

## ENQUIRY REPORT

### **In the matter of complaint filed by 7AAYS Corporation against National Transmission and Despatch Company and others**

1. This Enquiry report has been prepared in pursuance of the enquiry authorized by the Competition Commission of Pakistan (the “Commission”) on November 12, 2012 against M/s. National Transmission & Despatch Company (NTDC) and five others alleging violation of Section 3 and 4 of the Competition Act, 2010 (the “Act”).

#### **Factual Background:**

2. The Commission received an informal complaint dated April 9<sup>th</sup>, 2012 from 7AAYS Corporation (the “complainant”) alleging that NTDC maintained an absolute violation of the Act, by allowing monopoly in the procurement of Power/Auto transformers to Maschinenfabrik Reinhausen Germany (MR<sup>1</sup>-Germany) made On Load Tap Changer OLTC<sup>2</sup> since four decades, despite the fact that there are several manufacturers of OLTC in the world. These manufacturers include MR-Germany, Shanghai Huaming, (HM) China, ABB-Sweden and Hyundai Bulgaria.
3. In addition to this, the complainant stated that all the OLTCs in the world are manufactured according to International Standard IEC60214-1 2003 and NTDC followed the same specifications for OLTC to be manufactured. However all NTDC specs clearly refers to IEC60214-1 2003, but in the tender documents of Distribution Companies (DISCOs) under section IV of technical specification, they put a clause using brand name MR-Germany to favor this particular brand which is against the Public Procurement Regulatory Authority (PPRA) Rules.  
***“The power transformer must be equipped with vacuum type On-Load Tap Changer MR, Germany or equivalent specification”*** (NTDC letter dated 22-03-2011)
4. Also MR-Germany’s OLTC comprises 15% to 20 % of the cost of a transformer whereas other brands constitute 5% to 10%. Therefore it is extremely important to note that transformers equipped with MR-Germany OLTCs procured at a higher cost (even though others of lower cost are of the same standard), results in great loss to the public exchequer.
5. In order to seek rationale behind such practices letter(s) dated April 25, 2012 were issued to NTDC & DISCOs requesting them to furnish their comments on the issue. During this

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<sup>1</sup> "EMR is an Indo-German Joint Venture with "Maschinenfabrik Reinhausen GmbH, Germany (MR)" and the "Easun Group" of India.

<sup>2</sup> The function of OLTC is to change the voltage level of secondary side of transformer according to change in load to meet the requirement and to keep the voltage constant within the limits.

period the commission received another informal complaint dated 29-06-2012 providing the commission relevant information regarding this matter.

**Submission of Reply:**

6. In their reply, dated 04-07-2012, Multan Electric Supply Company (MEPCO) stated that the office of (Design) NTDC, Water & Power Development Authority (WAPDA) House, Lahore, is an authority upon power transformers. NTDC through its letter dated 22-03-2011 has instructed all the DISCOs to incorporate the following requirement in the bidding documents, while tendering for purchase of power transformers. ***“The power transformer must be equipped with vacuum Type On-Load Tap Changer MR-Germany or equivalent specification”.*** (Attached as Annex ‘A’)
7. NTDC in its reply dated 11-07-2012 stated that MR-Germany OLTC has been in use worldwide for the last 15 years due to efficient performance and long life. Member (Power) WAPDA during DISCOs meeting dated 10-10-2006 advised CEOs of DISCOs to purchase transformers equipped with MR-Germany make OLTCs in future. ***Reference to brand name and catalogue numbers specified in the bidding documents are intended to be descriptive and not restrictive, the object behind the reference to a brand name in the tender is to elaborate the level of requirements in the specification and to encourage all prospective bidders/manufacturers to attain an expected performance which is in line with the PPRA rules “Rule No.10-specifications”.***(Attached as Annex ‘B’)
8. Faisalabad Electric Supply Company (FESCO) in its reply letter dated 11-07-2012 stated that an OLTC of any make with technical data/specifications at par with make MR-Germany will be taken as equivalent and is acceptable. ***“The MR-Germany or Equivalent in bid documents under the clause 6.5.1 of section VI is in line with ADB procurement Guidelines April 2010 clause 2.20 (Attached as Annex ‘C’).”***
9. Lahore Electric Supply Company (LESCO) through its letter dated 10-08-2012 replied that ***“OLTC is a regulating device and is not a protective device and many transformers equipped with MR-Germany OLTCs are getting damaged in the system only due to substandard OLTCs, consequently all WAPDA formations were directed to operate these OLTCs under off load conditions”*** also one of GM’s (Design) letter dated 11-07-2012 itself is a violation of PPRA rules and Competition act. **(Attached as Annex ‘D’)**
10. Meanwhile, the commission received a formal complaint from the complainant dated 02-11-2012 under Regulation 18 of Competition (General Enforcement) Regulations, 2007 against NTDC, DISCOS (MEPCO, FESCO, and LESCO), MR-Germany and Associated Commercial Agencies (Pvt.) Limited (ACA)<sup>3</sup>. The contentions raised in the complaint by

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<sup>3</sup> ACA offers services which includes, buying and selling of products. They are working as agents, suppliers’ dealers and also involved in import & exports of different products.

the complainant are summarized below:

- a. That NTDC maintained an absolute violation of the Competition Act, 2010 by allowing monopoly in the procurement of Power/Auto transformers to MR-Germany made On Load Tap Changer (OLTC) since 4 decades despite the fact that there are several manufacturers of OLTC in the world. These manufacturers include MR-Germany, Shanghai Huaming, (HM) China, ABB-Sweden and Hyundai, Bulgaria.
  - b. All the OLTC's manufacturers in the world are manufactured according to International Standard IEC60214-1 2003, and NTDC followed the same specifications for OLTC to be manufactured. However all NTDC specs clearly refers to IEC60214-1 2003, but in the tender documents under section IV of technical specification, they put a clause using brand name MR-Germany to favor this particular brand.
  - c. It has also stated that NTDC functionaries under the garb of MR-Germany brand put specific clauses in the bidding documents, which have caused colossal financial losses of billions of rupees to public exchequer negating the spirit of least expense in all procurements and best value of money.
  - d. When floating tenders for transformers, NTDC's Design Department does not refer to any particular brand of transformers as a standard. However, it insists on procuring transformers with one particular brand of OLTC. Since there are four manufacturers of OLTCs in the world, and favoring MR-Germany's OLTCs adds to the gravity of anti-competitive practices.
  - e. It was submitted by the complainant that NTDC's Design Department is clearly in a dominant position when it comes to the market for providing services for preparing bidding documents laying down specifications and evaluating bids for transformers of 123KV, 220KV and 500KV floated by DISCOS and NTDC. In all such cases till now NTDC alone is entrusted with evaluation of bids and by imposing unfair trading conditions, excluding particular suppliers of transformers and refusing to deal with particular suppliers.
  - f. MR-Germany's OLTC comprises 15% to 20 % of the cost of a transformer whereas other brands constitute 5% to 10%. Therefore it is extremely important to note that transformers equipped with MR-Germany OLTCs procured at a higher cost even though others of lower cost are of the same standard, results in great loss to the public exchequer.
  - g. During the award of tenders' subsequent events point out the abuse of dominance position by NTDC and DISCOS by ignoring discount of bidders, extended advertisement dates, delay in execution of tenders, rejecting OLTCs manufactured by anyone other than MR-Germany and exclusion of bidders for no reasonable basis.
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h. It was also submitted that NTDC is involved in agreement(s) prohibited under section 4 of the Act<sup>4</sup> with DISCOS, MR-Germany and ACA relating to collusive tendering or procurement of transformers. Most of the time, the procurement of transformers were completed at exorbitant prices. The fact that NTDC procured these transformers without even floating a tender is clear evidence of collusion between MR- Germany agents ACA and NTDC.

11. **Categories of Transformers:**

- a. 132/ 11.5KV , 10/13 MVA Or 20/26 MVA, 40 MVA
- b. 220/132 /11KV , 160MVA Or 250MVA
- c. 500/ 220/23KV, 150MVA or 250MVA.

12. The commission in view of the foregoing and upon the perusal of the information/data available with it decided to initiate a formal enquiry under Section 37(2) of the Act. Pursuant to the powers contained in Section 28(2) of the Act, the Commission appointed Shaista Bano Director (C&TA), Ishtiaq Ahmed Deputy Director (C&TA) and Muhammad Fahad Junior Executive Officer (C&TA) as enquiry officers (hereinafter collectively referred to as the “Enquiry Committee”) to conduct an enquiry into the matter and to submit an enquiry report upon conclusion of the enquiry.

**Undertakings:**

13. **According to Section 2(1) (q) of the Act, an undertaking is defined as:**

*“Undertaking means any natural or legal person, government including a regulatory authority, body corporate, partnership, association; trust or other entity in any way engaged, directly or indirectly, in the production, supply, distribution of goods or provision of services and shall include an association of Undertakings.”*

**(1) 7AAYS Corporation - The Complainant**

14. The Complainant, Mr. Abdul Rauf, is sole proprietor of 7AAYS Corporation acting as a local agent for foreign companies engaged *inter alia*, in the manufacture/supply and/or sale of electrical equipment including but not limited to electrical transformers and accessories/components used in such transformers. The Complainant is an undertaking in terms of Section 2(1) (q) of the Act.

**(2) National Transmission & Despatch Company - (NTDC)**

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<sup>4</sup> Competition Act, 2010 ; section-4

15. NTDC was incorporated on 6th November, 1998 and commenced commercial operation on 24th December, 1998. It was organized to take over all the properties, rights and assets obligations and liabilities of 220 KV and 500KV Grid Stations and Transmission Lines/Network owned by Pakistan Water and Power Development Authority (WAPDA). NTDC operates and maintains twelve 500 KV and twenty nine 220 KV Grid Stations, 5077 km of 500 KV transmission line and 7359 km of 220 KV transmission line in Pakistan. As the Central Power Purchasing Agency (CPPA), for procurement of power from GENCOs, Hydel & IPPs on behalf of Distribution Companies (DISCOS), for delivery through 500 KV, 220 KV & 132KV Network. NTDC is an undertaking in terms of Section 2(1) (q) of the Act. NTDC has its Design Department which provides services for preparing bidding documents, laying down specifications and evaluating bids for the procurement of 132 KV, 220KV and 550KV under different tenders floated by NTDC and NTDC through its Design Department provide such services to DISCOs in the capacity of a consultant.

**(3) Distribution Companies- ( DISCOS)**

16. DISCOs distribute and supply electricity to millions of customers within Pakistan under a Distribution License granted by National Electric Power Regulatory Authority (NEPRA), pursuant to the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA Act). Services provided by a DISCO include the maintenance of connection points with high-voltage transmission networks, arrangement of emergency and reserve energy, meter reading and maintenance (but not necessarily billing). DISCOs may also serve as aggregators, billing and collection services and demand-side management (DSM) consultants, in addition to operating and maintaining transformers, substations, service poles and local power lines. There are total of eight DISCOs in Pakistan namely Lahore Electric Supply Company (LESCO), Islamabad Electric Supply Company (IESCO), Multan Electric Power Company (MEPCO), Faisalabad Electric Supply Company (FESCO), Peshawar Electric Supply Company (PESCO), Quetta Electric Supply Company (QESCO), Hyderabad Electric Supply Company (HESCO) and Gujranwala Electric Power Company (GEPCO). DISCOs are undertakings in terms of Section 2(1) (q) of the Act.

**(4) Maschinenfabrik Reinhausen, Germany- (MR-Germany)**

17. MR-Germany the Joint Venture partner in EMR is the technology leaders in Voltage regulation equipment and caters to the requirements of the Power Segment World Wide. MR's factory is equipped with state-of-art infrastructural facilities to cater the precision manufacturing requirements of its final product "On Load Tap Changer (OLTC)" used in the transformer industry. MR-Germany is an undertaking in terms of Section 2(1) (q) of the Act.

**(5) Associated Commercial Agencies (Pvt.) Limited – (ACA)**

18. ACA offers services which include, buying and selling of products. They are working as agents, suppliers' dealers and also involved in import & exports of different products. ACA is an undertaking in terms of Section 2(1) (q) of the Act.

19. **Issues / TOR:**

In terms of the contentions raised in the complaint and the material available with the Enquiry Committee, following issues are relevant to consider for the purposes of this enquiry.

- (i) What is the relevant market?
- (ii) Whether NTDC and DISCOs (MEPCO, LESCO and FESCO) hold dominant position in the relevant market?
- (iii) Whether NTDC and DISCOs have abused their dominant position in the relevant market, in violation of section 3 of the Act?
- (iv) Whether NTDC, DISCOS and Associated Commercial Agents (ACA) are engaged in collusive activities/practices prohibited under Section 4 of the Act?
- (v) Whether DISCOs and NTDC by agreeing to and implementing the advice of NTDC through its Design Department regarding procurement of transformers equipped with MR Germany's OLTC have prima facie violated Section 4 of the Act?

**Analysis:**

**Relevant Market:**

20. The definition of Relevant Market under section 2(1) (k) of the Act is being reproduced below:

*Relevant market” means the market which shall be determined by the Commission with reference to a product market and a geographic market and a product market comprises of all those products or services which are regarded as interchangeable or substitutable by the consumers by reason of the products’ characteristic, prices and intended uses. A geographic market comprises the area in which the undertakings concerned are involved in the supply of products or services and in which the conditions of competition are sufficiently homogenous and which can be distinguished from neighboring geographic areas because, in particular, the conditions of the Competition are appreciably different in those areas.<sup>5</sup>*

21. According to above definition the relevant market is comprised of both Product Market and Geographic Market. For the purpose of this enquiry, a number of relevant markets

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<sup>5</sup> [www.cc.gov.pk/competition Act 2010/section 2 \(1\) \(k\)](http://www.cc.gov.pk/competition%20Act%202010/section%20(1)%20(k))

are involved on the supply as well as demand side, including the market for procurement of transformers and market for supply of transformers<sup>6</sup>.

### **Market for Procurement of Transformers:**

22. Each tender floated by a DISCO or NTDC in respect of any aforementioned transformer determines a relevant product in terms of specifications given in the tender. Power transformers up to 132KV, 40 MVA are manufactured in Pakistan, however under loans from international financial institutions transformers of 132 KV, 20/26 MVA and 40 MVA are now being imported mainly from china.
  
23. DISCOs (LESCO, FESCO & MEPCO) procure transformers of 132KV in their respective jurisdictions. DISCOs usually follow NTDC Design Department's specifications with respect to procurements of various types of power/auto transformers; however, they can independently procure services of any other suitable consultant for tender design and evaluation. Relevant geographic market of DISCOS such as LESCO, FESCO and MEPCO varies with respect to their respective jurisdictions with regard to procurement of transformers. In view of the fact that each DISCO operates within its jurisdiction, determines its procurement requirement independent of other DISCOs and does not compete with any other DISCOs, we can say that each DISCO falls in a different geographic market that constitutes of its relevant jurisdiction.
  
24. In view of the above, the relevant product market for DISCOs appear to be the market for procurement of 132KV transformers and the relevant geographic market for each of the DISCO is the jurisdiction in which it operates. Therefore, for the purpose of this enquiry, the relevant market for FESCO, MEPCO and LESCO is the market for procurement of 132KV transformers in Faisalabad, Multan and Lahore regions respectively.
  
25. NTDC procures transformers of 220KV and 500KV from all those manufacturers / suppliers who are approved by WAPDA/PEPCO/DISCOs/NTDC and are prequalified / registered for the material to be procured. NTDC has its Design Department which provides services for preparing bidding documents, laying down specifications and evaluating bids for the procurement of 132 KV, 220KV and 500KV under different tenders floated by NTDC. Moreover, 220KV and 500KV auto transformers are not manufactured in Pakistan and are totally imported from china and other countries. NTDC is the only undertaking in Pakistan to procure 220KV and 500KV transformers.

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<sup>6</sup> Transformer is an apparatus for stepping up or stepping down the voltage of an alternating current. The Power/Auto transformer has many accessories and components; one of these is the OLTC for regulating voltage passing through the transformer. Such transformers are procured by NTDC and DISCOs from all those manufacturers / suppliers who meet post-qualification criteria of WAPDA/PEPCO/DISCOs/NTDC / registered for the material to be procured.

26. Accordingly, for the purpose of this enquiry the relevant market for NTDC is the market for procurement of 220KV and 500KV transformers in the whole Pakistan.

**NTDC Design Department:**

27. NTDC Design Department plays central role for providing services for preparing bidding documents, laying down specifications and evaluating bids for the procurement of 132 KV, 220KV and 550KV floated by NTDC and DISCOs. The relevant market for NTDC in respect of its Design Department is therefore, the market for providing services for preparing bidding documents, laying down specifications and evaluating bids for procurement of various categories of transformers by DISCOs and NTDC itself. This can also be seen as part of the market for procurement of transformers (of above mentioned capacity) in Pakistan. The power to design bids gives enormous power to NTDC.

**Dominant Position:**

28. Dominant position is defined in Section 2(1)(e) of the Act as;

*“dominant position of one undertaking or several undertakings in a relevant market shall be deemed to exist if such undertaking or undertakings have the ability to behave to an appreciable extent independently of competitors, customers, consumers and suppliers and the position of an undertaking shall be presumed to be dominant if its share of the relevant market exceeds forty percent;”*

29. In terms of Para 24 above, in the relevant market for procurement of 132 KV transformers, LESCO, FESCO and MEPCO *prima facie* hold dominant position in their respective jurisdictions due to the fact that no other undertaking in the jurisdiction of LESCO, FESCO and MEPCO procures 132 KV transformers.

30. In terms of Para 26 above, NTDC holds a dominant position in the market for procurement of 220 and 500KV transformers.

31. In terms of Para 27 above, NTDC through its Design Department is clearly in a dominant position when it comes to the market for (in Pakistan) for providing services for preparing bidding documents, laying down specifications and evaluating bids for transformers of 132KV, 220KV and 500KV floated by DISCOs and NTDC. Historically, in an overwhelming number of cases of procurement of transformers of aforementioned categories, NTDC’s Design Department had laid down specifications and prepared bidding document. In all such cases till now NTDC alone is entrusted with evaluation of bids. In economic terms NTDC through its Design Department has been operating as a monopoly in the power sector for preparation and evaluation of tenders and bids respectively, its dominant position is quite clear in these circumstances.

**Abuse of Dominant Position:**



32. Relevant portions of Sections 3 of the Act state:

*(3) Abuse of dominant position. (3) Abuse of dominant position. (1) No person shall abuse dominant position.*

*(3) The expression : practices referred to in sub section (2) shall include, but are not limited to\_\_*

*(a) limiting production, sales and unreasonable increases in price or other unfair trading conditions to;*

*(e) applying dissimilar conditions to equivalent transactions on other parties, placing them at a competitive disadvantage;*

*(f) predatory pricing driving competitors out of a market, prevent new entry, and monopolize the market;*

*(g) boycotting or excluding any other undertaking from the production, distribution or sale of any goods or the provision of any service;*

*(h) refusing to deal.*

33. The current enquiry concerns the OLTC that is one of the many accessories and components of the Power/Auto transformer for regulating voltage passing through the transformer. There are four main manufacturers of OLTC in the world. These manufacturers include MR-Germany, Shanghai Huaming, (HM) China, ABB-Sweden and Hyundai, Bulgaria, whereas there are about 500 manufacturers of transformers across the world.

34. The complainant has contended that when floating tenders for procurement of aforementioned transformers, NTDC's Design Department does not refer to any particular brand of transformers as a standard. There is an international standardization regime certifying the specification of all electrical equipments used, inter alia, in the distribution and transmission of electricity. These standards are notified by the International Electrotechnical Commission (IEC). With respect to OLTC the relevant standard used is IEC 60214-I: 2003. Any and all OLTCs meeting this standard conform to specifications and requirements that would satisfy international standards- including, rather obviously, those applicable in Pakistan. This fact has been accepted by NTDC in its own specification for Transformers. Reference is NTDC Specification P-46:2008 for 132KV power transformers, NTDC Specification P-36:2009 for 220KV Auto Transformers, NTDC Specification P-41:2010 (Draft) for 500KV Auto Transformers. All three NTDC specifications are attached hereto as (Annexes- 1, 2 & 3). The Foreword to each of these Specifications states that "specification is intended for procurement of material". Furthermore, each of the NTDC specifications states that the OLTC shall conform to IEC standard for OLTC mentioned in IEC 60214-1:2003 and particulars described herein: for the purpose of illustration reliance is placed on clause 2.1, 8.1.1 and 9.1.1 (Annexes- 4, 5 & 6).

35. Nothing in the above named NTDC Specifications envisages or allows for reference to particular brand names which are actually in accordance with law and PPRA Rules. However, there are a number of examples where NTDC's Design Department has insisted upon DISCOs and NTDC to procure transformers equipped with MR Germany Brand. Some of such examples are listed below.

**Annex-A (As above)**

A letter from NTDC to DISCOs dated 22-03-2011

**Subject:** procurement of 132/11.5KV power transformers under ADB & World Bank loans,

*“The power transformer must be equipped with vacuum type On-Load Tap Changer MR, Germany or equivalent specification”.*

**36. Annex-E**

A letter from MR, Sales Dept. vk1-phi-kai/4 dated 08-06-1988 to ACA, Att.Mr. Hanif, Lahore,

**Subject:** Agreement with Romanian on MR-Make OLTC.

*“Agreement between MR- and EEI-EP Romanian was signed last week for WAPDA tender 407 (which also applicable for 414) covering all lots.*

*Please further inform that since WAPDA has rightly preferred and insisted for original MR-OLTC, therefore our management always kept fully WAPDA’s interest top most during negotiation and also in agreement with Romanian. As per the agreement all the OLTC will be manufactured in MR having parts of Romanians”.*

*“It is essential we and WAPDA be in close contact during execution of the contracts”.*

**37. Annex-F**

Tender documents

No. 7.4

**Subject:** Bidding Document No. ADP-63

*“The auto transformer shall be preferably equipped with MR-German make OLTC”.*

**38. Annex- G**

**Subject:** Tender No.NOR-01-2007

**Bidding Document:  
7.4 (OLTC)**

*“The auto transformer shall be preferably equipped with MR-Germany make OLTC”.*

**39. Annex- H**

**Subject:** Tender No.ADB-44-2009

Bidding Document:

**5.4- Tap Changer:**

*“The transformer shall be preferably equipped with MR-Germany make tap changer”.*

40. **Annex- I**

**Subject:** Tender No.ADB-60-2012

Bidding Document:

5.4.1- **Tap Changer:**

*“The transformer shall be preferably equipped with MR-Germany OR Equivalent makes tap changer of appropriate type and rating complying with the technical specification”.*

41. **Annex- J**

**Subject:** Tender No.ADB-LESCO-01-2011

Bidding Document:

5.3- **Tap Changer:**

*“The power transformer must be equipped with vacuum type On-Load Tap Changer MR-Germany or equivalent specification”*

42. **Annex- K**

**Subject:** Tender No. ADB-II/FESCO/01-2011

Bidding Document:

6.5- **Tap Changer:**

*“The power transformer should be equipped with vacuum type On-Load Tap Changer MR-Germany or equivalent”*

43. **Annex-L**

A letter from MEPCO dated 27-05-2011 (**MEPCO Tender No. ADB-MEPCO -01-2011**)

**Subject:** MEPCO Tender No. ADB-MEPCO -01-2011

*“The power transformer must be equipped with Vacuum Tape On-Load Tap Changer, MR Germany or equivalent specification*

44. It is important to note that NTDC and other DISCOs choose a manufacturer who offers transformers equipped with MR Germany OLTC regardless of who offers the lowest price.

45. For instance, NTDC rejected Hyundai Korea’s main offer for the reason that the company “offered auto-transformer equipped with HHI-B Bulgaria make OLTC as against MR-Germany OLTC indicated to be preferred in the tender specification. Also the alternative offer of the bidder with Chinese make OLTC was rejected although it was cheaper in price than MR-Germany OLTC. It thus appears that NTDC favors MR brand over other manufacturers.

46. **Annex- M**

**Subject:** Tender Document No.ADP-63

**Page: 22 Main Offers (a)**

*“The equipment offered generally conforms to the principal requirements of the tender specifications except that the firm has offered auto-transformers equipped with HHI-B type Bulgarian make OLTC as against MR make OLTC indicated to be preferred in the tender specifications”*

**Alt Offer (ii)** *The alternative offer is based on transformers equipped with MR make OLTC and generally conforms to specifications.*

*(iv) Due to the discrepancy regarding OLTC in case of the main offer, the main offer is not considered satisfactory. The alt offers of the bidder with MR make OLTC, although compliant, is not to be considered under the provisions of clause 14.4 of section III of the bidding document.*

**47. Annex-N**

**Subject:** Tender Document

**Page:** 18

*Central Contract Cell (CCC) also understands that in WAPDA 132KV system so many transformers equipped with Bulgarian OLTC have been operating satisfactorily. Because of the price difference about 11% consideration for using 220KV transformers with OLTC's make other than MR should be given after proper satisfactory detailed testing. Merely rejected a transformer due to the reason that specified OLTC has not been offered, does not seem logical.*

*Under the scenario, CCC suggests that the Engineer and the project authorities may justify and convince the Authority of the unavoidable technical necessities for restricting the transformer with specified MR make OLTC via-a-vis high cost thereof. Otherwise the tender has to be re-evaluated.*

**48. Annex- O**

**Subject:** Tender No. NOR-01-2007

**Page No:** 4

*The bidder at Sr.No.2 has offered MR-Germany make OLTC or Hyundai Bulgaria make OLTC in covering letter, the firm stated in case of WAPDA/NTDC accepts OLTC manufactured by M/s. Hyundai Heavy Industries Bulgaria, they will offer a discount of US\$170,000 per unit on CIF prices in addition to extension in warranty period for OLTC from 18 months to 24 months from commissioning, which is not accepted.*

49. It appears from above that the bidders with OLTCs manufactured by anyone other than MR-Germany were rejected. And it seems like a common practice of NTDC and DISCOs in almost all tenders to seek further clarification with respect to certain substances declared in the bids by the potential suppliers except of the offer with OLTC of MR-Germany brand. And also, it is important to mention here that most of the time bid

reports were evaluated by the committee members from NTDC Design Department that were clearly biased for selecting and evaluating OLTCs offered in tenders floated by NTDC and DISCOS.

**50. Annex-P**

A letter from NTDC dated 28-10-2011, WAPDA House, Lahore

**Subject:** Office Order

*The following committee is hereby constituted to look into the matter of OLTC against LESCO tender No. ADB-LESCO-01-2011.*

- (i) General Manager (GSC) NTDC
- (ii) Chief Engineer (Design) NTDC
- (iii) Manager (Design) NTDC
- (iv) Representative of LESCO

*This issue with the approval of Managing Director PEPCO.*

**51. Annex-Q**

A letter from LESCO dated 01-11-2011, Lahore

**Subject:** Office Order

*In pursuance of Chief Engineer (Design) NTDC Office order 28-11-2011, LESCO nominated as LESCO's representative.*

**52. Annex-R**

A letter from LESCO dated 23-11-2011, Lahore to NTDC WAPDA.

**Subject:** Tender No. ADB-LESCO-01-2011

*As a representative of LESCO, undersigned participated in all proceedings of the committee on the issue of OLTC. The subject tender was opened on 27-11-2011 and the already extended bid validities are going to be expiring again shortly.*

**53. Annex-A (As above)**

A letter from NTDC to DISCOs dated 22-03-2011

**Subject:** procurement of 132/11.5KV power transformers under ADB & World Bank loans,

*"The power transformer must be equipped with vacuum type On-Load Tap Changer MR, Germany or equivalent specification".*

**54. Annex- E (As above)**

A letter from MR, Sales Dept. vk1-phi-kai/4 dated 08-06-1988 to ACA, Att.Mr. Hanif, Lahore,

**Subject:** Agreement with Romanian on MR-Make OLTC.

*“Agreement between MR- and EEI-EP Romanian was signed last week for WAPDA tender 407 (which also applicable for 414) covering all lots.*

*Please further inform that since WAPDA has rightly preferred and insisted for original MR-OLTC, therefore our management always kept fully WAPDA’s interest top most during negotiation and also in agreement with Romanian. As per the agreement all the OLTC will be manufactured in MR having parts of Romanians”.*

*“It is essential we and WAPDA be in close contact during execution of the contracts”.*

**55. Annex-F (As above)**

Tender documents

No.7.4

**Subject:** Bidding Document No. ADP-63

*“The auto transformer shall be preferably equipped with MR-German make OLTC”.*

**56. Annex-A (As above)**

A letter from NTDC to DISCOs dated 22-03-2011

**Subject:** procurement of 132/11.5KV power transformers under ADB & World Bank loans,

*“The power transformer must be equipped with vacuum type On-Load Tap Changer MR, Germany or equivalent specification”*

**57. Annex- M (As above)**

**Subject:** Tender Document No.ADP-63

**Page:** 22 Main Offers (a)

*“The equipment offered generally conforms to the principal requirements of the tender specifications except that the firm has offered auto-transformers equipped with HHI-B type Bulgarian make OLTC as against MR make OLTC indicated to be preferred in the tender specifications”*

**Alt Offer (ii)** *The alternative offer is based on transformers equipped with MR make OLTC and generally conforms to specifications.*

*(iv) Due to the discrepancy regarding OLTC in case of the main offer, the main offer is not considered satisfactory. The alt offers of the bidder with MR make OLTC, although compliant, is not to be considered under the provisions of clause 14.4 of section III of the bidding document.*

**58. Annex-N (As above)**

**Subject:** Tender Document

**Page:** 18

*Central Contract Cell (CCC) also understands that in WAPDA 132KV system so may transformers equipped with Bulgarian OLTC have been operating satisfactorily. Because of the price difference about 11% consideration for using 220KV transformers with OLTC's make other than MR should be given after proper satisfactory detailed testing. Merely rejected a transformer due to the reason that specified OLTC has not been offered, does not seems logical.*

*Under the scenario, CCC suggests that the Engineer and the project authorities may justify and convince the Authority of the unavoidable technical necessities for restricting the transformer with specified MR make OLTC via-a-vis high cost thereof. Otherwise the tender has to be re-evaluated.*

**59. Annex- O (As above)**

**Subject:** Tender No. NOR-01-2007

**Page No:** 4

*The bidder at Sr.No.2 has offered MR-Germany make OLTC or Hyundai Bulgaria make OLTC in covering letter, the firm stated in case of WAPDA/NTDC accepts OLTC manufactured by M/s. Hyundai Heavy Industries Bulgaria, they will offer a discount of US\$170,000 per unit on CIF prices in addition to extension in warranty period for OLTC from 18 months to 24 months from commissioning, which is not accepted.*

**60. Annex-P (As above)**

A letter from NTDC dated 28-10-2011, WAPDA House, Lahore

**Subject:** Office Order

*The following committee is hereby constituted to look into the matter of OLTC against LESCO tender No. ADB-LESCO-01-2011.*

(v) *General Manager (GSC) NTDC*

(vi) *Chief Engineer (Design) NTDC*

(vii) *Manager (Design) NTDC*

(viii) *Representative of LESCO*

*This issue with the approval of Managing Director PEPCO.*

**61. Annex-Q (As above)**

A letter from LESCO dated 01-11-2011, Lahore

**Subject:** Office Order

*In pursuance of Chief Engineer (Design) NTDC Office order 28-11-2011, LESCO nominated as LESCO's representative.*

**62. Annex-R (As above)**

A letter from LESCO dated 23-11-2011, Lahore to NTDC WAPDA.

**Subject:** Tender No. ADB-LESCO-01-2011

*As a representative of LESCO, undersigned participated in all proceedings of the committee on the issue of OLTC.*

*The subject tender was opened on 27-11-2011 and the already extended bid validities are going to be expiring again shortly.*

63. LESCO did not agree with the evaluation report prepared by NTDC and wrote letter dated 26-04-2012 to ADB, emphasizing on Para 5 that the comparison between two OLTCs should be based on the international recognized standard IEC-60214.

**64. Annex-S**

A letter from LESCO dated 26-04-2012, Lahore to NTDC WAPDA.

**Subject:** Tender No. ADB-LESCO-01-2011

*4 .Non equivalency of HM OLTC has been established by Design NTDC against MR specification which was not provided in the tender documents as a result, even MR-Germany OLTC data provided by different bidders.*

*5. In the absence of required specification data of OLTC's non equivalency of HM OLTC cannot be endorsed. And to evaluate HM OLTC according to IEC-60214 which is known to all bidders.*

65. Through MEPCO tender's letter dated 27-05-2011 an amendment was made regarding, inter alia, OLTCs. According to the said amendment "the power transformer must be equipped with Vacuum Type On-Load Tap Changer, MR Germany or equivalent specification".

**66. Annex-L (As above)**

A letter from MEPCO dated 27-05-2011, Lahore to NTDC WAPDA.

**Subject:** MEPCO Tender No. ADB-MEPCO -01-2011

*"The power transformer must be equipped with Vacuum Tape On-Load Tap Changer, MR Germany or equivalent specification".*

67. Upon the opening of tender dated 15-06-2011 MEPCO immediately sent all the bids to Chief Engineer Design NTDC for evaluation, which subsequently points out *prima facie* abuse of dominance by NTDC. NTDC Design Department recommended the award of tender to M/s.PEL which offered MR-Germany's OLTCs and resorted to facetious technical reasons to declare the complainant's (on behalf of Ele China) bid as Non-



responsive. According to complainant our bid bond value was 1.99% and fell short because of exchange rate fluctuations on the preceding day and day of the opening of the tender.

**68. Annex-T**

**Subject:** MEPCO Tender No. ADB-MEPCO -01-2011

**Appendix-4**

***M/s. Peoples ELE Appliance group Co.Ltd., China***

*They have submitted bid security amounted 1.9% of the bid price, according to clause 2.1.1 section 1 states that all bids must be accompanied by a bid security not less than 2% of the bid price. Therefore this bid is considered as incomplete and non-responsive.*

69. NTDC in its reply to the Commission's letter stated that, "*the sole objective behind the reference to a brand name in the tender is to elaborate the level of requirements in the specification. It is further clarified that NTDC specifications for transformers over almost all the general requirements of the OLTCs. However, still do not address some of the design parameters for which even IEC 60214 do not provide specific values for insulation level.*"

70. As per NTDC's explanation, references to brand names or catalogue numbers specified in bidding documents are intended to be descriptive only and not restrictive. The bidder may offer other standards of quality, brand names and/or catalogue numbers, provided that it demonstrates to Purchaser's satisfaction, that the substitutions ensure substantial equivalence or are superior to those specified in tender. However, it appears that in reality the position is not the same and all the offers with OLTC other than MR Germany are being rejected in the tenders evaluated by NTDC's Design Department.

71. FESCO in its reply stated that an OLTC of any make with technical data/specification at par with make MR-Germany will be taken as Equivalent and is acceptable. They further stated that the word MR-Germany or Equivalent in bid document under clause 6.5.1 of Section VI is in line with "ADB Procurement Guidelines April 2010, Clause 2.20<sup>7</sup>". So FESCO is not violating any provisions of Section 3 of the Act.

72. MEPCO in its reply stated that OLTC is a critical part of the power transformers. The office of Design (NTDC), vide its letter dated 22.03.2011 has instructed all the DISCOs to incorporate the following equipment in the Bidding Documents, while tendering for

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<sup>7</sup> Use of Brand Names

2.20 Specification shall be based on relevant characteristics and/or performance requirements. Reference to brand names, catalog numbers, or similar classification shall be avoided. If it is necessary to quote a brand name or catalog number of a particular manufacturers to clarify an otherwise incomplete specification, the words "or equivalent" shall be added after such reference. The specification shall permit the acceptance of offers for goods which have similar characteristics and which provide performance at least substantially equivalent to those specified.

purchase of Power Transformers. “The power transformer must be equipped with vacuum Type On Load Tap changer of MR-Germany or Equivalent Specification.”

73. However, LESCO in its letter to the Commission negated various contents of NTDC’s explanation and stated that “*Internationally declared non-standardized Parameters are being misinterpreted to prove the false stance of incomplete NTDC and IEC specifications, which otherwise are a complete document in context of OLTC. Hence PPRA Rule 10 is being misinterpreted, wrongly taking the refuge of incomplete specification, denying the very spirit contained in the said clause for fair and transparent competition. Due to the reasons explained above, observations given by GM (Design) NTDC having contradictions cannot be endorsed meaning thereby that, inclusion of brand specific clause have made the competition restrictive, which is against the spirit of competition and affair/transparent procurement.*”
74. It appears from the above that reference to brand name has been needlessly added whereas reference to the generic specifications would have been equally effective. Particularly, in the light of evidence presented in above paras, the word “or equivalent” appears to have become redundant because MR Germany’s OLTC has always been preferred despite being expensive when compared to other OLTCs. MR Germany’s OLTC represents about 15-20% of cost of a transformer whereas OLTCs manufactured by Chinese and Bulgarian companies represent 5-10% of the cost. Therefore, prima facie MR Germany’s OLTC impose a higher burden on the exchequer and funds used for procurement.
75. In a recent instance, Islamabad Electric Supply Company (IESCO) floated a tender No.ICB-11-Lot-01-PMU-W-6 for procurement of 2 units of 132KV, 10/13MVA Power Transformers for Noorpur Substation on a turnkey basis under a loan from the Asian Development Bank (ADB). In the said tender Siemens Pakistan’s bid was accepted by IESCO with JSHP Chinese made transformers equipped with HM Chinese made OLTC since this was the most cost effective and technically sound bid. This bid was related to a loan from ADB, therefore, relevant approvals were also obtained from IESCO’s Board of Directors and ADB. Although Siemens submitted an alternate offer (with higher price) with MR OLTC, still IESCO’s bid evaluation committee accepted the bid with HM OLTC, indicating that both the OLTCs are technically equivalent and the specification on HM OLTC i.e. IEC specification is a complete and comprehensive specification.
76. In view of above, it appears that NTDC, LESCO, MEPCO and FESCO are *prima facie* imposing an unfair trading condition on the suppliers of transformers by unnecessarily referring to a particular brand MR Germany in the bidding documents (despite the fact that a complete IEC specification exists )and insisting the bidders to supply transformers equipped with MR Germany made OLTC and rejecting the bids of the suppliers of transformers equipped with any other brand of OLTC. *Prima facie* due to this unfair practice the suppliers of transformers equipped with OLTC other than MR Germany are being excluded from participating in the bidding. Being in a dominant position in their respective relevant markets, LESCO, MEPCO, FESCO and NTDC have *prima facie* abused their dominant position by imposing unfair trading conditions and excluding

particular suppliers of transformers in the market for procurement of various categories of transformers.

77. In terms of section 3 of the Act, an abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market. Such practices include unfair trading conditions, boycotting or excluding any other undertakings from the production, distribution or sale of any goods or the provision of any services and refusal to deal. Therefore, LESCO, MEPCO, FESCO and NTDC have prima facie violated provisions of section 3(3)(a) and 3(3)(g) of the Act.

#### **Collusive Activities:**

78. Any agreements entered into by undertakings with respect to the production, supply or distribution of services that have the object or effect of preventing or restricting competition in the relevant market are prohibited under section 4 of the Act unless exempted under section 5. The relevant portions of section 4 are being reproduced below

*4. Prohibited Agreements: - (1) No undertaking or association of undertakings shall enter into any agreement or, in the case of an association of undertakings, shall make a decision in respect of the production, supply, distribution, acquisition or control of goods or the provision of services which have their object or effect of preventing, restricting or reducing competition within the relevant market unless exempted under section 5 of this Ordinance.*<sup>8</sup>

*(2) Such agreements include, but are not limited to-*

*(a) Fixing the purchase or selling price or imposing any other restrictive trading conditions with regard to the sale or distribution of any goods or the provision of any service;*

79. NTDC through its letter dated 22-03-2011 has instructed all the DISCOs to incorporate the following requirement in the bidding documents, while tendering for purchase of power transformers. **“The power transformer must be equipped with vacuum Type On-Load Tap Changer MR-Germany or equivalent specification”**. It is reiterated that NTDC through its Design Department works in the capacity of a consultant for various DISCOs for preparation of bidding documents, laying down of specifications and finally evaluation of bids. Being the consultant, it is not mandatory for the DISCOs to follow such direction of NTDC and as indicated above, IESCO has deviated from the direction of NTDC by procuring a transformer equipped with OLTC other than MR Germany brand.

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<sup>8</sup> [www.cc.gov.pk/Competition Act 2010/section 4 \(1\) & \(2\) a, b & d.](http://www.cc.gov.pk/Competition Act 2010/section 4 (1) & (2) a, b & d.)

80. The evidence produced by the complainant prima facie indicate that LESCO, MEPCO and FESCO have followed the instruction of NTDC's Design Department and have implemented it in all their tenders, although they were not under any obligation whatsoever to follow such instruction .In terms of Section 2(1)(b) of the Act, "*an agreement includes any arrangement, understanding or practice, whether or not it is in writing or intended to be legally enforceable.*" Therefore, prima facie, these three DISCOs have entered into an agreement with NTDC Design Department (agreement by accepting and practicing the instructions of NTDC issued through its Design Department without any legal obligation, thus indicating the existence of a tacit agreement between the undertakings concerned) that *prima facie* has the object or effect of distorting competition in the relevant market for supply of transformers of aforementioned categories to NTDC and DISCOs.
81. In view of above para, LESCO, MEPCO ,FESCO and NTDC through its Design Department have *prima facie* entered into a prohibited agreement in terms of Section 4 of the Act by imposing a restrictive trading condition with regard to supply of transformers in *prima facie* violation of section 4(2)(a) of the Act.
82. Although the complainants have alleged that the NTDC, LESCO, MEPCO, FESCO and ACA (the authorized agents of MR-Germany) are involved in corruption and collusion, however, the Commission under the Act is not mandated to take action against such allegations, therefore, the enquiry officers have not considered allegation and evidence supplied in this regard for the preparation of enquiry report.

#### **Conclusion and Recommendations:**

83. In terms of Para 24 above, in the relevant market for procurement of 132 KV transformers, LESCO, FESCO and MEPCO *prima facie* hold dominant position in their respective jurisdictions due to the fact that no other undertaking in the jurisdiction of LESCO, FESCO and MEPCO procures 132 KV transformers.
84. In terms of Para 26 above, NTDC holds a dominant position in the market for procurement of 220 and 500KV transformers
85. In view of above, it appears that NTDC, LESCO, MEPCO and FESCO are *prima facie* imposing an unfair trading condition on the suppliers of transformers by unnecessarily referring to a particular brand MR Germany in the bidding documents (despite the fact that a complete IEC specification exists )and insisting the bidders to supply transformers equipped with MR Germany made OLTC and rejecting the bids of the suppliers of transformers equipped with any other brand of OLTC. *Prima facie* due to this unfair practice the suppliers of transformers equipped with OLTC other than MR Germany are being excluded from participating in the bidding. Being in a dominant position in their respective relevant markets, LESCO, MEPCO, FESCO and NTDC have *prima facie* abused their dominant position by imposing unfair trading conditions and excluding particular suppliers of transformers in the market for procurement of various categories of transformers.

86. In terms of Section 3 sub-section 2, an abuse of dominant position shall be deemed to have been brought about, maintained or continued if it consists of practices which prevent, restrict, reduce or distort competition in the relevant market. Such practices include unfair trading conditions, boycotting or excluding any other undertakings from the production, distribution or sale of any goods or the provision of any services and refusal to deal. Therefore, it appears that LESCO, MEPCO, FESCO and NTDC have *prima facie* violated provisions of section 3(2)(a) and section 3(3)(g) of the Act.
87. NTDC through its letter dated 22-03-2011 has instructed all the DISCOs to incorporate the following requirement in the bidding documents, while tendering for purchase of power transformers. ***“The power transformer must be equipped with vacuum Type On-Load Tap Changer MR-Germany or equivalent specification”***. It is reiterated that NTDC through its Design Department works in the capacity of a consultant for various DISCOs for preparation of bidding documents, laying down of specifications and finally evaluation of bids. Being the consultant, it is not mandatory for the DISCOs to follow such direction of NTDC; however, FESCO, MEPCO and LESCO have followed the instructions of NTDC in all of their procurements of transformers. Such practice indicates that FESCO, MEPCO, LESCO and NTDC (through its Design Department) have *prima facie* entered into an arrangement for imposing a restrictive trading condition in the market for supply of transformers to NTDC and DISCOs in *prima facie* violation of Section 4(2)(a) of the Act
88. The procurement made by the public sector organizations is the single largest segment of the economy affected by collusive bidding and other such anti-competitive behavior, causing huge losses to government exchequer. For example it has been noted that in a recent IESCO tender for supply of a single unit of 132KV transformer, the difference between the quoted price of transformer equipped with MR Germany OLTC and with a Chinese made OLTC amounted to Rs.7,600,000/- indicating the level of expenditure involved in such procurements.
89. It would therefore, be appropriate and in the public interest for the Commission to initiate proceedings under section 30 of the Act against NTDC, FESCO, MEPCO and LESCO for *prima facie* violation of section 3 and section 4 of the Act.

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