Volume 9, Issue: 1, December, 2017

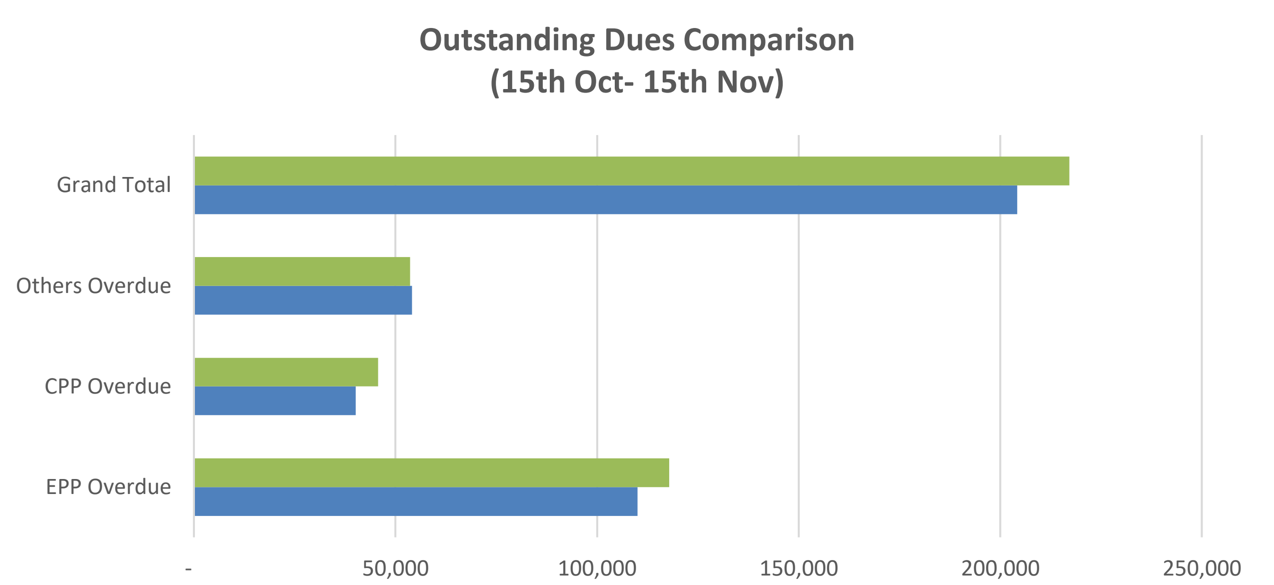
INDEPENDENT POWER PRODUCERS ASSOCIATION

MONTHLY NEWSLETTER

Welcome to the ninth edition of Independent Power Producers Association (IPPA) Newsletter. The newsletter is published on a monthly basis to ensure regular dissemination of information to Member IPPs and other stakeholders, and also to provide a platform to discuss issues pertinent to the energy sector of Pakistan. We would like you to send us your feedback and comments on how to improve the monthly newsletter.

Monthly Infographics

Outstanding Dues as of 15th November, 2017 in PKR Millions

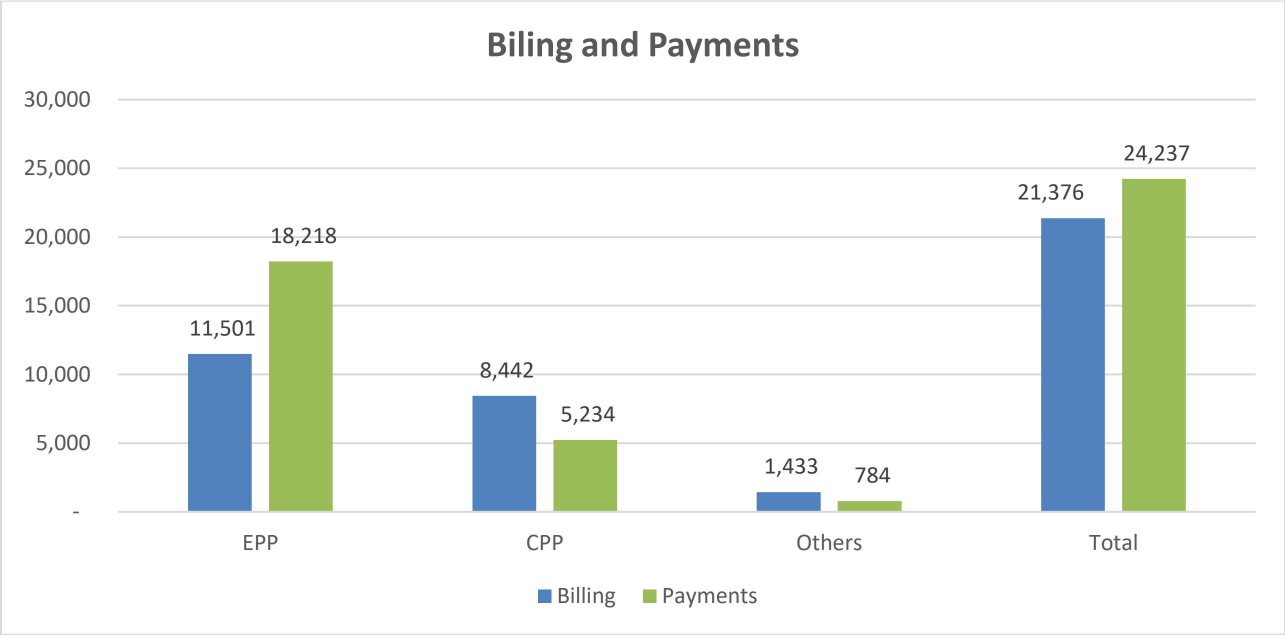


	EPP Overdue	CPP Overdue	Others Overdue	Grand Total
Nov	117,878	45,678	53,630	217,186
Oct	110,036	40,103	54,062	204,201

Source: Member and Subsidiary IPPs

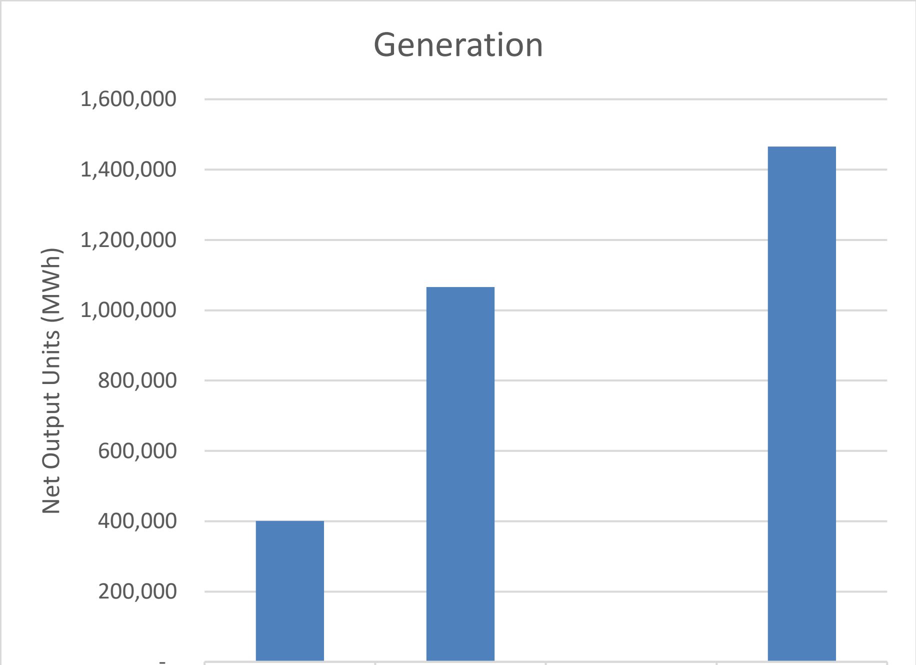
Monthly Infographics

Billing and Payments in November 2017 in PKR Millions

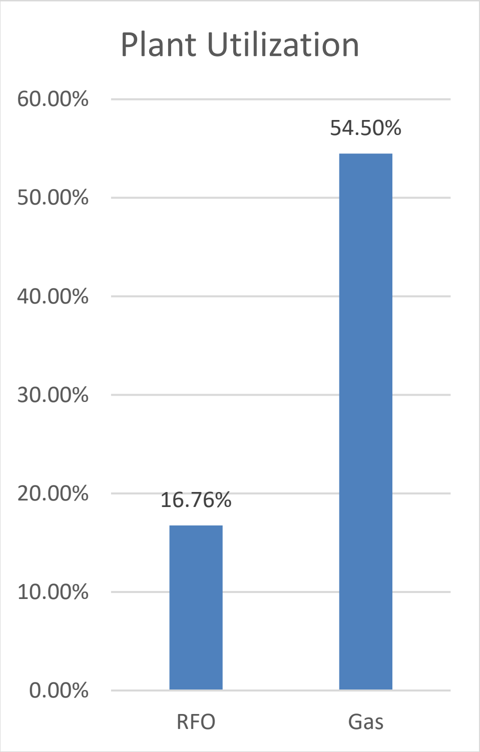


Source: Member and Subsidiary IPPs

Net Generation and Plant Utilization in November 2017



	RFO	Gas	HSD	Total
Generation	400,404	1,065,584	0	1,465,988



Source: Member and Subsidiary IPPs

Discussion: Litigation in the Power Sector

In 1985, the Government introduced reforms to encourage private investment in Pakistan's electricity sector. These measures resulted in the introduction of various power policies by the Government of Pakistan and establishment of the Private Power and Infrastructure Board (PPIB). As a result, several private sector entities entered the retail electricity market as Independent Power Producers (IPPs). These IPPs were awarded licenses under power policies and power purchase agreements were signed as SOPs for these entities. Over the years, a wide range of operational and procedural disputes have arisen between government entities and the IPPs. Both parties tend to resolve these conflicts and disputes by mutual negotiations under signed agreements. These deliberations involve the regulator (NEPRA) as well as relevant ministries. However, several unresolved conflicts and disputes end up in courts in the form of lawsuits. Further, these conflicts may end up in third-party arbitrations, requiring legal-opinions or international arbitrations as per the nature of the dispute. Majority of the cases sprout up due to the inability of the government to fulfill its contractual obligations.

Following are a few litigation cases involving IPPs and the government entities:

- **9 IPPs**

As per the Power Purchase Agreement (PPA), power producers are required to maintain an online capacity. In case of non-compliance, liquidated damages (LD) are charged. Starting in 2011, due to the inability of the government to clear the payments, IPPs[1] were unable to procure sufficient fuel to maintain all their capacity online. Initially no LD were charged to IPPs. However, in 2012 due to part of system capacity going offline because of liquidity crunch, the government entity decided to slash the capacity charges payment and LD charges were also imposed on the IPPs.

This issue was contested in court by the concerned IPPs claiming that it was because of the power purchasers' negligence that they couldn't procure fuel to keep the plant running. In 2013, the Supreme Court ruled in favour of the IPPs however, the issue of amounts already deducted by NTDC/CPPA-G was to be settled later. Then on the insistence of the newly elected government, the IPPs agreed to resolve the dispute through arbitration. The independent arbitrator, Justice Sair Ali, also gave the decision in favour of the IPPs. Thereafter, NTDC had the option of either complying with the decision or challenging the decision within 75 days. On the 75th day, NTDC took a stay order from local court and asserted that it was restrained by the law from participating in the arbitration.

The IPPs took the case to London Court of International Arbitration (LCIA), which also gave a decision in favour of IPPs. The LCIA issued a final award of Rs. 14 billion on 29th October, 2017. However, despite multiple appeals by the IPPS, NTDC is yet to pay the award amount.

- **Atlas power**

On account of non-payment of energy dues against an invoice by NTDC, Power Purchase Agreement (PPA) allows for charging interest on accumulated unpaid interest. This issue was settled at London court of arbitration

[1] Atlas Power Limited, Liberty Power Tech Limited, Nishat Chunian Power Limited, Nishat Power Limited, The Hub Power Company Limited, Saif Power Limited, Orient Power Company (Pvt.) Limited, Sapphire Electric Company Limited and Halmore Power Generation Company Limited

in favour of Atlas Power. Lahore high court was moved for implementation of the results of this arbitration. Many other IPPs are in the process of filing legal lawsuits.

- **Sabah Shipyard SDN BHD**

Under the 1994 Power Policy, Sabah Shipyard SDN BHD of Malaysia was issued a letter of support (LOS) in January 1995 to set up a 288 MW RFO based power plant in Korangi, Karachi at a cost of USD 240 million. Three agreements were signed in March 1996 to implement the project. These included

· Sabah Shipyard's implementation agreement (IA) with government of Pakistan

· Power Purchase Agreement (PPA) with Karachi Electric Supply Corporation (KESC)

· Fuel Supply Agreement (FSA) with Pakistan State Oil (PSO).

· Sovereign guarantee, Government of Pakistan May 1996

The original tariff for the power producer was determined at PKR 1.8/kWh for the first 10 years and a 30-year levelized tariff of PKR 1.67/kWh.

In 1998, the government served a termination notice to the company for not executing the project in accordance to the agreement. Later, the government also en-cashed the IPP’s performance guarantee worth USD 6.9 million under provisions of the power policy and agreements. The Independent Power Producer (IPP) went into arbitration against the government in Singapore and claimed an amount of USD 510 million.

The arbitration court gave an initial USD 10 million award in favor of the IPP, and later increased it to USD 12 million (in addition to the refund of USD 6.9 million performance guarantee en-cashed by the Government of Pakistan).

The PPIB moved a civil court in Islamabad to stop implementation of the decision but the IPP went to London for another arbitration. The London arbitration bench maintained the Singapore arbitration decision and concluded that the civil court in Islamabad had no jurisdiction to stop arbitration award as it was related to business interests of a foreign investor and Government of Pakistan had provided in the agreements to settle disputes with the IPP through international arbitration.

The company later, agreed for an out of court settlement.

Following are some of the pending issues between government entities and IPPs. Some of which are under deliberation/negotiation. However, these issues too might end up in a court of law if they remain unsettled:

- **Sales tax - Apportionment of input tax**

Under the law, IPPs are required to pay GST-Output Tax on sale of Energy Purchase Price (EPP) only while no tax is payable on Capacity Purchase Price (CPP). The law allows an IPP to adjust GST-Input Tax paid by it on items used for producing EPP from the GST-Output Tax payable by it. If the GST-Input is paid on an item which is being used for generating both EPP and CPP then instead of claiming full amount of GST-Input, IPPs claim GST-Input in the ratio EPP: CPP. The FBR opposes this stance and states that the rule of apportionment applies to IPPs.

- **Processing of invoices by NTDC**

The power purchase agreements require the party receiving an invoice to make full payment of that invoice unless it wishes to dispute that invoice. The party receiving an invoice cannot withhold any invoice, cannot withhold portions of amounts shown on the invoice and cannot return the invoice. If NTDC wishes to dispute an invoice received, then it must serve an Invoice Dispute Notice to the other Party and then start the dispute resolution process. Dispute resolution process has to be started by the party who is disputing (in this case NTDC) but, NTDC instead of disputing the invoice, only withholds the amount or returned the invoices which are not allowed under PPA. NTDC is violating the PPA and instead of serving Invoice Dispute Notices and initiating the dispute resolution process unilaterally deducts the amounts without disputing the invoices.

- **Income Tax – Interest income**

Interest income is exempt from tax both under the Implementation Agreement as well as under the law. However, the FBR is of the opinion that this income is subjected to tax.

- **Consistent default in payment obligations**

The accumulated outstanding dues have reached mammoth figures. The Government has consistently been defaulting on making payments to IPPs as per agreements. The IPPs have repeatedly served notices for payments, and have even invoked sovereign guarantees.

Conclusion

Due to the inefficiency of the government to comply with its contractual obligations towards power producers, several issues arise. Matters are further complicated when these issues are not addressed at appropriate forums at appropriate times, hence leading to litigation. This results in loss of resources at both ends.

Therefore, in the best interest of the country, the government entities should ensure compliance with all rules and regulations that pertain to the electricity business in the country. Moreover, the government should also respect the contractually granted conflict resolution mechanisms rather than finding ways to disengage with arbitration proceedings. This will not only result in smooth operations of the market, but would also ensure the credibility and trustworthiness of the government as Pakistan looks on to more of incoming foreign direct investments in the future.

Our Members

	Member IPPs	Primary Fuel	Alternate Fuel	Gross Capacity (MW)	Net Capacity (MW)
1	The Hub Power Company (Tehsil Hub)	RFO	HSD	1292	1200
2	Pakgen Private Limited	RFO	-	365	350
3	Lalpir Private Limited	RFO	-	362	350
4	Kohinoor Energy Limited	RFO	-	131	126
5	TNB Liberty Power Limited	GAS	HSD	235	211
6	Uch Power (Private) Limited	GAS	-	586	551
7	Rousch (Pakistan) Power Limited	GAS	HSD	412	395
8	Habibullah Coastal Power (Pvt.) Co.	GAS	HSD	140	126
9	Attock Gen Limited	RFO	HSD	165	156
10	Atlas Power Limited	RFO	HSD	225	214
11	Nishat Power Limited	RFO	HSD	200	195
12	Nishat Chunain Limited	RFO	HSD	200	195.6
13	Liberty Power Tech. Limited	RFO	HSD	200	195
14	Orient Power Company Limited	GAS	HSD	229	213
15	Saif Power Limited	GAS	HSD	229	209
16	Sapphire Electric Company Limited	GAS	HSD	225	209
17	Halmore Power Generation Co. Ltd.	GAS	HSD	225	209
18	Engro Powergen Qadirpur Limited	GAS	HSD	227	217
Subsidiary IPPs					
19	Hub Power Company Ltd (Narowal)	RFO	-	220	214
20	Uch-II Power (Pvt) Ltd	GAS	-	404	375.2
21	Saba Power Company (Private) Limited	RFO	-	134	125.5

Upcoming Topics

January

NEPRA: The Issue of Autonomy

February

Energy Mix