



Corporate Supervision Department
Company Law Division

Before Abid Hussain – Executive Director (CSD)

In the matter of

Southern Electric Power Company Limited

Number and date of notice: CSD/ARN/1302/2016-3881, dated March 31, 2016
Dates of hearings: May 2, 2016
Present: Mr. Salman Rahim, Mr. Khalid Rashid

ORDER

**UNDER SECTIONS 193 AND 196 READ WITH SECTION 476 OF THE COMPANIES
ORDINANCE, 1984**

This order shall dispose of the proceedings initiated against the following directors (the "respondents") of Southern Electric Power Company Limited (the "Company"):

- | | |
|----------------------------------|----------------------|
| 1. Mr. Yahia Aowd Idris | 5. Ms. Louisa Grasso |
| 2. Ms. Lynn Margaret Isobel Bell | 6. Ms. Carolyne Khan |
| 3. Mr. Mohammad Khalid Rashid | 7. Mr. Osama Salik |
| 4. Mr. Salman Rahim | 8. Mr. Rashid Mirza |

The proceedings against the respondents were initiated through show cause notice (the "SCN") dated March 31, 2016, under sections 193 and 196 read with section 476 of the Companies Ordinance, 1984 (the "Ordinance").

2. The brief facts of the case are that examination of annual audited financial statements (the "Accounts") for the year ended June 30, 2015 of the Company was carried out. In the directors' report attached to the Accounts, it was disclosed that the Company held nine meetings of the board of directors ("BOD") and all the directors including the foreign directors attended all the meetings. In response to the Commission's queries in this regard, the Company through letters dated December 22, 2015 and March 8, 2016 provided information and documents including minutes of the nine BOD's meetings held during the year ended June 30, 2015. Perusal of the information provided by the Company further revealed that majority of the directors of the Company were non-residents and all the nine meetings of the BOD during the year ended June 30, 2015 as well five meetings of the BOD held during six months period ended on December 31, 2015,



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 1 -

were conducted in terms of article 71 of the articles of association of the Company, which read as under:

"A resolution in writing circulated to the directors of the Company and signed by them or affirmed by them through facsimile shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held at which they were present."

3. It transpired that the Company's directors did not meet and instead all the business was transacted by passing resolutions through circulation. The Company provided relevant dates of such BOD resolution passed through circulations, as given below:

For the year ended June 30, 2015

- (i) On September 26, 2014 for approval of annual accounts;
- (ii) On October 24, 2014 for approval of quarterly accounts;
- (iii) On December 26, 2014 to consider present situation of the Company;
- (iv) On January 29, 2015 for consideration of tariff revision petition;
- (v) On February 27, 2015 for consideration of half yearly accounts;
- (vi) On April 9, 2015 to consider sale of 17 acres of land and notifying project lenders of acute financial distress;
- (vii) On April 28, 2015 to consider quarterly accounts;
- (viii) On May 18, 2015 to discuss restart of operations;
- (ix) On Jun 17, 2015 to discuss resignation of the CEO and appointment of new CEO.

For the six months period ended December 31, 2015

- (i) On August 18, 2015 to discuss sale of land and change of bank signatories;
- (ii) On September 9, 2015 to discuss change in signatories
- (iii) On October 2, 2015 to approve annual accounts and call AGM;
- (iv) On October 30, 2015 to approve quarterly accounts;
- (v) On December 14, 2015 to discuss resignation of the CEO and appointment of his replacement.

The BOD also, inter alia, accorded specific approvals through circulation on September 26, 2014 for:

Approval accorded for:	Amount in Rs.000
Capitalization of exchange loss in cost of property plant and equipment	37,534
Disposal of property plant and equipment	3,227
Write down of stock to net realizable value	23,713
Stock written off due to loss	1,664
Trade receivables written off	718
Advances to staff written off	92
Advance to others suppliers written off	3,401
Provision for doubtful trade debts	3,144
Note 12 – Contingencies and commitments	
Note 27 – Remuneration of Chief Executive, Directors and Executives	
Note 28 – Related Party Transactions	



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 2 -

It appeared that the respondents, prima facie, contravened the following provisions of the Ordinance:

- i. Sub-section (2) of section 193; As the BOD of the Company did not meet at least once in each quarter of the year and instead transacted all the business by passing resolutions through circulation; and
- ii. Sub-section (2) of section 196 of the Ordinance, as the directors exercised the aforesaid powers by passing resolutions through circulation instead of exercising those powers by passing a resolution at their meeting as specifically required by the Ordinance.

Consequently, the SCN was issued to the respondents in terms whereof they were called upon to show cause in writing as to why penalties may not be imposed on them for the aforesaid, prima facie, contraventions of the law.

4. In response to the SCN, the Company Secretary through letter dated April 12, 2016 submitted reply. A brief of the reply with reference to the contents of the SCN is given below:

- Out of seven elected directors, five are residents of foreign countries and two reside in Islamabad. One director who is nominee of National Bank of Pakistan (NBP) resides in Karachi
- Under these circumstances, soon after incorporation of the Company the Articles of Association (AOA) were amended by passing a special resolution by the members of the Company to incorporate article 71 in terms of which a resolution in writing circulated to the directors of the Company and signed by them or affirmed by them through facsimile shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held at which they were present.
- No shareholder objected to the amendment and neither did the Registrar. This practical practice has been followed since then. The agenda for the meetings and all relevant documents, including the resolutions to be passed, are sent with the notice calling the BOD's meeting. The individual directors are invited to circulate their comments or thoughts to the other directors and, in particular, the representative director of the lenders (NBP). Their comments are incorporated in the minutes of the BOD's meetings. Where any director so desires, a telephonic meeting is arranged if circumstances of time and place allow.
- Since article 71 deems that the directors are present at a meeting and there is nothing to



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 3 -

the contrary in the Ordinance to disallow such an amendment, the Commission is requested to allow it to govern future meetings of the BOD. Hence, the quoted sections of the Ordinance will not be contravened.

- The Company has suspended its business since the year 2012 due to various problems with WAPDA and has been facing financial constraints. This also served as a hurdle in conducting the BOD's meeting.

5. The case was fixed for hearing on May 2, 2016. On due date, Mr. Saleem Rahim and Mr. Khalid Rashid, appeared before the undersigned and mainly reiterated their earlier written submissions. They further stated as under:

- Out of total eight directors including the nominee of the NBP, five are non-residents, one resides in Karachi and only two are residents of Islamabad. Out of five non-resident directors only one is a Pakistani citizen while others are foreign nationals and are scattered around the world with their own time zone and locations.
- It is, hence, impossible to gather them in one place and time. To meet this eventuality, the AoA of the Company were amended and article 71 was added to allow passing of resolution through circulation.
- Since then, no regulatory authority or the shareholder has ever objected to it. There is no section in the Ordinance prohibiting this amendment.

The attention of the representatives was drawn towards the provisions of sub-section (2) of section 192 of the Ordinance which allows the director of a company to appoint an alternate or substitute director to act for him during his absence from Pakistan of not less than three months, with the approval of the BOD. They were further informed of the Commission's circulars whereby all the directors of public companies whether residing in Pakistan or abroad are allowed to participate in BOD's meeting through tele/video conferencing by complying with the requirements prescribed in the circulars. Subsequently, through letter dated May 12, 2016 submitted that they were taking the advice to request the foreign directors to appoint alternate directors and / or to attend the BOD meeting through tele/video conferencing.



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 4 -

6. Before proceeding further, it is necessary to advert to the following relevant provisions of Ordinance.

Sub-section (2) of section 193 of the Ordinance provides as under:

"The directors of a public company shall meet at least once in each quarter of a year."

Sub-section (2) of section 196 of the Ordinance, inter alia, provides as under

"The directors of a company shall exercise the following powers on behalf of the company, and shall do so by means of a resolution passed at their meeting, namely: —

(h) to approve annual or half-yearly or other periodical accounts as are required to be circulated to the members;

(i) to approve bonus to employees;

(j) to incur capital expenditure on any single item or dispose of a fixed asset in accordance with the limits as prescribed by the Commission from time to time;

(m) having regard to such amount as may be determined to be material (as construed in Generally Accepted Accounting Principles) by the Board,-

(i) to write off bad debts, advances and receivables;

(ii) to write off inventories and other assets of the company; and

(iii) to determine the terms of and the circumstances in which a law suit may be compromised and a claim or right in favour of a company may be released, extinguished or relinquished."

Sub-section (3) of section 193 of the Ordinance provides as under:

"If a meeting of directors is conducted in the absence of a quorum specified in sub-section (1), or a meeting of directors is not held as required by sub section (2), the chairman of the directors and the directors shall be liable—

(a) to a fine not exceeding ten thousand rupees and in the case of a continuing default to a further fine not exceeding one hundred rupees for every day after the first during which the default continues, if the contravention relates to a listed company; or

(b) to a fine not exceeding two thousand rupees and in the case of a continuing default to a further fine not exceeding fifty rupees for every day after the first during which the default continues, if the contravention relates to a non-listed company."

Sub-section (4) of section 196 of the Ordinance provides as under:

"Whosoever contravenes any provision of this section shall be punishable with a fine which may extend to 1[one hundred thousand] rupees and shall be individually and severally liable for losses or damages arising out of such action."

In terms of the Commission's notification SRO 1003 (I)/2015 dated October 15, 2015, powers to adjudicate cases under section 196 of the Ordinance have been delegated to the Executive Director (Corporate Supervision Department).

7th Floor, NIC Building, 63-Jinnah Avenue
Islamabad, Pakistan

PABX: + 92-51-9207091-4, Fax: +92-51-9100454, 9100471, Email: webmaster@secp.gov.pk, Website: www.secp.gov.pk



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 5 -

7. I have reviewed the facts of the case, relevant provisions of the Ordinance, and submissions made by the respondents and my observations are as under:

- Section 193 of the Ordinance clearly requires the directors of a public company to meet at least once in each quarter of a year. In terms of section 26 (2) of the Ordinance, a company in its AoA may adopt all or any of the regulations contained in Table A in the First Schedule to the Ordinance, clause 56 of which read as under:

"A resolution in writing signed by all the directors for the time being entitled to receive notice of a meeting of the directors shall be as valid and effectual as if it had been passed at a meeting of the directors duly convened and held."

The Company has validly adopted the aforesaid clause by inserting article 71 in its AoA. This allows the directors of the company to pass resolution through circulation. However, it must be understood that the aforesaid clause of the AoA does not override the specific provisions of section 193 or 196 of the Ordinance, which is a primary legislation. Section 193 of the Ordinance explicitly requires the directors of the Company to duly convene their meetings at least once in each quarter of a year. Therefore, passing of resolution through circulation cannot be construed as holding of a meeting of directors. Therefore, if the directors fail to hold their meeting during each quarter of a year, they would be liable for contravention with the provisions of section 193 of the Ordinance.

- A resolution of routine nature, in writing and signed by all directors is effective and valid as if it has been passed in a duly convened meeting of directors, in terms of AoA of the Company. However, this would be only allowed in case where the Ordinance does not specifically require the directors to exercise their powers at their meeting. Where the Ordinance expressly requires the directors to exercise their powers at their meeting, they cannot exercise any such powers by resolutions passed through circulation. Section 196 (2) of the Ordinance explicitly requires the directors to hold their meeting to exercise their powers relating to approval of annual and periodical accounts, bonuses to employees, incurring capital expenditure, writing off the bad debts and inventories, terms and conditions of compromising a law suit etc. Therefore, any resolution relating to the aforesaid businesses would have to be passed at a duly convened meeting of directors.



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 6 -

However, the respondents have given approval for approval of accounts, capital expenditure, writing off bad debts and stocks, disposal of assets etc. by passing resolution through circulation and without duly convening and holding their meeting as per the law. Therefore, they have contravened the provisions of section 196 of the Ordinance. In view of the aforesaid facts, the respondents' plea that AoA of the Company allow the directors to pass resolution through circulation and such a resolution signed by all directors is valid and effective and passing of resolution through circulation meets the requirement of holding of BOD meetings as per section 193 and 196, is not tenable.

- The respondent have pleaded that majority of directors are non-residents and reside in different countries and time zone and hence they cannot convene the meetings physically. In connection with this, it must be understood that provisions of the law have to be complied with by the directors without the status of their nationality or residence. Moreover, the Ordinance envisaging these practical difficulties has provided solution and sub-section (2) of section 192 allows the director of a company to appoint an alternate or substitute director to act for him during his absence from Pakistan of not less than three months, with the approval of the BOD. Therefore, the non-resident directors have the option to appoint alternate or substitute directors to act on their behalf. Moreover, the Commission through its Circular No. 20 dated November 10, 2005 and Circular No. 6 of 2010 dated February 24, 2010 has allowed all the directors of public companies whether residing in Pakistan or abroad to participate in BOD's meeting through tele/video conferencing. The companies are required to send the draft minutes to the directors participating through video/tele conferencing for their confirmation and get the confirmed minutes signed off by the chairman. Therefore, owing to availability of number of options provided by the Ordinance and the Commission through its circulars to appoint alternate director or convene the meetings through video/teleconferencing, the respondents plea that the directors of the Company reside in various locations and time zones and hence could not convene the meetings, is not justified.

8. For the foregoing reasons, I am of the view that the provisions of sections 193 and 196 of the Ordinance have been contravened by the respondents. However, I take cognizance of the facts that the Company has been financially constrained due to closure of operation and the aforesaid



SECURITIES & EXCHANGE COMMISSION OF PAKISTAN

Corporate Supervision Department
Company Law Division

Continuation Sheet - 7 -

non-compliance with the law was due to misinterpretation of the relevant legal provisions on the part of the respondents, who have given their commitment to ensure compliance with the law in future by appointing alternate directors and/or using tele/video conferencing for holding the BOD meetings. Therefore, in exercise of the powers conferred by the Ordinance, instead of imposing fines, I hereby conclude the proceedings with a stern warning to the respondents to be careful in future and ensure meticulous compliance with applicable provisions of the Ordinance.

Abid Hussain
Executive Director (CSD)

Announced:
June 13, 2016
Islamabad