
5) Mr. Zain Tariq
6) Mr. Amer Baloch, Commercial Head

Respondent No. 1: 1) Mr. Majid Khan, Chief Legal Officer
2) Mr. Hisham Humayun
3) Mr. Amir Ashraf, Deputy Manager
4) Mr. Aslam
5) Mr. Jamal Zamurrad, Deputy Manger

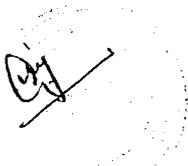
Respondent No. 2: 1) Mr. Shazeb Khan, Legal Counsel
2) Mr. Badar Iqbal Chaudhry, Legal Counsel
3) Mr. Muhammad Arshad Dharala, Addl. Manager



Subject: **ORDER IN THE MATTER OF COMPLAINT FILED BY FATIMA ENERGY LIMITED UNDER SECTION 39 OF THE REGULATION OF GENERATION, TRANSMISSION AND DISTRIBUTION OF ELECTRIC POWER ACT 1997, AGAINST MEPCO/CPPAG REGARDING NON PAYMENT OF DUES FOR DELIVERED ENERGY**

ORDER

1. This Order shall dispose of the complaint filed by Fatima Energy Limited (hereinafter referred to as the **Complainant**, the **Petitioner** or **FEL**), vide letter no. FEL/NEPRA/200818/0650 dated 20th August 2018 wherein they have sought a declaration of rights to energy dispatched by them to the Multan Electric Supply Company Limited (hereinafter referred to as the **Respondent No. 2** or **MEPCO**) and a restraining order against MEPCO & CPPA-G for disconnection of FEL's energy supply for non-payment of bills until the instant dispute has been resolved.
2. The facts of the case are that FEL is a company incorporated under the Companies Act 2017 (formerly the Companies Ordinance 1984) with the objective of building and operating a 120MW power project in Multan. MEPCO and the Central Power Purchasing Agency (hereinafter referred to as **Respondent No. 1** or the **CPPA-G**) are government functionaries. MEPCO is a distribution company licenced under the Regulation of Generation, Transmission and Distribution of Electric Power Act 2017 (the **NEPRA Act**) to undertake procurement and sale of electric power. The CPPA-G is an entity registered under the NEPRA Act and the National Electric Power Regulatory Authority (Market Operator Registration, Standards and Procedure) Rules, 2015 (the **Market Rules**) that functions as an agent of MEPCO (and other distribution companies) for fulfilling specific obligations (of procurement, generation invoicing, billing, collection etc.) on their behalf.
3. Within this regulatory framework, FEL was granted a generation licence by NEPRA under Section 14B (formerly Section 15) of the NEPRA Act on 31st December 2013 for their 120MW power project. The said licence authorized FEL to establish and operate their generation facility and to disperse their energy into MEPCO's distribution network for eventual delivery to 4 Bulk Power Consumers (**BPCs**) and other such Bulk Power Consumers that FEL could subsequently include in their licence vide a licence modification. To implement this framework, a wheeling agreement was signed between MEPCO and FEL on 16th May 2014 (hereinafter referred to as the **EWA**), which would govern the terms and conditions by which FEL would use MEPCO's distribution network to 'wheel' and deliver energy from its power plant to its designated BPCs.
4. Subsequently, FEL decided to expand the scope of their project and, in addition to its originally envisioned BPCs, sought to disperse/sell energy to distribution companies as well (through the CPPA-G). To implement this regime, FEL's original generation licence was modified with NEPRA's authorization, on 14th September 2015, which (to date) authorizes FEL to sell power to the original 4 BPCs, CPPA-G, XW-DISCOs, KEL and any other BPC using NTDC's network. Sale to the original 4 BPCs would continue under the same wheeling arrangement as before.
5. FEL was further granted a generation tariff by NEPRA on 17th June 2016.
6. FEL completed construction of its power project and initiated the plant's testing phase. In this regard, an agreement was signed between FEL and CPPA-G on 17th October 2016 (the **Interim Arrangement**) under which various technical components of the FEL power plant were to be tested jointly by the CPPA-G and FEL to ensure synchronization of the plant with the national grid.
7. After conclusion of the plant's testing phase, another agreement was signed between FEL and the CPPA-G on 15th February 2017 (the **Interim Agreement**) under which FEL would supply and sell power to the CPPA-G. The Interim Agreement also expressly suspended the EWA for the term of the agreement and rescinded the Interim Arrangement (See Clauses C (page 1) and 3.6 (page 3) of the Interim Agreement).



8. To summarize, FEL has executed the following contracts and holds the following regulatory authorizations relevant to the instant dispute:

Table 1.
Licence, Tariffs and Contracts Executed by Fatima Energy Limited

Sr. No.	Name	Effective Date		Description
		From	Till	
Licenses and Tariffs				
1.	Generation License	31 st December 2013	29 th June 2046	Initially granted for <u>sale of power limited to 4 BPCs</u> . Later expanded (vide modification dated 14.09.2015) to also include <u>sale of power to MEPCO / NTDC / CPPA-G</u>
2.	Generation Tariff	17 th June 2016	17 th June 2046	Tariff for generation and sale of power by FEL
Contracts and Agreements				
3.	Energy Wheeling Agreement (EWA)	16 th May 2014	Suspended by the Interim Agreement *	For sale of power to BPCs (using MEPCO's network).
4.	Interim Arrangement	17 th October 2016	Superseded by the Interim Agreement *	For FEL power plant testing
5.	Interim Agreement	15 th February 2017	Execution of PPA between the Parties	For sale of power to MEPCO / NTDC / CPPA-G

* as per the clauses of the Interim Agreement

9. FEL has now filed the instant complaint being aggrieved by MEPCO's refusal to pay for approximately 31,469,900 kWhs (hereinafter referred to as the **Impugned Units**) of energy exported by FEL to MEPCO during the time period of the above contracts and by MEPCO's concurrent raising of invoices for 3,562,340 kWhs imported/consumed by FEL (hereinafter referred to as the **Consumed Units**) during the same time periods. FEL has sought recognition of their legal rights to payment or draw-down of the power generated and evacuated by FEL. FEL has further sought directions for adjusting/setting-off any units imported by FEL against those exported.

10. In addition to the complaint, FEL also filed an application for early hearing and interim injunction against MEPCO before NEPRA on 30th August 2018. FEL concurrently also filed W.P. No. 230677/2018 before the Honorable Lahore High Court seeking the court's directions against NEPRA to decide the interim injunction application and to restrain MEPCO from disconnecting FEL's power supply till a final decision by NEPRA on the dispute. The Honorable Court, vide order dated 3rd September 2018, disposed of the petition with directions to NEPRA to decide the interim injunction application within one week's time. The operative excerpt of the order is reproduced hereunder for reference:

"2. The request of the learned counsel is tenable, which has not been opposed by the learned counsel for the Respondent. Therefore, Respondent No. 3 (NEPRA) is directed to decide the pending stay application of the Petitioner dated 30.08.2018 in accordance with law through a speaking order after hearing all the necessary parties within one week of receipt of certified copy of this order."

Order of the Honorable Lahore High Court dated 03.09.2018
in W.P. No. 230677/2018

11. In compliance of the foregoing order, a hearing was scheduled for 17th September 2018 at NEPRA's Head Office to decide the pending stay application and the parties were intimated of the same vide a hearing notice dated 13th September 2018. However, an application for rescheduling of hearing to was submitted by FEL's counsel on 14th September 2018, on account of their lead counsel being engaged before the Honorable Peshawar High Court. Accordingly, the hearing was rescheduled for 19th September 2018 at NEPRA Head Office. Representatives of FEL, CPPA-G and MEPCO attended the hearing and submitted arguments on the subject of the pending stay application. The Consumer Complaints Tribunal accordingly decided the pending stay application, vide order dated 24th September 2018, operative excerpts of which are reproduced below.

"8. The Tribunal has heard the arguments of the parties and has perused the documents on record. It is observed that the matter is complex and intricate in nature and requires detailed arguments and comments from the parties before it can be disposed of.

9. In view thereof, the Tribunal hereby directs the Respondents to submit detailed comments on the instant complaint before the next date of hearing to be held on 10th October 2018 at NEPRA Head Office, Islamabad. Meanwhile, the Respondents are restrained from disconnecting the electricity supply of the Petitioner till the next date of hearing."

Order of the NEPRA Consumer Complaints Tribunal dated
24/09/2018 in the matter of W.P. 230677/2018 referred to
NEPRA vide order of the Lahore High Court dated 03/09/2018
and complaint filed by FEL

12. Thereafter, hearings on the instant dispute before the Consumer Complaints Tribunal took place on 10th October 2018, 30th October 2018, 22nd November 2018 and 2nd January 2019. Numerous submissions, documents and pleadings have been submitted by the parties. Consolidated arguments are as follows.

13. Learned counsel for FEL have submitted that MEPCO is liable to pay FEL under the terms of the EWA for 27,907,560 kWhs of net power generated by it. The units dispersed from December 2016 to February 2017 were done so under the provisions of the EWA (being operative at that time) and since the said units were not successfully 'wheeled' to the target BPC, they stood 'banked' as per the provisions of the EWA. The EWA was also operative after February 2017, since its suspension under the Interim Agreement was vindicated by the latter agreement getting frustrated on account of FEL's Letter of Support getting cancelled on 12th January 2018. Therefore 31,469,900 kWhs of energy (Impugned **Units**) fall under the provisions of the EWA and MEPCO is liable to pay for these units that MEPCO had failed to 'wheel'.

14. FEL further submitted that, in accordance with the set-off and/or sale of banked energy clauses in the EWA, the 3,562,340 kWhs (**Consumed Units**) and the 6,877,060 kWhs (hereinafter referred to as the **Back-Feed Units**) of power it has imported/consumed during the concerned time period should be net-off against the outstanding Impugned Units.

15. Learned counsel for MEPCO have submitted an extensive narration of the history and background of the FEL power project and have contended that the power project was initially envisioned under a 'Wheeling to BPC Arrangement' but was later converted into an 'IPP' for the exclusive supply and sale of power to the CPPA-G. This is evident from the modification in licence, tariff obtained from NEPRA and the Interim Agreement executed with CPPA-G (as an interim measure until execution of PPA). Having converted to the IPP framework (i.e supply/sale of power exclusively to the CPPA-G), the earlier Wheeling framework stood abandoned by FEL itself and therefore the EWA executed under the said framework could not be exploited by FEL to claim arrears against MEPCO at this stage. Furthermore, the Impugned Units fell under the provisions of the Interim Arrangement (and were therefore free-of-cost) since all contracts under the 'Wheeling' framework (and specifically the EWA) stood repudiated due to execution of the latter Interim Arrangement. FEL is further estopped from claiming arrears under earlier agreements (the EWA specifically) due to execution of latter contrary agreements.

16. Learned counsel for MEPCO have also submitted that the energy exported by FEL was taken by MEPCO with the legitimate belief that the Interim Arrangement was operational at that time. This belief is based on clarification letters forwarded by MEPCO to the CPPA-G, and the latter's responses thereupon, which stated that the Interim Arrangement was in operation till execution of a PPA. During the concerned time period, FEL was in the process of negotiating a PPA with the CPPA-G, which has to date not been executed. Therefore, the intent of the contracting parties was clear in this regard, as evidenced by the relevant correspondences between MEPCO and CPPA-G, and that the exported Impugned Units fell within the purview of the Interim Arrangement (and were therefore free-of-cost).

17. MEPCO has further argued that, even if the EWA is held to be in field during the relevant time period, FEL had not complied with the mandatory conditions of the EWA to commence wheeling of power, namely issuance of a Wheeling Notice. FEL had failed to provide a satisfactory wheeling notice to MEPCO for the Impugned Units and therefore said units could not be construed to fall under the EWA (for non-compliance of mandatory provisions of contract).

18. Learned counsel for CPPA-G have submitted that the invoices raised by them for energy imported by FEL have been done so under the latter Interim Agreement and the said agreement does not envision any setting-off or credit energy arrangement. The setting-off/credit energy framework is found only within the provisions of the EWA and cannot be applied to the other disputed units of power, that have been consumed by FEL under a different contract (i.e. the Interim Agreement). Therefore, FEL's prayer regarding setting-off/crediting the Back-Feed Units and Consumed Units is not sustainable for being outside the scope of applicable contractual provisions.

Issues

19. We have heard the parties extensively and gone through the record. The Complainant's claim rests upon applying the provisions of the EWA on the disputed units of power and the Respondents have submitted various propositions on the same subject. As such, from the submissions and arguments of the parties, the issues to be adjudged may be framed as follows:

- (i) Whether conversion from a 'Supply to BPCs' to 'Supply to the National Grid' framework by FEL has any bearing on the EWA or the other contracts/agreements relating to the impugned matter?
- (ii) Whether MEPCO's reliance on the initial clarifications issued by CPPA-G, qua its energy procurement agent, is sufficient to construe energy exported by FEL to be free-of-cost?
- (iii) Whether the impugned units of power fall within the purview of the EWA or otherwise and can the said units be set-off/credited against one another?
- (iv) Subject to findings on the above issues, what rates would be applicable and payable on the disputed units?

Findings

Whether conversion from a 'Supply to BPCs' to 'Supply to the National Grid' framework by FEL has any bearing on the EWA or the other contracts/agreements relating to the impugned matter?

20. Generation power projects generally fall under one of two categories, those established for sale of power to the national grid and those established for sale of power to other parties, entities or consumers. Procurement of energy towards the national grid is necessary in order to supply energy to the government-owned distribution companies (like MEPCO), which in turn service the general public. The terms, conditions, concessions and incentives upon which power

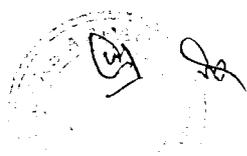
procurement for the national grid is undertaken are governed by Power Policies prescribed by the Federal and Provincial Governments for the purpose. Examples include the 2006 Policy for Development of Renewable Energy for Power Generation, which granted incentives to power projects like mandatory purchase of power and allocation of resource variability risk to the power purchaser. Power projects seeking to avail a Power Policy are required to be eligible for the concerned policy and need to acquire additional regulatory documents, such as a government Letter of Support. These requirements are in addition to the mandatory regulatory authorizations to be acquired under the NEPRA Act, including a generation license and generation tariff.

21. The other category of power plants are those which are established for supplying power otherwise than for the national grid. These projects are generally not covered under power policies and therefore do not avail any policy concessions or incentives. They are also naturally excused from other policy-related authorizations; but the requirements of the NEPRA Act are regardless applicable.

22. In addition to the above requirements, power plants also need to establish frameworks for transporting power from their generation facilities to the intended end-consumer or buyer. For this purpose, government-sponsored/policy power projects execute power purchase agreements with the CPPA-G, which generally contains provisions for allowing energy to flow through the national grid and distribution networks. However, other projects (that lack governmental/policy sponsorship) need to execute a 'wheeling agreement' with the concerned distribution and/or transmission company for use of their networks.

23. With the above context, it is the Respondent No. 2's (MEPCO) case that FEL was originally being established for supplying power to specific bulk power consumers, as evidenced by the original generation licence granted to it by NERPA dated 31st December 2013. For this purpose it had signed the EWA dated 16th May 2014 for use of MEPCO's network to wheel power to the designated bulk power consumers. However, FEL subsequently and unilaterally converted its status from 'supplying to bulk power consumers' into 'supplying to the national grid', by obtaining an LOS under the 2008 National Policy for Power Co-Generation by Sugar Industry & Guidelines for Investors (the **Co-Gen Policy**) and modifying its generation licence to allow for sale to the NTDC/CPPA-G. As such, FEL had entirely forsaken the earlier 'supplying to bulk power consumers' framework in favor of the 'supplying to the national grid' framework and cannot at this stage proffer the EWA (being a 'supply to BPCs' framework document) as the basis for its claims against MEPCO. The EWA stood rescinded and inoperative upon FEL's decision to shift its framework and upon executing agreements (i.e. the Interim Agreement) to implement the latter framework.

24. The underlying argument forwarded by MEPCO is that FEL now stands converted into a 'supply to the national grid' framework and is therefore no longer eligible to function within the 'supply to BPCs' framework. However, this argument stems from a misappraisal of the underlying facts and applicable law. There is no statutory bar under the NEPRA Act on a power project to be limited to a single scheme or arrangement. On the contrary, the NEPRA Act recognizes the possibility of a dual scheme power project under Section 14C(1), where a Captive Power Plant (self-consumption) can also supply power through the grid. With regards to the FEL power project specifically, its evolution is well-documented and a matter of record (reference is made to the NEPRA's current tariff redetermination for FEL dated 18th January 2018 issued in pursuance of the orders of the Honorable Islamabad High Court in W.P. 3858/16). Accordingly, the power project currently holds regulatory approvals granted by NEPRA for selling power to both the NTDC/CPPA-G and to BPCs (under its generation licence modified as of 14th September 2015). As such, FEL does not fall exclusively under (or is limited to) either the 'supply to the national grid' or the 'supply to BPCs' framework and has obtained the necessary regulatory authorizations to function under either framework. FEL possesses the legal capacity to execute agreement/contracts relating to either scheme/framework/regime since it possesses the requisite regulatory authorizations to do so. Therefore, the notion that FEL is limited to a single scheme/framework/regime and has repudiated one in favor of the other is contrary to the underlying facts and applicable law. MEPCO's submissions regarding the EWA being repudiated (due to it being a framework-specific contract) is therefore untenable.

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Whether MEPCO's reliance on the initial clarifications issued by CPPA-G, qua its energy procurement agent, is sufficient to construe energy exported by FEL to be free-of-cost?

25. MEPCO has argued that at the time it was receiving the disputed units of power from FEL, it was under the legitimate belief that the same was free-of-cost under the Interim Arrangement. When the initial subject of 'wheeling' was broached by FEL, vide their letter dated 2nd December 2016, MEPCO resorted to seek clarification from the CPPA-G on the matter, vide letters dated 16th December 2016 and 19th December 2016. CPPA-G responded, vide letter dated 23rd December 2016, that the Interim Arrangement was in operation till execution of a PPA and that the CPPA-G and FEL were currently negotiating the same. Evidently relying on this letter, MEPCO wrote to FEL that wheeling could not be commenced and that the Interim Arrangement was in effect, vide letters dated 28th December 2016 and 4th January 2017, and effectively maintaining the view that the power being exported by FEL was Interim Arrangement free-of-cost power.

26. However, the events and arrangements subsequent to these facts are worth examining. Since a PPA was not nearing finalizing between the CPPA-G and FEL, the parties decided to execute the Interim Agreement, on 15th February 2017, for supply of power to the CPPA-G till execution of a PPA. The Interim Agreement 'superseded' the Interim Arrangement as per recital (C) of the agreement (reproduced below for reference). It is relevant to mention that this Interim Agreement was signed by CPPA-G in its capacity as an agent of MEPCO.

- (C) Company has successfully conducted internal tests as per Annexure B of the Interim Arrangement dated 17th October 2016 (the "Interim Arrangement"). The Interim Arrangement shall be superseded on the date of the effectiveness of this Agreement

Clause (C) of the Interim Agreement executed 15.02.2017
between CPPA-G and FEL

27. On the subject of power already supplied by FEL, the parties agreed under the Interim Agreement that the energy already delivered during tests conducted under the Interim Arrangement was to be free of cost (relevant clause reproduced below for reference). It is worth highlighting that as per the contractual clause 3.4, 'power delivered during tests' was agreed to be free of cost, which is distinct from a provision that may have stated that 'all power delivered under the Interim Arrangement' was free of cost. As per the Interim Agreement, the parties agreed to limit free-of-cost power to the testing period of the power plant and not to the entire term or operation of the Interim Arrangement. MEPCO's contentions in this regard are contrary to this position, since they are based on an understanding that the free-of-cost power was linked to operation of the Interim Agreement (a legal matter) as opposed to being linked to the testing time period of the power plant (a factual matter). However, clause 3.4 of the Interim Agreement is abundantly clear; that only power supplied during tests was to be free-of-cost, which requires a factual assessment of the time period of FEL's plant testing.

3. Sale and Purchase of Energy

3.1 The parties agree that the energy that has already been delivered during tests conducted as per Annexure B of the Interim Arrangement shall be free of cost. However, Net Electric Output purchased after the signing of this Agreement shall be invoiced for at the Price under this Agreement.

Clause 3.1 of the Interim Agreement executed 15.02.2017
between CPPA-G and FEL

28. From the perusal of record, it is evident that the FEL power plant's testing concluded on 27th November 2016. Various correspondences of the parties evidence this fact, as summarized below:

Table 2

Sr. No.	Description	Date	Excerpt
1.	Letter from CPPA-G to Chief Engineer/ C.S Director MEPCO	23 rd February 2017	... as per this Arrangement and Interim Arrangement any power generated and supplied during these tests to the National Grid is "Free of Cost" till completion of these tests. Fatima Energy completed these tests on 27 th November 2017.*
2.	Letter from Chief Engineer/C.S MEPCO to Regional Manager MEPCO	24 th April 2017	With reference to above, supply of free of cost energy during the period of testing as per Annex-B of Interim Arrangement Agreement dated 17 th October 2016 has been completed on 27 th November 2016

* mistyped by CPPA-G and should have read 27th November 2016. This error is acknowledged by MEPCO itself in their subsequent letter dated 24th April 2017 wherein the correct date is mentioned when referring to the CPPA-G letter.

29. In view thereof, and regardless of the legal controversy regarding operative time periods of the impugned contracts, the contractually agreed free-of-cost power was limited to testing of the FEL power plant and not to the operation of the Interim Arrangement (for whatever time period that may be). Moreover, even if it is held that all power supplied by FEL under the Interim Arrangement was to be free-of-cost (on the basis of CPPA-G's earlier submissions and MEPCO's reliance thereupon or any other ground), any rights to non-testing free-of-cost power that may have accrued in favor of MEPCO under the Interim Arrangement stood expressly relinquished upon execution, by MEPCO's agent (the CPPA-G), of the subsequent (and superseding) Interim Agreement, which expressly states that only testing-power under the former Interim Arrangement was to be free of cost.

30. As such, free-of-cost power under the impugned contracts is limited to FEL's testing period (i.e. till 27th November 2016) and any power supplied thereafter cannot fall under the free-of-cost energy banner under the Interim Arrangement. Only power supplied during the testing period (i.e. before 27th November 2016) by FEL was expressly agreed to be free-of-cost by the parties.

31. Therefore, MEPCO's submissions, regarding reliance on CPPA-G's submissions as grounds for construing FEL's power to be free of cost after 27th November 2016, are contrary to the expressly agreed terms of the Interim Agreement and the connected factual position in the matter.

Whether the impugned units of power fall within the purview of the EWA or otherwise and can the said units be set-off/credited against one another?

32. Having established that free-of-cost units under the Interim Arrangement were limited to those related to the testing phase of the plant, the emanating issue is the treatment of the remaining disputed units (i.e. whether the non-testing units fall under the EWA or otherwise).

33. In the instant case, FEL has claimed arrears for the Impugned Units and also prayed for setting off/adjusting its dues for imported units (i.e. the Consumed Units and the Back-Feed Units) against the exported units (i.e. the Impugned Units) as per the provisions of the EWA. MEPCO however has argued that the EWA has been effectively inoperative during the relevant time period and that all these units were imported/exported under the Interim Arrangement and the Interim Agreement, under which units exported were free of cost and units imported were chargeable. Furthermore, these units could not be set-off/adjusted against one another since such a framework was only envisioned under the EWA and not under the applicable interim contracts. Therefore, MEPCO is not liable to pay for free-of-cost exported units and FEL is liable to pay for imported units (which cannot be set-off).

34. We have already established that only testing-units fall under the provisions of the Interim Arrangement. For establishing whether the remaining non-testing units fall under the provisions of the EWA, it is necessary to ascertain the operative period of the EWA (and connected/overlapping contracts) and appraise the time periods of the imported and exported units against the EWA's operative period. For reference, the dates relating to the Impugned Units, the Consumed Units and the Back-Feed Units, as evidenced from MEPCO's energy records attached to letter dated 27th April 2017, are reproduced below:

Table 3.
*Units Imported and Exported by FEL**

Sr. No.	Name	Description	No. of Units (kWhs)	Dates	
				From	Till
1.	<i>Impugned Units*</i>	Exported by FEL	31,469,900	Dec 2016	15 th Feb 2017
2.	<i>Consumed Units*</i>	Imported by FEL	1,105,100	5 th Nov 2016	27 th Nov 2016
			2,458,080	28 th Nov 2016	15 th Feb 2017
3.	<i>Back-Feed Units</i>	Imported by FEL	6,877,060	15 th Feb 2017 onwards	

**as evidenced by MEPCO's records attached to letter dated 27th April 2017*

Time period of operation of the EWA

35. Having perused the record at length, there appears to be nothing on record to suggest that any of the parties to these proceedings (MEPCO, FEL or CPPA-G) ever expressly terminated the EWA. Termination of the EWA is governed by Part 16. Event of Default and Termination of the contract and neither party has exercised or effected these contractual terms. The EWA was only rendered legally inoperative through the latter Interim Agreement (relevant clause reproduced below), through which the parties expressly agreed to suspend (not terminate) the EWA. Therefore, no express termination of the EWA is ascertainable from the facts of the case.

3.6. Parties agree that Energy Wheeling Agreement dated 16th May 2014 by and between MEPCO and the Company shall be suspended during the tenure of the Agreement

Clause 3.6. of the Energy Wheeling Agreement executed on 16.05.2014
between MEPCO and FEL

36. MEPCO has however argued that there has been an implied termination or repudiation of the EWA when FEL opted to execute the Interim Arrangement and the Interim Agreement and convert their project's framework. This interpretation is misconceived. As discussed in the preceding paragraphs, the 'supplying to BPCs' and 'supplying to the national grid' frameworks are not mutually destructive or inconsistent and that, regardless, FEL possesses the necessary regulatory authorizations to operate under either framework. These regulatory authorizations, alongside a lack of express termination of the EWA, suggests that FEL has elected to keep the necessary authorizations/agreements operative till date, which would allow it to function under either framework. Therefore, the relevant facts do not support the notion of an implied termination or repudiation of the EWA.

37. In addition to and regardless of the above facts, the existence and legal effect of the EWA has itself been recognized by FEL and CPPA-G in a subsequent contract (Clause 3.6 of the Interim Agreement - reproduced above), where both parties agree to suspend the EWA. This would not have been necessary had an express or implied termination of the EWA been effected earlier.

38. Therefore, it is evident that, in the absence of any express or implied termination, the EWA has remained legally operative from its date of execution (16th May 2014) till its date of suspension (15th February 2017).

CM *JS*

39. FEL's submissions regarding a later unsuspension of the EWA (due to LOS-related termination of the Interim Agreement) are also untenable, since existence of the LOS is not a fact essential to the operation of the Interim Agreement.

40. We now revert to resolving the individual categories of disputed units of power against the operative time periods of the relevant contracts and agreements

The Back-Feed Units

41. The Back-Feed Units were imported by FEL after 15th February 2017. The Interim Agreement is the sole agreement that has remained operative after 15th February 2017 and therefore the Back-Feed Units necessarily fall under its provisions. These units cannot be set-off or credited against any other units of power since such an arrangement would be beyond the contractual provisions of the Interim Agreement.

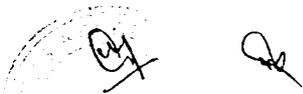
The Impugned Units

42. Reverting to the Impugned Units, these units of power were exported prior to 15th February 2017. Both the EWA and the Interim Arrangement were concurrently operative during this time and therefore further examination of the underlying facts and objects/purpose of these agreements is necessary.

43. The Interim Arrangement (executed on 17th October 2016) was for the purposes of 'internal testing' and 'synchronization of the plant with the grid' as per the contract recitals. The EWA (executed earlier on 16th May 2014) was for the purpose of 'using the Distribution System for transport of Input Energy to the BPCs' as per the contract recitals. Both agreements have distinct objects and purposes, where the EWA establishes the arrangement for FEL to deliver power to its consumers and the Interim Arrangement is limited to plant testing and synchronization. The relevant facts in the instant case have to be construed in accordance with these expressly defined objects of contract.

44. From the record it is evident that the FEL power plant's testing was completed as of 27th November 2016. This state of affairs has been expressly admitted by the CPPA-G and MEPCO in their letters on record, dated 23rd February 2017 and 24th April 2017 respectively. During the course of the proceedings, CPPA-G, being the other party to the Interim Arrangement, has also submitted that the said arrangement stood discharged by performance on accomplishment of internal testing and synchronization of the plant with the National Grid on 27th November 2016. As such, the record and submissions of the parties to these proceedings suggest that the Interim Arrangement was utilized for its objects and purpose only between 17th October 2016 and 27th November 2016. Upon the latter date, the FEL power plant had evidently completed its testing and synchronization for which the Interim Arrangement had been executed. Therefore, no units of power generated after 27th November 2016 can conceivably be construed to fall under the Interim Arrangement and therefore to have been supplied free-of-cost.

45. Directly after concluding testing and synchronization on 27th November 2016, FEL issued a notice to MEPCO, dated 2nd December 2016, which stated that the power plant was ready for commissioning and that they intended to wheel power to bulk power consumers (named specifically in the letter). MEPCO has also raised issue with this 'notice' arguing that it was not a sufficient 'wheeling notice' as per clause 13.1 of the EWA (reproduced below for reference), provision of which is a mandatory condition of contract to commence wheeling and any power supplied in the absence of such notice cannot fall under the provisions of the EWA. However, upholding this position would be inequitable keeping in view the underlying facts of the matter. It is an evidenced and admitted fact that FEL has generated the Impugned Units (incurring the associated costs of power generation), that MEPCO has received the Impugned Units, and that instead of wheeling the Impugned Units (as per the EWA) MEPCO has utilized/consumed the Impugned Units. Being the recipient of goods, MEPCO was to ensure that the goods being forwarded by FEL were in compliance of the contractual provisions currently in dispute and upon finding defect should have rejected said goods. Having accepted



(and even utilized/consumed) the disputed goods, MEPCO cannot condone its own non-compliance of contract (by not wheeling the Impugned Units) through *ex post* objections regarding contractual non-compliance on part of the wheeler. MEPCO was under contract with FEL to wheel power to designated BPCs, which MEPCO has admittedly failed to do in the instant case and instead consumed/utilized FEL's goods that were meant to be wheeled. As such, MEPCO's admitted acceptance and consumption/utilization of goods renders the insufficient wheeling notice ground as moot.

46. In view thereof, the units of power supplied by FEL under the alleged 'wheeling notice' (after 2nd December 2016) fall under the provisions of the EWA and are to be construed accordingly. FEL has supplied approximately 31 million kWhs of power (i.e. the Impugned Units) from December 2016 to 15th February 2017. These units cannot be construed as free-of-cost testing units under the Interim Arrangement, but were supplied under the provisions of the EWA to MEPCO for wheeling and delivery to designated BPCs; and, in the event of failure to wheel (as has transpired in the instant case), are to be designated as 'banked units' as per clause 11.1 of the EWA (reproduced below for reference).

11.1 Banked Energy

Where a BPC is unable for whatsoever reason, to accept delivery of the Output Energy at the Exit Point, or where MEPCO fails to transport Input Energy to an Exit Point (unless an Excusable Event others), in terms of the Wheeling Notice or the revised Wheeling Notice, as the case maybe (the "Banked Energy"), such banked electrical energy or any part thereof, shall be delivered to the Exit Point, requested by the Supplier, within thirty (30) Days of such request (regardless of whether MEPCO has paid liquidated damages for such failure, pursuant to Section 9.1 (*Failure to Transport*)).

If MEPCO fails to deliver Banked Energy within the aforesaid thirty (30) Days, it shall pay liquidated damages to the Supplier calculated in terms of Schedule 4 (*Liquidated Damages*). Such liquidated damages shall be in addition to the liquidated damages payable by MEPCO pursuant to Section 9.1 (*Failure to Transport*).

MEPCO shall, in accordance with the MEPCO Tariff Determination, separately bank energy as "*peak-hours energy*" and "*off-peak-hours energy*".

The Consumed Units

47. Having determined the operative time periods of the relevant contracts, treatment of the Consumed Units is a straightforward matter. The Consumed Units imported prior to December 2016 fall under the provisions of the Interim Arrangement and those imported during the wheeling period (December 2016 – 15th February 2017) fall under the provisions of the EWA. Approximately 1.1 million kWhs of the Consumed Units were imported by FEL before December 2016 (see table 2. of this Order for further reference) and therefore fall under the provisions of the Interim Arrangement. These cannot be set-off or credited against the exported Impugned Units (under the EWA) since these units (under the Interim Arrangement) have been imported under a separate contract that does not contain a setting off contractual mechanism

48. The remaining approximately 2,458,080 kWhs of the Consumed Units were imported by FEL during the wheeling period (see table 2. of this Order for further reference) and therefore fall under the provisions of the EWA. These imported units can be set-off against the exported Impugned Units under the EWA.

Subject to findings on the above issues, what rates would be applicable and payable on the disputed units?

49. Having determined that the applicable contracts on the disputed units, it is necessary to determine their applicable rates and consequently the quantum of arrears payable by the

parties. The imported Back-Feed Units (approximately 6.8 million kWhs) fall under the provisions of the Interim Agreement and, as per clause 3.5 thereof (reproduced below), are to be charged to FEL at the rate of bulk supply under tariff category C-3.

3. SALE AND PURCHASE OF ENERGY

3.5 Provide back-feeding and import of power to the Complex at the rate of the bulk supply tariff category C-3

50. The imported Consumed Units are governed by two contracts, the Interim Arrangement (for 1,105,100 kWhs imported prior to December 2016) and the EWA (2,458,080 kWhs imported after December 2016). The Consumed Units falling under the EWA have been set-off/credited against the Impugned Units imported under the same contract. The Consumed Units falling under the Interim Arrangement however, warrant further examination for determining their applicable rates. While the parties have not made any submissions regarding this matter in their pleadings (FEL has sought setting-off these units which cannot be done as discussed in the above paragraphs) the record shows that MEPCO and CPPA-G have maintained the view that the applicable rate on imported units under the Interim Arrangement are to be charged at tariff category C-3. The CPPA-G informed MEPCO, vide letter dated 23rd December 2016, that the Interim Arrangement was in operation till finalization of FEL's PPA.¹ Then, through a letter dated 26th January 2017, MEPCO solicited CPPA-G's opinion regarding *inter alia* the applicable rates on imported units by FEL during this Interim Arrangement time period and the CPPA-G, vide letter dated 31st January 2017, responded that the C-3 tariff should be charged till finalization/execution of FEL's PPA (i.e. while the Interim Arrangement is in operation). As such, it appears that the contracted parties envisioned imported units under the Interim Arrangement to be chargeable at the tariff category C-3. This will be applicable rate on 1,105,100 kWhs of the Consumed Units imported by FEL during the operative period of the said contract.

ORDER

51. In view of the foregoing discussion and findings, this Tribunal hereby decides as follows:

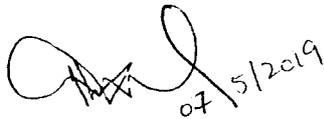
- (i) FEL shall pay the CPPA-G for the **Back-Feed Units** (6,877,070 kWhs) at the rate of bulk supply tariff category C-3;
- (ii) FEL shall pay the CPPA-G for the **Consumed Units** prior to the EWA period (1,105,100 kWhs) at the rate of bulk supply tariff category C-3;
- (iii) FEL's rights to 29,011,820 kWhs of net exported units of power are hereby recognized. The number of units has been calculated as the exported **Impugned Units** (i.e. 31,469,900 kWhs) set-off/adjusted against the imported **Consumed Units** during the wheeling period (i.e. 2,458,080 kWhs);
- (iv) MEPCO shall deliver units equivalent to the net exported units (i.e. 29,011,820 kWhs) to BPCs that FEL shall identify or notify to MEPCO, on payment of wheeling charges by FEL; or such other treatment as provided in the applicable contract (i.e. the EWA) to the benefit of FEL;
- (v) Although the numbers for the disputed units in the instant order have been taken from the documents on record, any actual variation or discrepancies in these figures may be reconciled by the parties;
- (vi) The performance of obligation i.e. payments of back feed/consumed units by FEL and delivery of banked units will take place by way of mutual agreement between the parties to ensure smooth settlement of the liabilities.

¹ The conflicting position provided by the CPPA-G in this letter has been examined in the following paragraphs

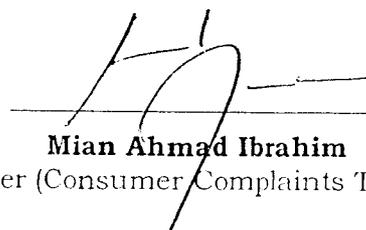
52. Before departing with this order, it is pertinent to highlight certain erroneous and inconsistent submissions that have been presented on record during these proceedings. From the numerous letters on record, CPPA-G was earlier of the view that the Interim Arrangement (for free-of-cost power) was in field during the disputed time period. However, the CPPA-G refuted its own position on the matter during the proceedings, by submitting that the Interim Arrangement had in fact been discharged by performance. These aspects are illustrated below.

Sr. No.	Description	Date	Excerpt
1.	Letter from CPPA-G to CEO MEPCO	23 rd December 2016	The Interim Arrangement is still in Operation till the PPA is finalized. Presently CPPA-G and FEL are in the process of PPA negotiation, it will be finalized in near future
2.	Written reply from CPPA-G of Queries on behalf of Respondent No. 1 pursuant to order dated 24 th January 2019 in complaint No. MEPCO-7599/08/2018	01 st February 2019	It is further affirmed that the Complainant agreed to energization, back-feeding and import of power at C-3 tariff and also agreed to accept dispatch to perform the tests and provide the energy generated as a result thereof, free of charge during the tenure of the Arrangement which terminated on accomplishment of internal testing and synchronization of plant with National Grid on 27 th November 2016. Thus it is clarified that energy supplied during the period from 27 th November 2016, till 15 th February, 2017 was not covered under the Arrangement which was categorically interim in nature, owing to the testing being complete on 27 th November, 2016 and thus, <u>the purpose/consensus ad idem of the Arrangement was accomplished on 27th November, 2016 making the contractual arrangement discharged by performance, thereby post 27th November, 2016 the arrangement ceased to exist and doesn't constitute free of cost test energy.</u>

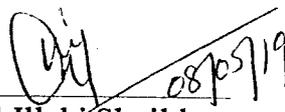
53. As such, the instant dispute would not have materialized had the CPPA-G kept a consistent and accurate position on the Interim Arrangement during its earlier dealings with the parties and the market participants would not have been embroiled in protracted dispute resolution. As such, CPPA-G is directed to ensure diligence in its future dealings with market participants, its principal DISCOs and the regulator.



Lashkar Khan Qambrani
Member (Consumer Complaints Tribunal)



Mian Ahmad Ibrahim
Member (Consumer Complaints Tribunal)



Naweed Illahi Shaikh
Member (Consumer Complaints Tribunal)