

Stereo: HCJDA-38

JUDGMENT SHEET**IN THE LAHORE HIGH COURT, LAHORE.****JUDICIAL DEPARTMENT****W.P. No. 50725 of 2022****Muhammad Azhar Siddique Vs. Federation of Pakistan etc.**

Dates of Hearing	30.08.2022, 31.08.2022, 13.09.2022, 23.09.2022, 15.09.2022, 20.09.2022, 03.10.2022, 04.10.2022, 05.10.2022, 06.10.2022, 10.10.2022.
Petitioners By	Mr. Muhammad Azhar Siddique, advocate. M/s Khalil-ur-Rehman, Qamar-uz-Zaman Cheema, Mustafa Kamal, Muhammad Aslam Sheikh, Muhammad Naeem Sheikh, Adnan Tariq, Mian Ghulam Ali Chotya, Syed Tassadaq Mustafa Naqvi, Syed Tassadaq Murtaza Naqvi, Syed Ali Naqi, Barrister Muhammad Umar Riaz, Nauman Sarwar, Ahtisham-ud-Din Khan, Ch. Muhammad Ashfaq, Waqas Umar, Rana Rehan, Muhammad Amin, Maryam Sajjad, Irfan Ali Sheikh, Mian Mehmood Rashid, Miss Rohi Saleh, Mian Zulfiqar Ali, Muhammad Hassan Farooq, Abdul Hameed Tahir Kasuri, Muhammad Rizwan Ghumman, Tanzil-ur-Rehman, Muhammad Suleman, Sajid Sial, Zahid Farooq, Malik Muhammad Riaz, Muhammad Riaz, Hafiz Jamshaid Anwar, Tahir Muneer, Malik Asad Ali Awan, Ihsan-ul-Haq Sajid, Zain Sikandar, Zaman Khan Vardag, Mian Muhammad Sohail, Mushtaq Dhoon, Naila Mushtaq Dhoon, Muhammad Idrees Aslam Chohan, Raja Muhammad Faisal Ullah Khan, Amna Iqbal, Mamoon Nisar, Kamran Iftikhar, Nasir Mehmood, Falak Sher Khan, Javed Imran Ranjha, Arif Hussain Cheema, Qazi Zafar Abbas, Abdul Rehman Dar, Aetisam Ahmad, Sheraz Sultan, Shahid Mehmood Bhatti, Prince Naseem Raza, Afzal Hussain, Zahid Chaudhary, Muhammad Muzahir Chaudhary, Fateh Khan Malik, Mian Tariq Saeed Salotra, Adnan Saeed Chaudhary, Muhammad Zaheer Asghar Bhatti, Amir Aziz Khan, Maaz Sajjad, Hafeez-Ullah Gondal, Ch. Shakeel Gondal, Sardar Dilnawaz Cheema, Waqas Ahmad Aziz, Waqas Ali Bhutta, Muhammad Nauman Yahya, Muhammad Nadeem Abbasi, Mohsin Iqbal, Ch. Qamar-uz-Zaman, Muhammad Waqar Akram, Muhammad Farooq Khokhar, Rai Inam Qadir, Muhammad Khalid, Arif Munir, Zeba Munir, Ali Raza Cheema, Muhammad Bilal, Muhammad Irfan-ul-Haq, Khan Talib Hussain Baloch, Khurram Shehzad Chughtai, Muhammad Arfan Randhawa, Muhammad Umar, Saqib Haroon Chishti, Hammad Khan Babar, Adil Shabbir, Muhammad Imran Rana, Zaman Ali Dogar, Rao Muhammad Akmal, Adnan Rauf, Mahid Abdul Ghaffoor, Nabeel Razaqat, Saba

Shaheen, Waqas Chaudhary, Mehar Alam Sher, Malik Asif Rafiq Rajwana, Tahir Abbas Bhatti, Sardar Muhammad Sadiq Tahir, Nasir Ali Gillani, Syed Zeeshan Hassan, Ahmad Yar Chawli, Mehar Muhammad Waqas, Jabran Ahmad Khan, Waqas Arfan Sandhu, Muhammad Shahid Iqbal Qureshi, Javed Iqbal Qureshi, Malik Muhammad Rafiq, Muhammad Anwar Khan, Aftab Hussain Qureshi, Pervaiz Ali, Abad-urRehman, Umar Tariq Gill, Wajab Fareed, Haris Iftikhar, Mustafa Haroon, R.A. Majid, Muhammad Abdul Qadus, Mohib Ghazi, Mian Kashif Maqsood, Khurram Mehboob, Wajid Islam Hashmi, Muhammad Azwa Sultan, Fawad Ahmad Chishti, Muqit Ahmad Mohila, Waqar Ahmad Ranjha, Muhammad Osama Tariq, Muhammad Ahmad, Rao Javid-ul-Haq Khan, Muhammad Nauman Qazi, Raza Ahmad, Imran Malik, Aakif Majeed Butt, Hassan Ismail, Asim Tufail Farooqi, Nida Aftab, Khaliq Ishaq, Faizan Ahmad, Faheem Gondal, Usman Nasir Awan, Abid Hussain Sial, Muhammad Osama Hanif, Syed Samir Sohail, Asad Ali Gondal, Malik Muhammad Iqbal, Atif Mumtaz Bhatti, Faiz Batool, Mirza Mubashir Baig, Abdul Waheed Habib, Mirza Bilal Zafar, Faisal Rasheed, Muhammad Imran Mansha, Mian Muhammad Mubin Saeed, Sadaqat Mehmood Butt, Faran Ahmad Cheema, Ch. Waseem Ahmad, Muhammad Shahbaz Rana, Muhammad Abbas Wattoo, Syed Waseem Haider Naqvi, Barrister Muhammad Imran Chaudhary, Sh. Muhammad Rizwan, Anwar-ul-Haq, Tanvir Abbas Bhatti, Imran Anjum Alvi, Rai Muhammad Usman, Muhammad Shehzad Hussain Sangla, Gulzar Hussain Sangla, Ch. Usman Sana, Rana Nadeem Ahmad, Nadeem Qaisar, Ch. Abdul Qayyum, Allah Nawaz Khosa, Sajid Iqbal Mohal, Syed Alamdar Hussain, Muhammad Farrukh Khan, Muhammad Ijaz Ali Bhatti, Muhammad Naveed Siyan, Mian Naveed Sadiq, Muhammad Shakeel Tajwani, Ch. Mumtaz Ahmad, Muhammad Alamgir Chaudhary, Tariq Mehmood Ansari, Muhammad Irshad Ali, Malik Bashir Ahmad Khalid, Hammad-ul-Hassan Hanjra, Rana Ali Akbar Khan, Muhammad Majid Saeed, Muhammad Tahir Habibi, Sher Baz Ali, Yasir Islam Chaudhary, Saira Zaffar, Faisal Zaffar, Arfan Ahmad Chattha, Ahmad Munir Khan, Mirza Ahmad Nadir, Azeem Ullah Virk, Muhammad Ali Siddiqui, Taimoor Akhtar Nida Aftab, Khalid Ishaq, Usman Nasir Awan, Malik Riaz Awan, Muhammad Rashid, Syed Imtiaz Hussain Shah, Muhammad Zahid Rafi, Sarmad Nawaz, Dil Nawaz Ahmad Cheema, Muhammad Faizan, Sohail Asghar, Ghulam Mustafa, Amjad Iqbal, Jam Khalid Farid, Amir Sohail Bosal, Ijaz Ahmad Awan, Sultan Ali Awan, Babar Riaz Sidhu, Qaisar Mehmood Sra, Rai Rafi, Uzma Firdos, Mehboob-e-Elahi, Muhammad Tahir Muneer, Ghulam Murtaza, Muhammad Akbar, Mudassar Ijaz, Barrister Muhammad Sohaib Ahmed, Mian Mohsin Mehmood, Malik Sajjad Ashraf Alvi, Shoukat Ali Tanweer, Muhammad Rehan Sarwar, Shah Jahan Khan, Tauseef Zada Khan, Syeda Hamdia Haq, Abid Mehmood Mirza, Mirza Khalid Mehmood, Hassan Maqsood

	<p>Ahmad Aujla, Azhar Yaseen Mahlra, Aftab Zafar, Muhammad Naeem Aziz, Muhammad Ilyas, Tanveer Ahmad Gill, Ch. Imran Arshad Naro, Muhammad Siddique Butt, Malik Hafiz Muhammad Arshad, Adeel Hussain Bhatti, Mian Waqas Khalid, Muhammad Irfan Liaqat, Saad Ayub Khan, Rana Qaisar Mehmood, Abdul Hanan Sarmad, Muhammad Nadeem Ashraf, Muhammad Shehzad Saleem, Ahmad Imran Ghazi, Dr. Ali Qazilbash, Ms. Nudrat B. Majeed, Ashhad Ali Azhar, Munir Ahmad, Irfan Mukhtar, Mian Shabbir Ismail, Amna Liaqat, Salma Riaz, Awais Butt, Tanveer Hussain Mirza, Barrister Zargham Lukhesar, Muhammad Hussam, Mian Asif Ali Maneka, Malik Azhar Iqbal, Waqar Hassan, Barrister Haris Azmat advocates.</p>
<p>Respondents By</p>	<p>Mr. Nasar Ahmad, Additional Attorney General for Pakistan, Mr. Asad Ali Bajwa, Deputy Attorney General, and Ch. Usman Ghani, Assistant Attorney General.</p> <p>Mr. Shoaib Rashid, Mian Danish Quddous, Mr. Furqan Naveed, Mr. Ghulam Mujtaba, Mr. Muhammad Bilal Munir, advocates for LESCO.</p> <p>Mehr Shahid Mehmood, Deputy Manager (Legal) Basharat Ali Mehmood, Deputy Manager (Legal) and Adnan Aslam Qureshi, Chief Law Officer, Yasin Badar, Legal Consultant, LESCO.</p> <p>Mirza Aurangzeb, advocate for GEPCO.</p> <p>Mr. Waqar A. Sheikh, Syed Faisal G.Meeran, Sarfraz Ahmad Cheema, Shehzad Ahmad Cheema, Malik Asad Akram Khan Awan, advocates for FESCO.</p> <p>Barrister Malik Kashif Rafiq Rajwana, and Malik Asif Rafiq Rajwana, advocates for MEPCO.</p> <p>Mian Muhammad Javed, advocate for IESCO, MEPCO.</p> <p>Mr. Amir Sikandar Ranjha, advocate for NEPRA.</p> <p>M/s Sh. Muhammad Ali, Muhammad Rizwan Nazar, Maryam Asad, Ali Usman, Abdul Hafeez Dhillon, advocates for CPPA.</p> <p>Mr. Muhammad Saqlain Arshad and Ehsan Malik for NTDC.</p> <p>Mr. Muhammad Bilal Munir and Mr. Naeem Khan, Shahjahan Khan advocates for FBR.</p> <p>Ch. Muhammad Ijaz Jamal, advocate for Model Town Society.</p>

**IN THE NAME OF ALLAH, THE MOST BENEFICIENT, THE MOST
MERCIFUL**

وَأَنْزَلْنَا الْحَدِيدَ فِيهِ بَأْسٌ شَدِيدٌ وَمَنَافِعُ لِلنَّاسِ {الحديد: 25}

"اور ہم نے لوہے کو اتارا، اس میں سخت قوت اور لوگوں کے لئے فائدے ہیں۔"

"And We sent down iron, wherein there is awesome power and many benefits for people,"

وَلِسْلَيْمَانَ الرِّيحَ عُدُوها شَهْرٌ وَرَواحُها شَهْرٌ ۚ وَأَسَلْنَا لَهُ عَيْنَ الْقِطْرِ ۚ وَمِنَ الْجِبِّ مَن يَعْمَلُ بَيْنَ يَدَيْهِ

يَأْذِنُ رَبِّهِ ۚ وَمَنْ يَزِغْ مِنْهُمْ عَنْ أَمْرِنَا نُذِقْهُ مِنْ عَذَابِ السَّعِيرِ {السبا: ۱۲}

"اور ہم نے سلیمان کے لئے ہوا کو مسخر کر دیا کہ صبح کی منزل اس کی مہینہ بھر کی ہوتی تھی اور شام کی منزل بھی اور ہم نے ان کے لئے

تانبے کا چشمہ بہا دیا اور اس کے رب کے حکم سے بعض جنات اس کی ماتحتی میں اس کے سامنے کام کرتے تھے اور ان میں سے جو بھی

ہمارے حکم سے سرتابی کرے ہم اسے بھڑکتی ہوئی آگ کے عذاب کا مزہ چکھائیں گے۔"

"And to Solomon 'We subjected' the wind: its morning stride was a month's journey and so was its evening stride. And We caused a stream of molten copper to flow for him, and 'We subjected' some of the jinn to work under him by his Lord's Will. And whoever of them deviated from Our command, We made them taste the torment of the blaze."

ALI BAQAR NAJAFI, J:- Through all these

constitutional petitions enumerated in Schedules (A), (B), (C), (D) & (E)

the petitioners domestic, industrial and commercial consumers herein

have challenged the imposition of FUEL PRICE ADJUSTMENT

(hereinafter to be called **FPA**) and QUARTER TARIFF ADJUSTMENT

(hereinafter to be called **QTA**) etc. change of tariff from Industrial to

Commercial by invoking the constitutional jurisdiction under Article 199

of the Constitution of Islamic Republic of Pakistan, 1973 and seek a

direction to the **National Electric Power Regulatory Authority**

(hereinafter to be called **NEPRA**) and **Distributing Companies**

(hereinafter to be called **DISCOs**) not to charge them illegally in violation

of Article 4, 9 & 38 of the Constitution of Islamic Republic of Pakistan, 1973 by taking different favourable grounds.

2. The Almighty Allah نور السموات والارض created Noor/light/energy for the existence of the universe ever essential for the life on our planet, therefore, has to be made accessible for all of us since it is our basic human right so fundamental that it is guaranteed by our Constitution and the law.

3. At present the relevant law on the subject is National Electric Power Regulatory Authority Act, 1997 (hereinafter to be called NEPRA Act 1997) which needs to be read, understood and discussed.

NEPRA ACT, 1997

4. Since the entire discussion will revolve around the NEPRA Act, 1997 therefore, it will be expedient to read the original Act of 1997 and then study subsequent amendments introduced in the year 2011, 2018 and 2021. This will help to understand the legislative response due to the difficulties in the power sector.

5. The original Act promulgated on 16.12.1997 had a preamble for being just and expedient to provide any regulation, generation, transmission, and distribution of electric power and the connected matters. This preamble was changed through Amendment Act of XII of 2018 on 02.05.2018 and the preamble was drastically modified keeping in view the expediency to ensure elimination of energy poverty in Pakistan and to ensure a transparency and to effectively regulate the electric power markets of the country and to provide a legal framework to develop and sustain the competitive market. It also aimed

at providing and developing renewable electricity markets in line with the international commitments of the country while acknowledging the responsibility of Pakistan to support and encourage steps for effectively mitigating adverse climate change and to efficiently manage the conflict and interest of the states in relation to the electric power markets of the country.

The preamble is reproduced as under:-

“AND WHEREAS it is expedient to ensure the elimination of energy poverty in the country to ensure the highest standards of transparent, certain and effective regulation of the electric power markets of the Islamic Republic of Pakistan, to provide the legal framework within which a competitive electric power market can develop and sustain, to make special provisions for development of renewable electricity markets in accordance with the international commitments of the Islamic Republic of Pakistan as well as the responsibility of Islamic Republic of Pakistan to support and encourage measures to effectively mitigate adverse climate change and to effectively manage conflict of interest of the State in relation to development of the electric power markets of the Islamic Republic of Pakistan.”

6. The National Energy Power Regulatory Authority (NEPRA) created under section 3 of NEPRA Act, 1997 by Federal Government through a notification, was consisting of a Chairman directly appointed by the Federal Government and 4 members (one from each province) appointed by the Federal Government after considering the recommendations of the Provincial Governments. The vice Chairman of the Authority was appointed from the members for a period of one year by rotation in an alphabetical order. The qualification for Chairman was that he must be an eminent professional of known integrity and competence with 20 years of related experience in law, business, engineering, finance, accounting, economics or the electric utility business. The qualification for the member was the same but with the slight difference of maximum experience reduced to 15 years instead of 20 years.

The tenure of the Chairman and the member was 4 years each and their maximum age limit was 65 years. However, it was prescribed that any act or proceedings of the Authority would not be considered invalidated if there existed a vacancy or a defect in the constitution of the Authority. Under Section 5 three members out of total membership of 5, 6 & 7 would constitute a quorum of the Authority for taking a decision. The decision of the Authority was to be made by majority of the members present in the meeting and in case of a tie, the person presiding over the meeting would have a casting vote. The Authority was empowered to grant license for generation etc., prescribe procedure for investment performance standards, to establish a uniform system of accounts, prescribe fee for the grant of licenses and fine in case of contravention of the Act and perform any other function consequent thereto. The Authority was also empowered to determine tariff, rates, charges, terms and conditions of supply of electric power, renew organizational affairs, encourage uniform industry standards and develop code of conduct, tender advice to public sector projects, submit report about activities of the companies and to perform any other consequential functions. It was also given in the Act that before approving the tariff for supply of electric power by generation companies using hydroelectric plants, the Provincial Government's recommendation (where such generation facility was located), was also to be considered. It was specifically mentioned that in performing its functions under the Act, the Authority shall as far as practicable, protect the interest of consumers and companies providing electric power services in accordance with guidelines laid down by the Federal Government but not inconsistent with provisions of the Act. Under section 31, the tariff was to be

determined by the Authority under the prescribed procedures and following standards for determination, modification, revision of rates, charges and terms and conditions for generation of electric power, transmission, inter-connection, distribution services and power sales to the consumers. The Authority while determining above standards, was required to protect consumers against monopolistic and oligopolistic prices, keeping in mind the research, development and capital investment program costs of licensees. It was also supposed to encourage efficiency in licensees operations and quality of service, economic efficiency in the electric power industry keeping in view the economic and social policy objectives of the Federal Government, thus was also responsible to determine tariff so as to eliminate the demand of exploitation and minimize the economic distortions. In order to determine the tariff, the procedure would ensure the timeframe to decide the tariff petitions to provide opportunity to consumers and other interested parties to participate meaningfully in the tariff approval process and protect the refund to the consumers during the pendency of the tariff decision. Once the tariff rates, charges and other terms for supply of electric services by the generation, transmission and distribution companies is approved by the Authority, it shall be notified in the official Gazette by the Federal Government upon intimation to the Authority. However, the Federal Government could require the Authority to reconsider its determination within 15 days and then Authority shall determine and renew after consideration and intimate the decision within 15 days to the Federal Government. Notably, the decisions of the Authority were to be enforced as decrees of the civil court. For our comparative analysis

relevant Section 3, Section 5, Section 6, Section 7 and Section 31 are reproduced as under for ready reference:-

3. Establishment of the Authority. — (1) *As soon as may be, but not later than thirty days after the commencement of this Act, the Federal Government shall, by notification in the official Gazette, establish a National Electric Power Regulatory Authority consisting of a Chairman to be appointed by the Federal Government and four members, one from each Province, to be appointed by the Federal Government after considering the recommendations of the respective Provincial Governments.*

(2) *There shall be a Vice-Chairman of the Authority, appointed from amongst the members for a period of one year, by rotation, in the following order, namely: -*

- (i) *the member representing the Province of Balochistan;*
- (ii) *the member representing the Province of North-West Frontier;*
- (iii) *the member representing the Province of the Punjab;*
and
- (iv) *the member representing the Province of Sindh.*

(3) *The Chairman shall be an eminent professional of known integrity and competence with twenty years of related experience in law, business, engineering, finance, accounting, economics or the electric utility business.*

(5) *The Chairman and a member shall, unless he resigns or is removed from office earlier as hereinafter provided, hold office for a term of four years and shall be eligible for reappointment for similar term:*

Provided that the Chairman or a member shall not be appointed under sub-section (1) if he has attained the age of sixty-five years.

(6) *No act or proceeding of the Authority shall be invalid by reason only of the existence of a vacancy in, or defect in, the constitution of the Authority.*

(7) *The principal office of the Authority shall be in Islamabad and it may set-up offices at such place or places as it may deem appropriate.*

5. Meetings of the Authority, etc. — (1) *The meetings of the Authority shall be presided over by the Chairman or, in his absence, the Vice-Chairman.*

(2) *Three members shall constitute a quorum for meetings of the Authority requiring a decision by the Authority.*

(3) *The members shall have reasonable notice of the time and place of the meeting and the matters on which a decision by the Authority shall be taken in such meeting.*

(4) *The decision of the Authority shall be taken by the majority of its members present, and in case of a tie, the person presiding the meeting shall have a casting vote.*

6. Decisions of the Authority. *All orders, determinations and decisions of the Authority shall be taken in writing and shall identify the determination of the Chairman and each member.*

7. Powers and functions of the Authority.—(1) *The Authority shall be exclusively responsible for regulating the provision of electric power services.*

(2) *In particular and without prejudice to the generality of the foregoing power, only the Authority, but subject to the provisions of sub-section (4), shall—*

- (a) *grant licences for generation, transmission and distribution of electric power;*
- (b) *prescribe procedures and standards for investment programs by generation, transmission and distribution companies;*
- (c) *prescribe and enforce performance standards for generation, transmission and distribution companies;*
- (d) *establish a uniform system of accounts by generation, transmissions and distribution companies;*
- (e) *prescribe fee including fee for grant of licences and renewal thereof;*
- (f) *prescribe fines for contravention of the provisions of this Act; and*
- (g) *perform any other function which is incidental or consequential to any of the aforesaid functions.*

(3) *Notwithstanding the provisions of sub-section (2) and without prejudice to the generality of the power conferred by sub-section (1) the Authority shall—*

- (a) *determine tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend to the Federal Government for notification;*
- (b) *review organizational affairs of generation, transmission and distribution companies to avoid any adverse effect on the operation of electric power services and for continuous and efficient supply of such services;*
- (c) *encourage uniform industry standards and code of conduct for generation, transmission and distribution companies;*
- (d) *tender advice to public sector projects;*
- (e) *submit reports to the Federal Government in respect of activities of generation, transmission and distribution companies; and*
- (f) *perform any other function which is incidental or consequential to any of the aforesaid functions.*

(4) *Notwithstanding anything contained in this Act, the Government of a Province may construct power houses and grid stations and lay transmission lines for use within the Province and determine the tariff for distribution of electricity within the Province.*

(5) *Before approving the tariff for the supply of electric power by generation companies using hydroelectric plants, the Authority shall consider the recommendations of the Government of the Province in which such generation facility is located.*

(6) *In performing its functions under this Act, the Authority shall protect interests of consumers and companies providing electric power services in accordance with the guidelines, not inconsistent with the provision of this Act, laid down by the Federal Government.*

31. Tariffs. (1) *As soon as may be, but not later than six months from the commencement of this Act, the Authority shall determine and prescribe procedures and standards for determination, modification or revision of rates, charges and terms and conditions for generation of electric power, transmission, inter-connection, distribution services and power sales to consumers by licensees and until such procedures and standards are prescribed, the Authority shall determine, modify or revise such rates, charges and terms and conditions in accordance with the directions issued by the Federal Government.*

(2) *The Authority while determining the standards referred to in sub-section (1) shall-*

- (a) *protect consumers against monopolistic and oligopolistic prices;*
- (b) *keep in view the research, development and capital investment programme costs of licensees;*
- (c) *encourage efficiency in licensees operations and quality of service;*
- (d) *encourage economic efficiency in the electric power industry;*
- (e) *keep in view the economic and social policy objectives of the Federal Government; and*
- (f) *determine tariffs so as to eliminate exploitation and minimize economic distortions.*

(3) *The procedures established under sub-section (1) shall include*

- (a) *time frame for decisions by the Authority on tariff applications;*
- (b) *opportunity for customers and other interested parties to participate meaningfully in the tariff approval process; and*
- (c) *protection for refund, if any, to customers while tariff decisions are pending.*

(4) *Notification of the Authority's approved tariff rates, charges, and other terms and conditions for the supply of electric power services by generation, transmission and distribution companies shall be made, in the official Gazette, by the Federal Government upon intimation by the Authority:*

Provided that the Federal Government may, as soon as may be, but not later than fifteen days of receipt of the Authority's intimation, require the Authority to reconsider its determination of such tariff, rates, charges and other terms and conditions. Whereupon the Authority shall, within fifteen days, determine these anew after reconsideration and intimate the same to the Federal Government."

LEGISLATIVE HISTORY OF NEPRA ACT, 1997

7. Initially, the Act did not provide a forum to challenge the decision against determination of tariff and other charges, therefore, the amendments were made according to the requirements of the time. The first amendment was made on 27.06.2008 in Section 31 by introducing a proviso according to which the Authority was required to renew and revise the approved tariff on monthly basis on account of any variation in the fuel charges and policy guidelines that the Federal Government might issue and then recommend the revised tariff to the Federal Government for notification in the official Gazette; whereafter the tariff is imposed. On 24.09.2011 Section 3 was further amended to improve the qualification of the Chairman to be a person who may have an experience of power industry. Section 7 was also amended and according to the amended position the Authority could also review its order, decisions or determinations, settle disputed between the licensees, issue guidelines and Standards Operation Procedure (SOPs). Section 12A was inserted according to which a right of appeal was provided to any aggrieved person against the order of the single Member of the Authority or Tribunal, established under Section 11, before the newly constituted

Tribunal within 15 days in the prescribed manner which was to be decided within 60 days. Section 31 was further amended by introducing the requirement that Authority could make adjustment in the approved tariff on monthly basis but not later than the period of 7 days. However, on 30.04.2018, substantial amendments were made by the Act of XII of 2018 under which in Section 3, the Khyber Pakhtunkhwa name was substituted for NWFP and the qualification of the Chairman as well as the members of the Authority was prescribed with an experience of not less than 12 years in the relevant field including law, business, engineering, finance, accounting or economics preferably in the electric power services business. However, the Authority as a whole was to comprise of the requisite range of skill, competence, knowledge and experience relevant to its functions. The maximum age for Chairman or Member was 60 years. Under Section 5, the Authority was further empowered to perform its functions and conduct its proceedings in accordance with the regulations made under the said Act. Now the maximum age limit of the Chairman of the authority was 65 years whereas the Member Finance and the Member Electricity, both of not more than 60 years, were to be appointed for a period of 3 years by rotation from each Provinces. In case of a vacancy of the member of the authority, the Federal Government would designate a new member and if the position of the Chairman was vacant, the Federal Government would appoint one of the existing members as acting Chairman only for a period of 3 months. The Federal Government was essentially required to fill up the vacancy of the tribunal within 3 months from the date when such vacancy occurred. The absence

of Chairman or his temporary incapacity was not to affect the power of members to decide. In order to further strengthen and provide more efficient forum for the resolution of disputes the Appellate Tribunal was established by the Federal Government with its members appointed by the Federal Government under section 12 and a former Judge of the High Court as Chairman for a period of 4 years whereas the members should be nominated by the Provinces or the Federal Government representing Federal Government and the Provinces. The decision of the Appellate Tribunal was to be taken by the majority. If there were less than 03 members in the Appellate Tribunal the presence of 02 shall constitute a quorum and the decision shall be taken by consensus. Importantly, the Appellate Tribunal at the most could remand a matter of tariff determination to the Authority with the relevant guidelines to review such determination within one month. The decision of the Authority was to be given full effect during the pendency of the appeal and against the decision of the said Tribunal further appeal was competent before the High Court having territorial jurisdiction. The Appellate Tribunal was deemed to be a Civil Court having same powers under Code of Civil Procedure including the power to enforce attendance, production of documents, issuing commissions and was also empowered to examine any record, require information of document from any person in relation to the matter under appeal. The appellate tribunal was also competent to maintain a panel of national and international experts in power sector to assist in its performance and functions. Sections 12G, 12H, 12I, 12J, 12K are reproduced as under:-

12G. Appellate procedures.—(1) Any person aggrieved by a decision or order of the Authority or a single member thereof or a Tribunal established under section 11 may, within thirty days of the decision or order, prefer an appeal to the Appellate Tribunal in the prescribed manner and the Appellate Tribunal shall decide such appeal within three months after filing of the appeal.

(2) In examining an appeal under sub-section (1), the Appellate Tribunal may make such further inquiry as it may consider necessary and after giving the Authority or the Tribunal and an appellant an opportunity of being heard, pass such order as it thinks fit, confirming, altering or annulling a decision or order appealed against:

Provided that if the decision under appeal is a determination of tariff by the Authority, then the Appellate Tribunal may in case of disagreement with the determination of the Authority, remand the matter back to the Authority with relevant guidelines, which shall be duly considered by the Authority which shall be bound to review its determination within one month of the receipt of such guidelines from the Appellate Tribunal.

(3) The decision of the Appellate Tribunal shall be in writing, detailing the issues raised in the appeal and the arguments adopted by the appellant and the Authority or Tribunal, as the case may be. The Appellate Tribunal shall also provide reasons for reaching its decision with reference to the provisions of this Act and the facts of the case.

(4) The Appellate Tribunal shall provide copies of its decision to all the appellants and the respondents including the Authority or Tribunal, as the case may be, not later than five days from the date of rendering its decision.

(5) A decision or order of the Authority or Tribunal, as the case may be, shall be given full force and effect during the pendency of any appeal of such determination.

(6) The decision of the Appellate Tribunal shall be appealable before the High Court having territorial jurisdiction.

12H. Disclosure of interest.—The following shall apply to members of the Appellate Tribunal including the Chairman, namely:—

(a) a member of the Appellate Tribunal shall be deemed to have an interest in a matter if he has any interest, pecuniary or otherwise, in such matter which could reasonably be regarded as giving rise to a conflict between his duty to honestly perform his functions, so that his ability to consider and decide any question Page 19 of 46 impartially or to give any advice without bias, may reasonably be regarded as impaired;

(b) a member of the Appellate Tribunal having any interest in any matter to be discussed or decided by the Appellate Tribunal shall disclose in writing to the Secretary to the Appellate Tribunal, the fact of his interest and the nature thereof;

(c) a member of the Appellate Tribunal shall give written notice to the Secretary to the Appellate Tribunal of all direct or indirect pecuniary or other material or personal interests that he has or acquires in a body corporate involved in a matter before the Appellate Tribunal; and

(d) a disclosure of interest under clause (a) shall be made a part of the record of the Appellate Tribunal in that particular matter.

12I. Powers of the Appellate Tribunal.—(1) The Appellate Tribunal shall, for the purpose of deciding an appeal, be deemed to be a civil court and shall have the same powers as are vested in such court

under the Code of Civil Procedure, 1908 (Act V of 1908), including the powers of—

(a) enforcing attendance of any person and examining him on oath;

(b) compelling production of documents; and

(c) issuing commissions for examination of witnesses and documents.

(2) The Appellate Tribunal may call for and examine any record, information or documents from any person in relation to the matter under appeal before it for the purposes of enabling it to come to a decision.

12J. Panel of experts.— *The Appellate Tribunal may maintain a panel of national and international experts in power sector to assist it in performance of its functions under this Act as and when deemed fit by the Appellate Tribunal.*

12K. Budget.— *The Appellate Tribunal shall have an independent budget which shall comprise— (a) an initial grant from the Federal Government; and (b) fees and costs associated with appellate procedures as may be prescribed.]*

8. Likewise on 10.08.2021, further amendments were made in Section 31 (Tariff) emphasizing upon the protection of public consumer interests and to determine the uniform tariff for distribution licensees wholly owned and controlled by a common shareholder. The Federal Government was empowered to require the Authority to reconsider determination of tariff to the extent of issues common to these licensees and upon which within 30 days the decision would be intimated to the Federal Government. Likewise, Authority is to make a quarterly adjustment within a period of 15 days from the approved tariff on account of capacity and transmission charges, impact of transmission and distribution losses, operation & maintenance variables and policy guidelines by the Government and to decide the same within 15 days. The electric power supplier was authorized to collect surcharges from any category of consumers as the Federal Government might charge and notify in the Gazette in respect of each unit of electric power to be sold and to deposit

the said amount in the prescribed manner. Such surcharge will be considered as cost incurred by the electric power supplier to be levied for the purpose of funding of any public sector project of public importance, fulfilment of any financial obligation taken by the Federal Government with respect to the electric power.

9. On 01.12.2021, another amendment was made in Section 3 according to which the Authority was made to consist of a Chairman and 4 specialized members to be appointed by the Federal Government; called (1) Member tariff, (2) Member Finance, (3) Member Technical and (4) Member Development with the prescribed qualification and each member from each Province was to act by rotation in the above said capacity. The age of the Chairman and for Member is now maximum 60 years (instead of 65) to be appointed for 3 years and now the appointment was to be finalized necessarily within 90 days prior to the retirement of the incumbent. The Federal Government could appoint an acting Chairman if the office of the Chairman becomes vacant due to death, resignation or removal of the Chairman or a member. The Chairman and two other members shall constitute a quorum for a meeting. Any member could be appointed as acting Chairman if the situation so arises.

NEPRA AUTHORITY AS IT EXISTS TODAY.

10. The purpose of tracing out the historical background of legislative reforms in the power sector is to understand the improvement in local generation and transmission and electricity supply which indicate that it had been responding to the requirements envisaged by the variables from

time to time. The present status of the NEPRA Act, 1997 and the salient features for the purposes of our discussion are as follows:-

NEPRA is a body corporate which can acquire and hold property and can sue or be sued in its name. It comprises of a Chairman and 4 specialized members to be appointed by the Federal Government which shall be called (1) Member Tariff and Finance having degree in the field of economics, corporate finance or chartered accountancy and is a professional of known integrity and eminence with 12 years related experience in the field of business and chartered accountancy to be appointed by the Province or Federal Government, as the case may be by rotation as member Balochistan, Punjab, Khyber Pakhtunkhwa and Sindh. Likewise, the (2) Member Technical was to be a person holding an engineering degree in the field of electricity, energy or power and is a professional of known integrity and eminence with a 12 years experience in the related field to be appointed by the Province or the Federal Government, as the case may be on rotation for all provinces. Likewise, the (3) Member Law must hold a degree in the field of corporate and economics law and is a professional of known integrity and eminence with 12 years' experience in the field of corporate law and economics law, to be appointed by the Federal Government and the Province, as the case may be, on the same lines rotation from each 4 Provinces. The qualification for (4) Member Development was that he must possess a degree in the field of economics, chartered accountancy or an engineering in electricity, energy or power and be a professional of known integrity and eminence with 12 years related experience in the field of public policy,

renewable energy or electric power services business to be nominated by the Province or the Federal Government, as the case may be on the basis of rotation from each Province, to be appointed for a period of 3 years. Therefore, the Authority as a whole was to comprise of the requisite range of skills, competence, knowledge and experience relevant to its functions. The maximum age for Chairman and Member is 60 years. The process of appointment of new Chairman and member must start in advance. It was also provided that any act or proceeding of the Authority shall not be invalidated on the ground that the vacancy existed or the constitution of the Authority was defective. The Chairman and two other members was to constitute a quorum for the meeting of the Authority. The Authority was entitled to determine the tariff, rates, charges, review organizational affairs of generation, encourage uniform industry standards, submit report to the Federal Government, etc.

LEGAL STATUS OF THE NEPRA AUTHORITY.

11. It is clear that the NEPRA Act, 1997 has undergone substantial amendments through Act IX of 2018 and Act XIV of 2021 and interpretation by the Supreme Court in various judgments since its promulgation and the passing of the 18th amendment in the Constitution. The basic legal question raised before this court is the constitution of the authority defined under Section 3 after the said modification in the Act and the judgments of the Supreme Court. As already noted that by means of the amendment in 2021, sub clause (2) of Section 3 has now made it obligatory upon the Federal Government to appoint a Chairman and 4

specialized Members experts in the field of tariff and finance, chartered accountant, etc., as discussed above. It is however to be pointed out that each of these Members are to be rotated so that the 4 Provinces of the Federation, namely Punjab, Balochistan, Sindh, KPK are continuously represented as a part of the Authority which would make it fully functional. This policy of rotational representation enumerated in sub section (2) is to ensure the equal and equitable representation of the Provinces. However, under section 31(2)(4a) the authority as a whole was to comply with the requisite range of skills. Admittedly, the Authority contemplated in section 3 had not been completed, since other than the Chairman and 02 Members rests were not appointed by the Federal Government for the reasons best known to them. Resultantly, at the time of the working out the adjustments in the approved tariff on account of variations in the fuel charges on monthly basis the authority was not fully functional. Obviously, the objectives of having members from each province is to carry forward the basic principle and rationale behind the 18th Amendment. After devolution of the power to the provinces it was important that national integration should be observed at the forefront of Power Sector Management as well, therefore, Provincial representation is essential not only to protect the national interest but also to ensure that none of the Provinces feels deprived of their role in contributing into the running of the affairs of the country/Federation. This important issue in my humble understanding goes to the root of Federalism, therefore, must be given its due importance and recognition by this court.

TARIFF DETERMINATION.

12. While determining the tariff it is the sacred duty of NEPRA to protect the interest of consumers, power generation and distribution companies, National Transmission and Dispatch Companies and then to fix, renew, revise or modify the tariff of energy after conducting a discrete inquiry and thoroughly hearing them. Under Section 31(2) Tariff means a final cost of energy offered to consumer determined on the basis of reference fuel price and any subsequent difference in the fuel price, added by NEPRA, therefore, it should be in the knowledge of the consumer that they were required to pay the price of energy on the basis of tentative fuel price and that the actual price would be payable on the receipt of the actual invoice of the fuel. Thus, it was a pre-agreed but reasonably contemplated liability of the consumer payable as and when finally determined, therefore, no question of vested right and legitimate expectancy arises if it not unjust. Simultaneously, it is also the heavy responsibility of the NEPRA to adjudge against the power generation companies if they wrongly claimed fuel adjustment costs and other expenses in order to transfer its burden to the consumers. Federal Government and NEPRA will also be responsible to determine the transmission losses after holding detailed probe and to fix the responsibility and then to take appropriate action against the culprits as held in Muhammad Yasin's case.¹ More so as under section 31(2) the NEPRA is bound to protect consumers against monopolistic and oligopolistic prices as the electricity was a monopoly product of WAPDA thus it is required to examine each and every component used for generation and transmission of energy while determining

¹ MUHAMMAD YASIN versus FEDERATION OF PAKISTAN through Secretary, Establishment Division, Islamabad and others reported as PLD 2012 Supreme Court 132

the tariff as held in Noorani Steel Mills's case.² However, in paragraph No.3 of the judgment, it has been observed by the Single Bench of this Court that prior to a new decision, notice was to be given in the national press and if the petitioners did not choose to intervene, the estoppel would operate against them and that the tariff determination has to be calculated, say for the month of January, in the following month of February, and that it must be determined periodically on the basis of actual and not hypothetical consumption. The question of tariff determination was dealt with in details in Pakistan Flour Mills Association's case³ wherein the case was sent to NEPRA to re-examine the determination and tariff as well as losses. It was further held that remanding the matter to NEPRA will not take away the rights of DISCOs or power generation companies to participate, where they will be at liberty to object and raise any such objection not be attended to by the authority according to law. Obviously, the notification issued by the Federal Government is always based upon determination of tariff by NEPRA and if it had reached at a conclusion other than the one already arrived at then the Federal Government would be free to issue a fresh notification and until changed, the same will remain in field. However, the procedural defects in the price determination by NEPRA were to be covered through fresh determination in view of the guidelines and observations as decided in Flying Board & Paper's case.⁴

² Messrs NOORANI STEEL MILLS versus FEDERATION OF PAKISTAN reported as 2010 YLR 2872

³ PAKISTAN FLOUR MILLS ASSOCIATION (PUNJAB BRANCH) through Vice Chairman versus WATER AND POWER DEVELOPMENT AUTHORITY (WAPDA) and others reported as PLD 2013 Lahore 182

⁴ FLYING BOARD AND PAPER PRODUCTS LTD. and others versus GOVERNMENT OF PAKISTAN through Secretary Cabinet Division and others reported as 2010 SCMR 517.

TARIFF DETERMINATION ON REGULAR BASIS

13. Under Section 3 the tariff is to be determined regularly and mandatorily on yearly, quarterly and monthly basis so as to demand the exact amounts from the domestic, industrial and commercial consumers. The broad reasoning is that the timely demand with legitimate expectancy is essential for the budgetary and to prepare a profit-loss balance sheet ever essential for payments, therefore, the timeframe so given in the said provision cannot be extended as it is mandatory and not directory. A reference to Super Asia's Case⁵ in which the legislative object and purpose is held as the clearest indicator to ascertain the mandatory nature of statute. Para 6 of the judgment is reproduced as under:-

“6. The ultimate test to determine whether a provision is mandatory or directory is that of ascertaining the legislative intent. While the use of the word 'shall' is not the sole factor which determines the mandatory or directory nature of a provision, it is certainly one of the indicators of legislative intent. Other factors include the presence of penal consequences in case of non-compliance, but perhaps the clearest indicator is the object and purpose of the statute and the provision in question. It is the duty of the Court to garner the real intent of the legislature as expressed in the law itself. Reference may be made to the cases of Syed Zia Haider Rizvi and others v. Deputy Commissioner of Wealth Tax, Lahore and others (2011 SCMR 420), In Re. Presidential Election, 1974 (AIR 1974 SC 1682), Lachmi Narain v. Union of India (AIR 1976 SC 714) and Dinesh Chandra Pandey v. High Court of Madhya Pradesh and another [(2010) 11 SCC 500].

Similarly, the legislative intent has been held as the guiding principal to distinguish the mandatory or directory nature of the statutory

⁵ The COLLECTOR OF SALES TAX, GUJRANWALA versus Messrs SUPER ASIA MOHAMMAD DIN AND SONS reported as 2017 SCMR 1427

provisions in Imam Bakhsh's case⁶. Relevant extract of para 11 is reproduced as under:-

“.....The duty of the court is to try to unravel the real intention of the legislature. This exercise entails carefully attending to the scheme of the Act and then highlighting the provisions that actually embody the real purpose and object of the Act....”

The Due Process ever essential for tariff determination was emphasized in E-Mover's case⁷ as the concept to be understood holistically by keeping in mind the entire constitution. It protects the citizens from arbitrariness. Relevant extract of para 24 is reproduced as under:-

“....The right to be treated in accordance with law was invigorated and bolstered when the Constitution was amended to provide an additional Fundamental Right by adding Article 10A to the Constitution stipulating that, 'For the determination of his civil rights and obligations or in any criminal charge against him a person shall be entitled to a fair trial and due process. The due process requirement must be met in the determination of rights and obligations. The Constitution does not define due process. Therefore, it would not be appropriate to limit its scope by defining it. But this does not mean that the due process requirement is a meaningless concept. Rather due process incorporates universally accepted standards of justice and is not dependent upon any law or laws. It is an all encompassing expression which may not be curtailed with reference to particular laws. Due process is to be understood holistically by keeping in mind the entire Constitution, which excludes arbitrary power, authoritarianism and autocratic rule.”

JUDICIAL HISTORY OF NEPRA CASES

The development of the judicial history through various judgments handed down by the superior courts will show the trend of enforcement and protection of fundamental rights of the consumers of electricity. First of its kind was the judgment in 2009 by this Court in case ICC Textile's

⁶ STATE through Regional Director ANF versus IMAM BAKHSH reported as 2018 SCMR 2039

⁷ FEDERATION OF PAKISTAN through Secretary Finance, Islamabad and another versus E-MOVERS (PVT.) LIMITED and other reported as 2022 SCMR 1021

case⁸ in which, besides discussing the immorality of short orders, the infirmities in the detailed order passed by NEPRA authority were also pointed out by observing that issues were required to be framed, evidence to be recorded and the substantial increase in tariff merely on the basis of previous long years expenditures was whimsical, irrational, and without reasons and that even depreciation of rate of return of investment with comparative risks were not discussed, hence the cost was held not prudently incurred. Since the procedure and the guidelines and standards were not followed ignoring the related law, in the said case the tariff petitions were remanded and were deemed to be pending before the NEPRA where they were to be decided. Relevant para 20 is reproduced as under:-

“The overview of the provision of the Act and the Rules framed thereunder, referred to above reveal that NEPRA is vested with the power to determine the tariff, and in doing so, it is enjoined by law, as far as practicable to protect the interest of consumers and the companies providing service. More particularly NEPRA while determining the tariff must protect the consumer against monopolistic and oligarchical practices, encourage efficiency in the operation and quality of service and promote economic efficiency in the power industry. NEPRA must keep in view the economic and social policy objectives of the Federal Government, and more importantly, eliminate exploitation and economic distortions. Furthermore, the tariffs should allow licensees (in the instant case DISCs) recovery of any and all costs prudently incurred. The tariff should also provide for a Rate of Return to the licensee of the capital investment which is commensurate to the Rate of Return earned by other investment or comparable risks and promote investments. The tariff should also include a mechanism to allow licensee benefits through improved efficiency and to improve the quality of service. Financial stability in the power sector should also be taken into account. Competition should be encouraged. Inter class and inter-region subsidies should be provided transparently, consumer with low consumption levels i.e. the lifeline consumers being provided with electricity at a below rate and appropriate arrangement for rural electrification should be built into the tariff. Discrimination inter se the consumer groups with similarly service requirements should be avoided. And most importantly, each tariff determination

⁸ ICC Textiles Limited through Authorized Representative and 31 others Vs. Water and Power Development Authority (WAPDA), WAPDA House, Lahore through Chairman and 15 others reported as 2009 CLC 1343

should be comprehensive and free of the possibility of misinterpretation and state explicitly each component thereof”.

It was further held that the nature of the proceedings before NEPRA are inquisitorial, therefore, the rights of the interveners were also protected. Para 22 and 43 are reproduced as under:-

“22. The fact that the proceedings conducted by NEPRA are inquisitorial in nature does not in any manner detract from the right of the intervener to have his objections adjudicated upon by invoking the various provisions vested in NEPRA, referred to above. In fact, the NEPRA should not hesitate to exercise such powers at the behest of the Intervener if so required so as to make the participation thereof meaningful in the tariff approval process as is enjoined by section 31(3)(b) OF THE Act. Any failure in this behalf would reduce the proceedings before NEPRA a sham and would denude of its validity.

43. It would have been appropriate for NEPRA to have permitted the consumers to have resort to intervention or otherwise participate in the proceedings. Of course, scope of the hearing would be limited to examine and test the veracity and accuracy of the change in the components of the formula already determined without permitting the interveners, if any, to reopen the matters settled through the previous final determination, whereunder, the adjustment was being effected. In this view of the matter determination through adjustment dated 23-08-2008 being violative of principle of natural justice is without jurisdiction and is liable to be set aside”.

In another important judgment given in Pakistan Flour Mills Association’s case (supra) a learned Single Judge of this Court held that the NEPRA was duty bound to protect the interest of both parties; i.e. consumers and the power generation companies and it was its responsibility to fix renew, revise and modify the tariff of energy after conducting an inquiry & hearing the stake holders which also include National Transmission and Dispatch Companies (NTDC). It was concluded that the tariff means the final cost of energy offered to the consumers, even if it was received provisionally since it was already a pre-agreed arrangement/terms by the consumers. However further held that it did not include the line losses as NEPRA determines the energy

tariffs on the basis of referred fuel prices and any subsequent differences in fuel prices was added by NEPRA, therefore, it was in the knowledge of the consumers that they were paying the price of the energy which was arrived at on the basis of tentative fuel price and that the actual price would be payable as and when it is finally determined and, therefore, no vested right and legitimate expectancy could arise. A right is the one which is complete in all respects and did not depend upon any contingency. However, it was decided that domestic consumers of less than 350 units were not to pay the fuel price adjustment price and the DISCO were bound to return the excess cost back to the consumers. The observations are relevant in para 41, 42, 43, 44, 45, 46, therefore, are reproduced as under for our understanding of the issue:-

41. *However this argument has a force to the extent of individual consumer. Every citizen of Pakistan is enjoying the right of life with dignity under Articles 9 and 14 of the Constitution of Islamic Republic of Pakistan. Pakistan is a Islamic State and Holy Quran says about the right of Basic needs; "And in their wealth the seeker and the deprived has due share "(al-Dhriyat 51:" Give the Kinsman his due, and the needy and the wayfarer, and do not dissipate your wealth extravagantly . (Bani Isrial 17:26).*

42. *Now it has to be seen whether the right to get electricity with reference to Articles 9 and 14 is the basic need and is a right of life and if it is a right of life than the life line declared by the respondent for domestic consumers fulfill the minimum requirement of domestic consumer or not?*

43. *Right to Life has been dilated upon by the honourable Supreme Court of Pakistan in Ms. Shehla Zia and others v. WAPDA (PLD 1994 SC 693).*

"47. Article 9 of the Constitution provides that no person shall be deprived of life or liberty save in accordance with law. The word 'life' is very significant as it covers all facts of human existence. The word 'life' has not been defined in the Constitution but it does not mean nor can it be restricted only to the vegetative or animal life or mere existence from conception to death. Life includes all such amenities and facilities which a person born in a free country, is entitled to enjoy with dignity, legally and constitutionally. The word 'life' in the Constitution has not been used in a limited manner. A wide meaning should be given to enable a man not only to sustain life but to enjoy it. Under our Constitution, Article 14 provides that the dignity of man and subject to

law the privacy of home shall be inviolable. The fundamental right to preserve and protect the dignity of man under Article 14 is unparalleled and could be found only in few Constitutions of the world. The Constitution guarantees dignity of man and also right to 'life' under Article 9 and if both are read together, question will, arise whether a person can be said to have dignity of man if his right to life is below bare necessity like without proper food, clothing, shelter, education, health care, clean atmosphere and unpolluted environment. Such questions will arise for consideration which can be dilated upon in more detail in a proper proceeding involving such specific questions."

44. *The Hon'ble Supreme Court again examined Article 9 of the Constitution in Arshad Mehmood and others v. Government of Punjab through Secretary, Transport Civil Secretariat, Lahore and others (PLD 2005 SC 193) and held as under:*

"Word 'life' used in Art.9 of the Constitution includes all such amenities and facilities which a person born in a free country is entitled to enjoy with dignity, legally and constitutionally, Word 'life' in the Constitution has not been used in a limited manner; a wide meaning should be given to enable a man not only to sustain life but to enjoy it."

45. *Again the word life has been examined in Dr.Mobashir Hassan and others v. Federation of Pakistan and others (PLD 2010 SC 265), Bank of Punjab and another v. Haris Steel Industries (Pvt.) Ltd. and others (PLD 2010 SC 1109) and Watan Party and another v. Federation of Pakistan and others (PLD 2011 SC 997), Alleged Corruption in Rental Power Plants etc. case (2012 SCMR 773).*

46. *The Hon'ble Supreme Court of Pakistan examined the right of life with reference to electricity 2012 SCMR 773, Alleged Corruption in Rental Power Plants etc. and opined as under;*

"15. It is to be clarified that the Government of the day under Article 29 read with Article 2A of the Constitution is bound to formulate policies for the promotion of social and economic well being of the people, which includes provision of facilities to the citizens for work and adequate livelihood with a reasonable rest and leisure, etc. Energy/electricity is essentially one of the significant facilities required by the citizens for manifold purposes, namely, uplifting of their social and economic status. Non-supply of electricity to the citizen regularly, is tantamount to depriving them of one of the essentials of the life including the security of economic activities, which are relatable to their fundamental rights protected under Articles 9 and 14 of the Constitution. In the cases of Bank of Punjab v. Haris Steel Industries (PLD 2010 SC 1109), Liaqat Hussain v. The Federation of Pakistan (Constitution Petition No.50/2011). In Re: Human Rights Case regarding fast food chain in F-9 Park (PLD 2010 SC 759), In Re: SMC No.13 of 2009 (Case regarding Multi-Professional Housing Schemes) (PLD 2011 SC 619) and Shehla Zia v. WAPDA (PLD 1994 SC 693), Article 9 has been interpreted and its scope has been enlarged to each and every aspect of human life. Therefore, whenever a policy is framed with reference to uplifting the socio-economic conditions of the citizens, object should be to ensure enforcement of their fundamental rights."

Importantly, the I.C.A. No.173-2013 is pending before a Division Bench of this Court.

14. To ascertain whether the State is providing or safeguarding fundamental right of its citizens, more recently the Apex Court in Naimatullah Khan Advocate's case⁹ re-emphasized upon the provision of electricity and held it as right to life which is to be protected by the State and its organs. Relevant extract from page 627 is reproduced as under:-

“5. The provision of drinking water, is a right to life; provision of electricity, is a right to life; provision of education, is a right to life; provision of health facility, is a right to life; provision of civic infrastructure and civil infrastructure, is a right to life;

.....The State and its Organs cannot, as per mandate of the Constitution, abdicate, ignore or abandon this most important function of theirs and leave the citizens to fend themselves, which only drives the citizen towards anarchy.....”

In the year 2020 against the judgment of a Single Judge in Chamber of this court an Intra Court Appeal was decided by its Divisional Bench in North Star Textile's case¹⁰ holding that fuel price adjustment was an operational costs imposed in addition to the cost of generation and not a surcharge with retrospective effect. To resolve the issue of providing the fuel for others purposes, the NEPRA was directed to keep vigilance on the weekly or fortnightly check on GENCOs and NTDC according to their capacity. A mechanism was therefore evolved on the interpretation of section 31 whereby the Federal Government was to notify the tariff within specific time. Para 44 is relevant and therefore reproduced as under:-

“44. The plain reading of subsection (4) provides no time scale for issuance of the notification, but the Authority with regard to tariff,

⁹ **Naimatullah Khan Advocate and others versus Federation of Pakistan and others** reported as **2020 SCMR 622**

¹⁰ **LESCO etc. versus North Star Textile Mills** reported as **2014 CLC 28**

rates, charges and other term and conditions when approves tariff, it shall be made in the official Gazette by the Federal Government on intimation. Intimation communicated by the Authority, Proviso (2) of subsection (4) prescribed guidance with regard to the Federal. Government by using "may as soon as may" to consider the determination, of such tariff, rates, charges and other terms and Conditions for re-consideration and intimate the same to the Federal Government, such time scale of 15 days in the Federal Government to determine and issue guidelines to determine after intimation as required by subsection (4) of section 31”.

In the connected C.A.No.807 of 2014 filed by the private persons, the Hon’ble Supreme Court on 02.05.2018 disposed them of by fixing a time frame and directed that the residential tariff on the basis of fuel price fluctuation shall be four months from the bill or notified tariff and the referred process be completed within two months. Para-5 is reproduced as under:-

5. *After considering the questions raised by the learned counsel for the appellants, the response given by the learned counsel for NEPRA and with consent of both parties, we direct as follows:-*

- a) *in future, the time fixed in terms of provisions of second proviso to Section 31(4) of Act XL of 1997 for claiming tariff revision on the basis of fuel prices fluctuation shall be four (04) months with reference to the bill/notified tax of any particular month;*
- (b) *For filing refund claims by consumers, which are based upon downward fluctuation of fuel price, we find that a period of two (02) months is reasonable for the purpose of processing and granting such refunds relatable to the bill of a particular month; and*
- (c) *The above timeframe would apply for future billing/refunds etc. However, fuel price adjustment surcharge already imposed and recovered/claimed on the basis of fuel price fluctuation having been permitted by the NEPRA in the past shall be paid/cleared by the appellants/consumers within a period of one (01) month”.*

Likewise, W.P. No.25437/2015 decided on 02.09.2015, Flying Cement’s case¹¹ and lastly Ghani Global Glass’s case¹², Single Benches of

¹¹ **Flying Cement Co. Ltd. and others Vs. Government of Pakistan through Secretary, Ministry of Water and Power and others** reported as **PLD 2015 Lah 146**

this Court had dismissed the writ petitions on the grounds that quarterly charged tariff or provisional type adjustment were valid since the presumptive figures are to be actualized on the basis of verified data under a prescribed methodology in terms of law and the procedure.

CONTENTIONS & REPELLENTS

15. Learned counsel for the petitioner Sh. Usman Riaz, Advocate on the maintainability of these writ petitions submits that the decisions taken by the NEPRA/Authority for tariff determination are without the full strength as mandated under Section 3 of NEPRA Act, 1997 since out of 4 only 2 members are functional along with the Chairman. Notwithstanding the availability of quorum, the Authority was not legally constituted, therefore, it did not have the full power to decide. Adds that each member of the authority is to be appointed for a period of 3 years and well before expiry of his turn, the process has to be initiated since the office is so vital that it could not be allowed to remain vacant even for a day. Thus vacancy in the office is not a mere irregularity but a glaring deficiency in the composition of the authority. The objectives set forth in the NEPRA Act, 1997 is the elimination of energy poverty through highest standards of transparency and effective regulation of the electric power market of the country and to provide a legal framework to develop and sustain the electric power market and also to provide for development to renewable electricity markets in accordance with the international commitments of the country to encourage effectively mitigate adverse effects of climate

¹² Ghani Global Glass Ltd. Vs. Federation of Pakistan through Secretary Energy (Power Division), Islamabad and others reported as PLD 2020 Lah 167

change and also to manage the conflict of interest of the country for development of the electric power markets could not be followed unless the Authority under Section 3 is fully constituted which is a *sine qua non* for the exercise of its effective powers. Further adds that the appeal before the Appellate Tribunal under Section 12-G will not be an adequate and efficacious remedy keeping in view the various constitutional points raised in the present petition as the Appellate Tribunal has the power to decide an appeal only if the order was passed by the Authority constituted under Section 3 that if it is not legally constituted, its decisions would be *coram non iudice* that in this background there is no validly issued notification under Section 31-A by the Federal Government. He further argues that levy is always prescribed and imposed by the Federal Government to cater or to shift such financial burden on to the consumers whether NEPRA has to justify it in all circumstances, therefore, it is a superfluous and cosmetic determination. He argues that from 2018 to 2021, there was no taxing provision under which such cost or tax could be recovered and, therefore, now the recovery of such charges with retrospective effect is illegal. Although against the judgment given by the Division Bench of this Court in Flying Cement's case¹³ the leave has been granted by the Supreme Court but it is yet to be finally decided. He refers to Section 51; i.e. validation clause to argue that such a lacuna cannot be filled subsequently through this stereotype clause which is normally present in almost every statute.

¹³ **Flying Cement versus Federation of Pakistan** reported as **PLD 2016 Lah 35**

16. M/s Khawaja Ahmad Tariq Raheem and Muhammad Azhar Siddique, Advocates, learned counsel for the petitioner have argued that in LESCO Vs. NEPRA's case¹⁴ order determination of tariff passed by NEPRA can be set aside by this Court in its Constitutional jurisdiction. Even in Ghani Global Glass's case (already referred) upheld by the Supreme Court but the case was sent back to NEPRA, instead of Appellate Tribunal, to re-determine the tariff after associating the stakeholders. It is also argued that in NEPRA Vs. FESCO's case¹⁵ the Hon'ble Supreme Court held that full strength before the amendment made in 2021 of Section 31 provided the availability of quorum but after the said amendment not only the quorum but the full strength of the authority will meet the legal requirements.

It is argued that the decision made by the Authority was oblivious to certain facts and as such it did not protect the interest of consumers, therefore, obviously, the petitioner has the legitimate expectation not to pay the additional surcharges etc. which were not previously demanded from him at such a high rate.

Rai Ahmed Raza, Advocate, learned counsel for the petitioner in W.P. No. 54667 of 2022 and W.P. No. 55853 of 2022 submits that the agricultural tariff imposed upon the petitioner is un-called for.

Mian Faisal, Advocate, learned counsel for the petitioner in Writ Petition No. 52892 of 2022 correctly emphasizes upon the corporate culture supposed to be promoted in NEPRA which required timely decisions to reduce the Corporate Risk as referred in National Electricity Policy, 2021

¹⁴ **Lahore Electric Supply Company Limited (LESCO) and others Vs. National Electric Power Regulatory Authority and others** reported as **PLD 2018 Islamabad 20**

¹⁵ **National Electric Power Regulatory Authority Vs. Faisalabad Electric Supply Company Limited** reported as **2016 SCMR 550**

and mentioned in Section 5 of the NEPRA Act, 1997 but is not being followed. He traces out the short history to demonstrate that the time fixed for determination was gradually reduced to the period of 7 days in the last amendment of 2021. He submits that the role of Chairman will come into play only in case of a tie, therefore, the authority if operates only on the basis of the quorum, would be an express violation of this Section. Section 5 is reproduced as under:-

5. Meetings of the Authority, etc.—(1) Subject to the provisions of this Act, the Authority shall, in performance of its functions and exercise of its powers, conduct its proceedings in accordance with regulations made under this Act.]

(2) The Chairman and two other members shall constitute a quorum for a meeting of the Authority requiring a decision by the Authority:

Provided that the members of the Authority shall nominate a member amongst themselves to work as an acting Chairman in case of absence of the Chairman, as the case may be, for meeting of the Authority.

(3) The member shall have reasonable notice of the time and place of the meeting and the matters on which a decision by the Authority shall be taken in such meeting.

(4) The decision of the Authority shall be taken by the majority of its members present, and in case of a tie, the person presiding the meeting shall have a casting vote.

On the maintainability it is argued that in the present case there is no adequate and efficacious remedy as provided in Dr. Sher Afgan Khan Niazi's case¹⁶ according to which certain laid down parameters have not been fulfilled in the present case.

17. Mr. Shoaib Rashid, advocate, learned counsel appearing on behalf of LESCO submits that the writ petitions are not maintainable in view of the fact that the petitioners herein have got an alternate adequate and efficacious remedy available to them. Adds that without participating in the process of determination of tariff the petitioners cannot challenge it before this court directly. Adds that under section 12(G) of the NEPRA

¹⁶ Dr. Sher Afgan Khan Niazi Vs. Ali S. Habib and others reported as **2011 SCMR 1813**

Act 1997, the Appellate Tribunal comprising of Chairman and 02 members have been specifically given the powers to decide the appeals filed against the decision of NEPRA. Further adds that the Appellate Tribunal has the vast powers of a civil court not only to uphold, modify but also to set-aside and refer back to the authority for redetermination of tariff. However, it is undesirable that the Appellate Tribunal cannot determine the tariff or cannot set-aside the decision of the authority and substitute its own finding in contravention of the original proceedings in the capacity of Appellate Authority. In other words, the Appellate Tribunal has no power to re-appraise the evidence/material placed before the NEPRA authority. Such powers do not, in the considered opinion of this court, provide efficacious and adequate remedy, as discussed in the preceding paras. He next argues that the provision of Service Tribunal Act 1974 has been borrowed *mutates mutandis* and, therefore, had to be interpreted in view of the judgment of Syed Imran Raza Zaidi's case¹⁷ in which it was held that the said Service Tribunal is also equipped with the powers under Order 39 of Code of Civil Procedure. In this context, suffice it to say that this court cannot read into so as to extend the scope of the statute in the context of granting of the stay order when the pendency of appeal before the Appellate Tribunal will not affect the execution of the order of NEPRA authority. Obviously, any such interpretation would tantamount to legislate the provision of law not in the scope of this court's

¹⁷ “Syed Imran Raza Zaidi, Superintending Engineer, Public Health Engineering Circle-I Gujranwala Vs. Government of the Punjab through Services, General Administration and Information Department, Punjab Secretariat, Lahore and 2 others” reported as 1996 SCMR 645

powers¹⁸. He adds that the Tribunal is fully constituted and functional since May, 2022 and that the filing of the appeal before the said Tribunal has already been found to be a valid remedy by two learned Single Benches of this Court. The said judgments have not touched the large canvas of the composition of the authority in the context of the Provincial Autonomy. He refers to NEPRA Vs. FESCO' case (supra) to argue that notwithstanding the non-composition of the full authority, vital decision can still be taken if the quorum is available. However, it is pertinent to note that the said decision is with reference to scheme of law in NEPRA Act, 1997 before the amendment in Section 3 requiring the establishment of the authority by legal representation by all the provinces. Learned counsel is of the view that the objections and reservations mentioned by the Member Sindh under section 31 in the decision have been fully addressed and incorporated in the subsequent meetings, therefore, cannot be agitated before this court. Adds that the issues so highlighted are not tantamount to dissent and that the determination of tariff is too technical which requires expert opinions of various technical experts which opinion cannot be substituted by this court. This court agrees to the extent that tariff determination is a technically complicated issue within the domain of the NEPRA but this court is very much concerned about the applicability of broad principle of law such as good governance, corporate culture fairness, transparency, decision on the basis of facts keeping in view the recovery of tariff from the lower stratum of the society as well as

¹⁸ "National Electric Power Regulatory Authority Vs. Faisalabad Electric Supply Company Limited" reported as 2016 SCMR 550

the adequate constitutional protection guaranteed against the exploitation. He next submits that the advertisement was duly published in the newspaper/press for public hearing for the large scale participation of stake holders and public prior to following the procedure and the process transparently for tariff determination and therefore their interests have been duly watched since as it is their lifeline. However it goes without mention that as the case may, the NEPRA has an onerous duty to determine the tariff fairly and keeping in view the input by all the stakeholders. Here one may question the status of the members as the domestic consumers who may have also faced unjust charges in the head of electricity tariff. Importantly, under Article 4 and 14 of the Constitution right to receive electricity has already been held as fundamental right to life, therefore, it must be guarded by the Courts as already held in detailed in Shehla Zia's case¹⁹, Muhammad younas's case²⁰, Dr. Mobashir Hassan's case²¹, Watan Party's case²² and in Rental Power's case²³.

ADJUSTMENT IN APPROVED TARIFF IN 07 DAYS

18. Learned counsel for respondents also contends that exceeding the period of 7 days will not violate the principles of legitimate expectancy in the minds of businessmen or domestic consumers (both rich and poor) for tariff determination who must have prepared a budget under immense financial constraints to cater for day to day running of their households

¹⁹ **Ms. Shehla Zia and others versus WAPDA** reported as **PLD 1994 SC 693**

²⁰ **Muhammad Younas and others versus THE STATE** reported as **PLD 2005 SC 93**

²¹ **Dr. Mobashir Hassan and others versus Federation of Pakistan and others** reported as **PLD 2010 SC 265**

²² **Watan Party and another versus Federation of Pakistan and others** reported as **PLD 2011 SC 997**

²³ **Alleged Corruption In Rental Power Plants etc.** reported as **2012 SCMR 773**

and businesses, therefore, in view of this court slapping them with unexpected, unwarranted, disproportionately huge amounts under the garb of adjustments is unreasonable. The legitimate expectancy is equated to fairness and equity which is a rightful attribute of a public functionary. An executive authority cannot take away the rights which vest in the citizen as held in Al-Samrez Enterprise's case.²⁴ The other principle that would apply here is of good governance according to which citizens are entitled to place implicit faith on to government functionaries only if they act fairly in protecting their rights. In the present case, when the bills have been paid it is an implied understanding that no further unreasonable dues are payable especially when the statutory period had elapsed. Besides, the wording "not later than a period of 7 days" has to be seen in the perspective of the Act and the amendment made therein, therefore, the judgments prior to 2018 are not applicable *stricto sensu*. Section 31(7)(iv) from its very language is certainly mandatory in nature as it is clothed with prohibition. The parameters laid down by the Supreme Court to see whether a provision is mandatory or directory is the intention of the Legislature. Obviously, the quick calculated/determined reasons are the clear objection of law. Reference is given to Javed Iqbal's case²⁵ and Messrs Sarwaq Traders' case²⁶, therefore, the condition "not later than a period of 7 days" in all probabilities is mandatory and not directory. Therefore, it can be easily noted that not only the Authority was

²⁴ Al-Samrez Enterprise Vs. The Federation of Pakistan reported as 1986 SCMR 1917

²⁵ Province of Punjab through Conservator of Forest, Faisalabad and others Vs. Javed Iqbal reported as 2021 SCMR 328

²⁶ Commissioner Inland Revenue, Zone-II, Regional Tax Officer (RTO), Mayo Road, Rawalpindi and another Vs. Messrs Sarwaq Traders, 216/1-A, Adamjee Road, Rawalpindi and another reported as 2022 SCMR 1333

incomplete but also the mandatory provisions have been violated, therefore, principles of estoppel are attracted like the principle of legitimate expectancy. Section 31(7)(iv) of NEPRA Act, 1997 is reproduced for emphasis:-

“31. *Tariff.*(1).....

(2)

(3)

(4)

(5)

(6)

(7)

(i)

(ii)

(iii)

(iv) *the Authority may, on a monthly basis and not later than a period of seven days, make adjustments in the approved tariff on account of any variations in the fuel charges and policy guidelines as the Federal Government may issue and, notify the tariff so adjusted in the official Gazette.”*

The plain reading of Section 31(7)(iv) shows the only factor to be taken into consideration is any increase in fuel prices. The present GENCO's use a number of fuel types i.e. nuclear, coal, furnace oil, RLNG, diesel etc. for which a mechanism had been provided and if go through the decision given by 2 members of the Authority the two points which emerge are that CPPA did not meet its commitments and it is mentioned that the monthly adjustments are done on a method/formula that is worked out by the authority on annual tariff basis which indicates the non-compliance of the provisions of Section 31(7)(iv). It is interesting that paragraph 17, 18, 19 and 20 of the said order be read in conjecture which take into account the factors other than increase in fuel prices. There is no discussion in the entire decision as to which fuel has registered an increase. The dissenting note described as an additional note

by the Chairman is very important as it highlights that CPPA has consistently failed to obey the directions of the Authority and has not acquired economic procurement of electricity from efficient power plants, therefore, the merit order stands violated. Notably, paragraph 3 and 4 destroy the majority decision as electricity has been obtained from plants which had no generation licenses. Further in paragraph 5 the decision has been taken on account of the previous adjustments which amounts is more than Rs.6.5 billion. The more interesting feature is that in paragraph 6 of partial load adjustment charges amounting to Rs.3.9 billion was made and this is on account of the fact that the 3 most efficient RLNG power plants were not used to their maximum capacity inspite of fuel being supplied to them yet load shedding continued to the extent of 6-12 hours. Even transmission losses were included. Therefore, determined Rs. 3.9 billion does not appears to be justified. Further in paragraph 8 GENCO II has been considered as the worst performing entity and the cheapest power plant Guddu 747 Megawatt was not used. The loss in this respect is well over Rs.6.06 billion. But no material steps taken subsequently to rectify this omission so as to reduce the tariff. This court should also consider the nature of the fuel price adjustment provided in Section 31(7)(iv) as the electricity cost is a fee which is payable for services rendered. The adjustment is in the nature of a levy which cannot be left at the discretion of the Authority or permissible under the law. The legislature may have given the power to the authority with some structured discretion which was not exercised as per law laid down by the Superior Courts. The guidelines for such periodical determination in any case, cannot derogate

from the principles laid down by the Superior Courts. In essence the power exercised by the Authority is in the nature of a fiscal liability imposed on the consumers, therefore, the principles established in our jurisprudence would have to be followed which prima facie is lacking in the decision of NEPRA. As far as the legal position of a consent order by the Hon'ble Supreme Court is concerned, the law is very clear that any judgment which does not decide the questions of law and is not based upon or enunciates a principle of law is not binding in terms of Article 189 of the Constitution, 1973 but operates inter se the parties as laid down as early as in Ghulam Jilani's case.²⁷ and Mubashar Sheikh's case²⁸. In this context the order dated 02.05.2018 passed in C.A. No. 807/2014 by the Hon'ble Supreme Court is clearly a consent order and not a decision on merits on the proposition of law on merits where 4 months were granted for payments. However, in any case the said order related to the period before 2018 amendments.

19. On the question of alternate remedy, the judgment of West Pakistan Tanks Terminal's case²⁹ cited by the NEPRA to argue that one who seeks equity must do equity and, therefore, in the presence of alternate remedy no discretionary relief can be granted by a constitutional court. Relevant para-14 is reproduced as under:-

“Further more in law, the petitioner seeking leave to appeal against the High Court order is not entitled to the discretionary and equitable relief from this Court in the exercise of constitutional jurisdiction as he has no

²⁷ **Maj.-Gen. (Retd.) Mian Ghulam Jilani Vs. The Federal Government through the Secretary, Government of Pakistan, Interior Division, Islamabad** reported as **PLD 1975 Lahore 65**

²⁸ **Commissioner of Income Tax and others Vs. Mubashar Sheikh, City Towers** reported as **2017 PTD Lahore 795**

²⁹ **West Pakistan Tanks Terminal (Pvt.) Ltd. Vs. Collector (Appraisalment)** reported as **2007SCMR 1318**

approached this Court or the for a prescribed under the Constitution and the law with clean hands. Once who seeks equity must have equities in his favour. In the present case we are firmly of the opinion that the equities do not lean in favour of the petitioner therefore in our considered view the impugned judgment does not warrant any interference by this Court.”

However, keeping in view the legal questions this court does not see any element of unclean hand. The petitioners have not withheld any substantial information debarring them from seeking the equitable relief. To avail a legal remedy is obviously the right of the petitioner. Participation of each and every consumer in proceedings before the authority would be impossible, therefore, cannot be non-suited before this court, particularly, when their legitimate concerns were not addressed. The next important issue relating to the alternate remedy related to the existence of an Appellate Tribunal in terms of section 12G of the Act, 1997. The said section is qualified by a proviso to sub clause (2), which stipulates that the maximum power available to the Tribunal is to remand the case to the Authority for tariff determination. One of the issue raised before this Court is fuel adjustment and not the whole determination of tariff. It is a fundamental law that the proviso is intended to qualify the main part of the provision and cannot carve out an exception from the same. Under the recognized principle of Interpretation of Statute such provision does not operate independently. In this respect reliance is placed on Messrs Gul Rehman's case.³⁰ Relevant extract from para 6 is reproduced as under:-

³⁰ **Collector of Customs Appraisement, Collectorate, Customs House, Karachi Vs. Messrs Gul Rehman, Proprietor Messrs G. Kin Enterprises, Ghazali Street, Nasir Road, Sialkot** reported as 2017 SCMR 339

“Generally a proviso is an exception to or qualifies the main provision of law to which it is attached. Its purpose is to qualify or modify the scope or ambit of the matter dealt with in the main provision, and its effect is restricted to the particular situation specified in the proviso itself. Further, it is a settled canon of interpretation that a proviso is to be strictly construed and that it applies only to the particular provision to which it is appended. Whilst holding that a proviso is limited to the provision which immediately precedes it.”

By now it is well settled principle of law in Habibullah Energy’s case³¹ that all public functionaries must exercise public authority specially while dealing with public property, public funds and assets in a fair, just, transparent and reasonable manner untainted by mala fide without discrimination and in accordance with law keeping in view the constitutional rights of the citizens. Understandably, due process in terms of the Constitution of authority excludes arbitrary power, authoritarianism and autocratic rule as envisaged in section 24A of the General Clauses Act, 1897. It is, therefore, observed that under section (7)(IV) of the NEPRA Act, 1997 , which deals with the monthly fuel adjustments while working out fuel adjustments, no other factor other than fuel changes can be considered and the decision has to take place not later than a period of 7 days from the date the application is made to the Federal Government as per the dictum laid down in the Mustafa Impex’s case³² which means the Prime Minister and the Cabinet, otherwise it will undermine the power of the Federal Government which is against the spirit of the law.

THE CONDITION OF QUORUM

³¹ **Habibullah Energy** case reported as **PLD 2014 SC 47**

³² **Messrs. Mustafa Impex, Karachi and others Vs. The Government of Pakistan through Secretary Finance, Islamabad and others** reported as **PLD 2016 SC 808**

20. Much emphasis was laid upon the dictum of the Supreme Court on case titled “**NEPRA Vs. FESCO**” (supra) which overturned the judgments of the Honourable Lahore High Court in W.P. and ICA but it was given in a completely different context and was not related to the present question of composition of the Authority under section 3 of the Act. In the said judgment, the composition of the body for review purpose was considered complete and full in terms of R.16(6) of NEPRA Rules, 1998 reproduced hereunder:-

“Within 10 days of a service of final order, determination or decision of the Authority, a party may file a motion for leave for review by the full strength of the Authority of such final order, determination or decision as the case may be.”

The Honourable Supreme Court has clearly stated in paragraph 10 at page 558 of the above referred judgment that the controversy in the case revolves around the interpretation of Rule 16(6) and the court held in paragraph 11 that since NEPRA Rules 1998 were framed by the Authority under the provision of the 1997 Act the said Rules could not run contrary to the provisions of the Act. Since under the Act the quorum was 3, therefore, the argument that the review should have been heard by the full strength (5 members) was not accepted. The above case is not applicable to present case as the argument raised before this court is that the Authority constituted under section 3 was not complete and not fully functional. The record shows that 1 or 2 members are yet to be appointed. In other words, there was no proper representation of all Provinces. Besides, the question of quorum arises only after when the Authority is complete. In absence of a member for being sick, or on leave or for some

other reason is unable to attend the meeting and in that case the question of quorum will arise as stated in section 5 of the Act. Besides, the Federation has not taken the stand regarding the composition of authority, hence it can be concluded that no Authority is constituted under the law with the letter and spirit of section 3 of the Act *ibid*.

The learned counsel for the LESCO argues that the absence of a member/incumbent will not invalidate the body as a whole and refers to Dr. Kamal Hussain's case³³. However, in the said judgment the constitution of the Bar Council for the purpose of convening a meeting to scrutinize nomination paper of the candidate for election was challenged on the grounds, *inter alia* that Advocate General was not real incumbent but was merely acting as incharge during the absence of the actual incumbent who had gone abroad temporarily, therefore, the body's decision could not be challenged. Notably, in the said judgment the office of the Advocate General was not vacant, therefore, held that this fact could not nullify the constitution of the body. However, in the present case authority lacked two important members who were not appointed and, therefore, the question of their temporary absence does not arise, notwithstanding the fact that Chairman was in place.

21. Next it was argued that since section 3 of Oil & Gas Regulatory Authority Ordinance (XVII of 2002) is identical to section 3 of NEPRA, 1997, therefore, in Sindh Petroleum and CNG Dealers' Associations'

³³ **Dr. Kamal Hussain and 7 others Vs. Muhammad Sirajul Islam and others** reported as **PLD 1969 SC 42**

case³⁴ a Division Bench of Sindh High Court, it was held that quorum requirements are sufficient as the plain meaning of this section also has the same grammatical meaning, and therefore, vacancy in OGRA does not vitiate the process of determination of gas prices duly notified to the general public by the Federal Government. However, in the present case the 2021 amendment had made it different from the statute discussed in the said judgment since the question of provincial representation and participation was introduced deliberately to address many issues of provincial autonomy. The said judgment is therefore not attracted in the present case.

SUPREME COURT JUDGMENT RESERVED/ANNOUNCED.
(C.A.No.513 to 586 of 2014 & C.M.No.367 of 2014 in C.A.No.542 of 2014

22. Learned counsel for LESCO finally argues that C.A. Nos.513 to 586 of 2014 titled “Peshawar Electric Supply Company Ltd. (PESCO Vs. The National Electric Power Regulatory Authority (NEPRA)” has been reserved by the Supreme Court for announcement on 14.09.2022 in which the leave was granted way back on 01.04.2014 *inter alia* on the grounds whether the Fuel Price Adjustment levelled under section 31(4) of the NEPRA, 1997 could be declared ultra vires; whether the judgment of Peshawar High Court under challenge was in violation of Gadoon Textile Mills’s case³⁵, Pakistan Flour Mills Association’s case³⁶ and North Star

³⁴ **Sindh Petroleum and CNG Dealers’ Association and 15 others Vs. Federation of Pakistan through Secretary and 3 others** reported as **2020 CLC 851**

³⁵ **Messrs Gadoon Textile Mills and 814 others Vs. WAPDA and others** reported as **1997 SCMR 641**

³⁶ **Pakistan Flour Mills Association (Punjab Branch) through Vice Chairman Vs. Water and Power Development Authority (WAPDA) and others** reported as **PLD 2013 LHR 182**

Textile Mills's case³⁷. However, as an interim relief the NEPRA was permitted to recover the FPA in 10 monthly installments. According to him similar questions have been raised before this court and, therefore, the expected decision by the Supreme Court is awaited. The office has provided the decision dated 14.09.2022 on the said case in which the question of Provincial Autonomy and the composition of the full authority was not discussed. The apex court concludes:-

“..... In the instant case with all due respect, the learned High Court has overstepped its jurisdiction under Article 199 of the Constitution and, has overridden the policy/frame work of NEPRA which matter is beyond the jurisdictional parameters of the High Court. In such situation, the learned High Court was required to exercise self-restraint and defer the matter for determination to NEPRA.”

Obviously, this court cannot determine the Tariff.

However, since the said Civil Petition filed in the year 2014 pertained to section 31 as it existed then and after the amendment made in the year 2018 and 2021 the Constitution of the authority under section 3 under NEPRA has been purposefully changed. Besides, the judgment “Pakistan Flour Mills (Supra) also relates to the year 2012 wherein the NEPRA Act, 1997 was not amended.

As far as the question whether notice was required to be issued to the Authority under Order XXVII CPC is concerned, suffice it to say that neither any legislative provision is under challenge nor interpretation of any constitutional provision is sought from this court hence no legal justification for such notice.

ROLE OF THE FEDERAL GOVERNMENT.

³⁷ **LESCO and 501 others Vs. North Star Textile Mills and others** reported as **2014 CLC 28 (Islamabad)**

23. It is pointed out that most of the arguments addressed by the learned counsel for LESCO, a Distribution Company, were to be raised by the Federal Government, which just adopted it. This may add strength to the argument that in fact the Federal Government had just instructed/ordered the NEPRA to collect the electricity charges as per its desire giving little independence and maneuverability, therefore, the unjustified and high tariff rates are charged. Strangely, it does conclusively include the line losses, which is not the responsibility of the petitioner consumer.

PROVINCIAL AUTONOMY

24. Learned counsel for the petitioner has rightly argued that under the 18th Amendment the Provinces have been given authority in the field of Electricity Generation to adopt different modes and maintain their independence at different levels and such platform is the NEPRA constituted in Section 3 of the Act of 1997 under which the each province has to nominate one member to make it fully functional. The purpose is to provide opportunity to the federating units to sit and discuss on the issue and to evolve a policy with a participatory approval if not on consensus. Such unity in decision does not only increase the confidence of the citizens of the country leaving in their respective provinces but will also strengthen the Federation to determine and collect the tariff with power and confidence. Hence the necessity of full strength of NEPRA.

STATE OF INDUSTRY REPORT.

(75 years of Pakistan)

25. According to the learned counsel for NEPRA, the fuel price adjustment variation is not a new phenomenon. However, during the last one year because of these fuel prices unprecedented hikes, the prices of different fuel sources almost jumped three times owing to the increase in international prices and the devaluation of Pak rupees. The price of the imported fuels is dependent upon global fuel price hike increasing the cost of generation which obviously had resulted into unparalleled monthly fuel cost adjustment (FCA) and had a great impact to the end-consumers. According to the learned counsel for the respondent, the government had given the relief against fuel price adjustment (FPA) at the rate of 5/kwh on fuel cost adjustment for a period of four months from March, 2022 to June, 2022 and the subsidies was around Rs.126 billion. It was, therefore, found necessary to develop the base load power plants on indigenous fuel like “Thar Coal, dedicated local wellhead gas, etc. and developed more renewable sources like Wind, Solar, bagasse for electricity generation preferably by distributed generations. According to the learned counsel, there is a lack of almost one month for the recovery of fuel cost adjustment (FCA) which is to be eliminated in view of the time valuation of money and sufficient cash flow to avoid borrowing cost. Learned counsel has referred to the subsidies given from 2018 to 2022 in different heads. The detail is given in tabulate form:

TABLE 81
Details of Subsidies to Electricity Consumers (Rs. in Million)

		TDS	ISP	AQTA	ZRIR	Others	Total
PESCO							
2017-18	Accrued	32,265.10	2,419.66				34,684.76
	Paid	18,595.27	7,642.00				26,237.27
2018-19	Accrued	51,590.89	6,785.36		257.00		58,633.25
	Paid	46,048.05					46,048.05
2019-20	Accrued	57,814.37	1,003.67	14,283.00	440.33		73,541.37
	Paid	40,055.32	816.06				40,871.38
2020-21	Accrued	36,877.96	2,125.74	17,087.72	420.10		56,511.52

W.P.No.50725-2022 & Connected matters.

	Paid	46,917.08	25,878		554.55		47,471.63
2021-22	Claimed	17,295.83	2,156.33	13,345.13		7532.94	40,330.23
	Received	36,015.88	1,340.94	16,706.13		1,098.62	55,161.58
IESCO							
2017-18	Accrued	(10,418.09)	1,864.50				(8,553.59)
	Paid	(8,219.71)	5,908.00				(2,311.71)
2018-19	Accrued	(2,577.77)	5,098.60		489.03		3,009.86
	Paid	(3,125.00)					(3,125.00)
2019-20	Accrued	(7,659.10)	616.96	1,143.92	636.00		(5,262.22)
	Paid	(5,243.70)	501.92				(4,741.78)
2020-21	Accrued	(16,945.88)	1,193.86	(2,131.38)	635.34		(17,248.06)
	Paid	(18,184.85)			890.93		(17,293.92)
2021-22	Claimed	17,738.78	1471.85	(1,259.24)	1,458.97	41,495.71	60,906.07
	Received	13395.23	1335.3	(547.24)	772.62	0	14,955.91
GEPSCO							
2017-18	Accrued	21,424.37	2,995.01				24,419.38
	Paid	17,709.39	8,868.00				26,577.39
2018-19	Accrued	7,577.45	7,534.46		279.24		15,391.15
	Paid	2,555.94					2,555.94
2019-20	Accrued	19,438.47	740.10	2,761.96	513.96		23,454.49
	Paid	12,068.06	560.92				12,628.98
2020-21	Accrued	15,309.98	3,018.19	(287.50)	655.54		18,696.21
	Paid	13,028.34			801.86		13,830.20
2021-22	Claimed	7,641	2,250	(1,872)	1,457	8,411	17,887
	Received	6,956	2,053	(1,259)	805		8,556
LESOCO							
2017-18	Accrued	(19,716.64)	8,790.85				(10,925.79)
	Paid	(13,334.09)	25,329.00				11,994.91
2018-19	Accrued	5,917.36	21,054.59		4,769.85		31,741.80
	Paid	(2,464.48)					(2,464.48)
2019-20	Accrued	16,953.34	1,968.21	3,427.37	6,940.22		29,289.14
	Paid	13,832.84	1,375.40				15,208.24
2020-21	Accrued	(1,549.08)	9,395.55	(9,139.83)	5,790.69		4,497.33
	Paid	(10,699.31)			7,837.75		(2,861.56)
2021-22	Claimed	(1,684)	8,576	(9,444)	19681	11660	28,790
	Received	9,254	4,971	0	12,305	752	27,282
FESCO							
2017-18	Accrued	(19,716.64)	8,790.85				(10,925.79)
	Paid	(13,334.09)	25,329.00				11,994.91
2018-19	Accrued	5,917.36	21,054.59		4,769.85		31,741.80
	Paid	(2,464.48)					(2,464.48)
2019-20	Accrued	16,953.34	1,968.21	3,427.37	6,940.22		29,289.14
	Paid	13,832.84	1,375.40				15,208.24
2020-21	Accrued	(1,549.08)	9,395.55	(9,139.83)	5,790.69		4,497.33
	Paid	(10,699.31)			7,837.75		(2,861.56)
2021-22	Claimed	(1,684)	8,576	(9,444)	19681	11660	28,790
	Received	9,254	4,971	0	12,305	752	27,282
MEPCO							
2017-18	Accrued	30,711.83	3,956.99				34,668.82
	Paid	16,134.29	10,043.00				26,177.29
2018-19	Accrued	62,405.43	7,914.87		1,971.45		72,291.75
	Paid	50,625.69					50,625.69
2019-20	Accrued	79,583.46	807.43	13,542.35	1,671.95		95,605.19
	Paid	53,108.07	547.71				53,655.78
2020-21	Accrued	63,029.14	3,348.62	5,291.92	1,846.16		73,515.84
	Paid	55,690.49			2,876.54		58,567.03
2021-22	Claimed	66,370.84	3,029.12	883.99		21,100.51	91,384.45
	Received	99,809.59	5,842.86	11,036.07		5,257.52	121,946.04
TDS ISP AQTA ZRIR Others Total							
PESCO							
2017-18	Accrued	32,265.10	2,419.66				34,684.76
	Paid	18,595.27	7,642.00				26,237.27
2018-19	Accrued	51,590.89	6,785.36		257.00		58,633.25
	Paid	46,048.05					46,048.05
2019-20	Accrued	57,814.37	1,003.67	14,283.00	440.33		73,541.37
	Paid	40,055.32	816.06				40,871.38
2020-21	Accrued	36,877.96	2,125.74	17,087.72	420.10		56,511.52
	Paid	46,917.08	25,878		554.55		47,471.63
2021-22	Claimed	17,295.83	2,156.33	13,345.13		7532.94	40,330.23
	Received	36,015.88	1,340.94	16,706.13		1,098.62	55,161.58
IESCO							
2017-18	Accrued	(10,418.09)	1,864.50				(8,553.59)
	Paid	(8,219.71)	5,908.00				(2,311.71)
2018-19	Accrued	(2,577.77)	5,098.60		489.03		3,009.86
	Paid	(3,125.00)					(3,125.00)
2019-20	Accrued	(7,659.10)	616.96	1,143.92	636.00		(5,262.22)
	Paid	(5,243.70)	501.92				(4,741.78)
2020-21	Accrued	(16,945.88)	1,193.86	(2,131.38)	635.34		(17,248.06)
	Paid	(18,184.85)			890.93		(17,293.92)
2021-22	Claimed	17,738.78	1471.85	(1,259.24)	1,458.97	41,495.71	60,906.07
	Received	13395.23	1335.3	(547.24)	772.62	0	14,955.91
GEPSCO							
2017-18	Accrued	21,424.37	2,995.01				24,419.38
	Paid	17,709.39	8,868.00				26,577.39
2018-19	Accrued	7,577.45	7,534.46		279.24		15,391.15
	Paid	2,555.94					2,555.94
2019-20	Accrued	19,438.47	740.10	2,761.96	513.96		23,454.49
	Paid	12,068.06	560.92				12,628.98

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2020-21	Accrued	15,309.98	3,018.19	(287.50)	655.54		18,696.21
	Paid	13,028.34			801.86		13,830.20
2021-22	Claimed	7,641	2,250	(1,872)	1,457	8,411	17,887
	Received	6,956	2,053	(1,259)	805		8,556
LESCO							
2017-18	Accrued	(19,716.64)	8,790.85				(10,925.79)
	Paid	(13,334.09)	25,329.00				11,994.91
2018-19	Accrued	5,917.36	21,054.59		4,769.85		31,741.80
	Paid	(2,464.48)					(2,464.48)
2019-20	Accrued	16,953.34	1,968.21	3,427.37	6,940.22		29,289.14
	Paid	13,832.84	1,375.40				15,208.24
2020-21	Accrued	(1,549.08)	9,395.55	(9,139.83)	5,790.69		4,497.33
	Paid	(10,699.31)			7,837.75		(2,861.56)
2021-22	Claimed	(1,684)	8,576	(9,444)	19681	11660	28,790
	Received	9,254	4,971	0	12,305	752	27,282
FESCO							
2017-18	Accrued	(19,716.64)	8,790.85				(10,925.79)
	Paid	(13,334.09)	25,329.00				11,994.91
2018-19	Accrued	5,917.36	21,054.59		4,769.85		31,741.80
	Paid	(2,464.48)					(2,464.48)
2019-20	Accrued	16,953.34	1,968.21	3,427.37	6,940.22		29,289.14
	Paid	13,832.84	1,375.40				15,208.24
2020-21	Accrued	(1,549.08)	9,395.55	(9,139.83)	5,790.69		4,497.33
	Paid	(10,699.31)			7,837.75		(2,861.56)
2021-22	Claimed	(1,684)	8,576	(9,444)	19681	11660	28,790
	Received	9,254	4,971	0	12,305	752	27,282
MEPCO							
2017-18	Accrued	30,711.83	3,956.99				34,668.82
	Paid	16,134.29	10,043.00				26,177.29
2018-19	Accrued	62,405.43	7,914.87		1,971.45		72,291.75
	Paid	50,625.69					50,625.69
2019-20	Accrued	79,583.46	807.43	13,542.35	1,671.95		95,605.19
	Paid	53,108.07	547.71				53,655.78
2020-21	Accrued	63,029.14	3,348.62	5,291.92	1,846.16		73,515.84
	Paid	55,690.49			2,876.54		58,567.03
2021-22	Claimed	66,370.84	3,029.12	883.99		21,100.51	91,384.45
	Received	99,809.59	5,842.86	11,036.07		5,257.52	121,946.04

		TDS	ISP	AQTA	ZRIR	Others	Total
HESCO							
2017-18	Accrued	6,254.79	953.89				7,208.68
	Paid	2,053.96	2,671.00				4,724.96
2018-19	Accrued	22,369.08	2,162.48		156.80		24,688.36
	Paid	21,026.01					21,026.01
2019-20	Accrued	20,363.71	266.71	3,866.67	309.90		24,806.99
	Paid	14,232.24	173.09				14,405.33
2020-21	Accrued	15,622.79	880.34	3,182.28	365.60		20,051.01
	Paid	14,913.81			447.55		15,361.36
2021-22	Claimed	25,878	820	1,297		2824	30,818
	Received	27,445	570	2,019		2065	32,099
SEPCO							
2017-18	Accrued	6,208.19	661.28				6,869.47
	Paid	2,899.12	1,594.00				4,493.12
2018-19	Accrued	10,077.43	1,238.80				11,316.23
	Paid	10,070.71					10,070.71
2019-20	Accrued	8,208.06	218.80	2,342.71			10,769.57
	Paid	5,796.46	179.83				5,976.29
2020-21	Accrued	8,585.96	333.08	2,118.86			11,037.90
	Paid	8,080.03					8,080.03
2021-22	Claimed	18,693	310	2,539		1,282	22,824
	Received	n.p	n.p	n.p	n.p	n.p	13,146
TESCO						FATA (Receivables)	
2017-18	Accrued	6,506.53	258.23			12,308.49	19,073.25
	Paid	4,577.12	977.00			8,123.70	13,677.82
2018-19	Accrued	3,344.12	951.45			16,144.67	20,440.24
	Paid	3,602.39				10,961.27	14,563.66
2019-20	Accrued	3,430.93	107.82	(4,316.32)			(777.57)
	Paid	1,536.71	94.14				1,630.85
2020-21	Accrued	2,312.75	533.32	(4,482.80)			(1,636.73)
	Paid	(1,910.07)					(1,910.07)
2021-22	Claimed	(2,510)	251	(5,381)		28,398	20,758
	Received					18,040	18,040
QESCO						QESCO (40%)	
2017-18	Accrued	11,535.14	177.49			7,293.99	19,006.62
	Paid	8,419.66	567.00				8,986.66
2018-19	Accrued	3,993.51	507.72			6,931.00	11,432.23
	Paid	1,655.56				4,860.00	6,515.56
2019-20	Accrued	11,950.71	84.96	471.70			12,507.37
	Paid	7,807.61	67.98				7,875.59
2020-21	Accrued	20,486.02	156.23	43.73			20,685.98
	Paid	13,542.24					13,542.24
2021-22	Claimed	38,233.02	171.11	(3,842.23)		8,462.23	43,024.13
	Received	-	133.76	42097.57		5000	47231.33
		TDS	ISP	AQTA	ZRIR	Others	Total
KE							
2017-18	Accrued	12,096.92	12,369.58			191.86	24,658.36
	Paid	10,980.77	2,084.00			292.56	13,357.33
2018-19	Accrued	11,377.59	12,410.34			514.00	24,301.93

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	Paid	10,849.52				493.38	11,342.90
2019-20	Accrued	(3,493.32)					(3,493.32)
	Paid	25,000.00					25,000.00
2020-21	Accrued	11,342.97					11,342.97
	Paid	10,000.00					10,000.00
2021-22	Claimed	137,619	4,753	4,617	334	8,504	155,495
	Received	56,001	6,949		-	10,276	73,225
		Total TDS	Total ISP	Total AQTA	Total ZRIR	Total Others (FATA Receivable, QESCO 40% and KE 40%)	Grand Total
2017-18	Accrued	100,083.85	39,161.84	-	-	19,794.34	159,040.03
	Paid	59,727.78	79,094.00	-	-	8,416.26	147,238.04
2018-19	Accrued	204,816.71	76,563.12	-	13,360.84	23,589.67	318,330.34
	Paid	160,442.03	-	-	-	16,314.65	176,756.68
2019-20	Accrued	247,587.19	6,889.56	41,818.80	18,111.32	-	314,406.87
	Paid	195,957.11	5,112.49	-	-	-	201,069.60
2020-21	Accrued	179,127.61	26,410.15	11,860.32	19,242.96	-	236,641.04
	Paid	150,592.50	-	-	25,836.82	-	176,429.32
2021-22	Claimed	346,705.47	29,129.41	-5,462.35	22,930.97	171,038.39	564,009.88
	Received	289,705.70	32,429.86	66,783.53	13,882.62	64,663.14	480,610.86

ANNUAL REPORT-2021-22.

According to section 13 of the NEPRA, the NEPRA authority is to be funded from grants from Federal Government and fees and fines collected. Any surplus of receipts over expenditure after payment of tax had to be remitted to the Federal Consolidation Fund and in case of any deficit, the Federal Government will have to make up the deficiency. According to section 14 of the NEPRA, 1997, the authority had to maintain books of accounts and have it audited by the Auditor General of Pakistan (AGP).

In the year 2007, all regulatory authorities including NEPRA was brought under the tax net in compliance of the Federal Board of Revenue (FBR) and, therefore, the annual return of income tax accompanied by audited financial statements is to be necessarily filed under the corporate taxation network. The annual accounts of NEPRA was later audited by external audit firms of Chartered Accountants and the Auditors' Report and Audited Financial Statements are published at the part of the annual reports by NEPRA. The financial statements for the financial year 2021-

22 ended 30 June, 2022 approved by the authority on 23.09.2022 is a part of the annual report. This contribution to the Government and PEER Organizations during the financial year ended on 30.06.2022.

**VARIOUS DECISIONS OF THE AUTHORITY IN THE MATTER
OF FUEL CHARGES ADJUSTMENT.**

26. Learned counsel for NEPRA has placed on record various determinations to demonstrate before the court that the authority is functioning properly and has completed the due process and the prescribed procedure. The decisions dated 20.03.2015, 10.03.2022, 15.04.2022, 06.05.2022, 13.06.2022, 07.07.2022, 12.08.2022 and 12.09.2022 has been shown to this court. The last decision being the latest so far was perused and was found that the authority which was to be comprised of 05 members including the Chairman, only 03 members including the Chairman had attended it and Rafiq Ahmad Sheikh (Member) gave its additional note. According to the said majority decision the authority had reviewed the information provided by CPPA-G seeking monthly fuel cost adjustment (FCA) on which due diligence was done. The actual pool fuel cost for the month of July, 2022 was 10.9833/kWh against the reference fuel cost component of Rs.6.2879/kWh showing the increase of Rs.4.6954/kWh. The authority then conducted a public hearing for which advertisement was given along with the salient features and details of the proposed adjustments in the approved tariff on 20.08.2022 and also uploaded on NEPRA's website. On 31.08.2022 the public hearing was conducted and after hearing the

representatives of CPPA-G, National Power Control Centre (NPCC)/NTDC, Media and General Public. By giving a reference to the previous 2002 Power Policy Plant, 1994 Power Policy Plants and relying upon the information supported by certification by CPPA-G was relied upon with a condition that in case of any variation, error, omission or misstatement, the CPPA-G was to be held responsible and will be subsequently adjusted. It was also observed that energy of 46.572 GWh was purchased from Tavanir Iran in July, 2022 at the cost of Rs.1,063.62 million despite the expiry of the agreement in December, 2021. The cost of the said electricity purchased was provisionally allowed subject to the extension of the contract. The fuel cost of the power plants, namely, Orient, Saif Power, Sapphire Power, QATPL, Haveli Bahadur Shah, Baloki and Lucky Electric Power Company Limited was mentioned for the adjustment to the tune of Rs.4,340,351,134 rupees. The CPPA-G also claims Rs.752 million as previous adjustment which was allowed for the month of July, 2022 to the tune of Rs.752,370,233/-. 16.924 GWh from Captive Power Plants (CPPs) during the month of July, 2022 was also purchased against actual fuel cost of this energy Rs.80.503 million. The authority however directed CPPA-G/NPCC/NTDC to examine the dispatch of generation plant(s) out of merit order and scrutinize the dispatch report and then prepare a report comprised of all dispatch deviation from merit order, plants available but not dispatched and dispatch deviation justified or unjustified with their financial impact. It was further observed by the authority that the data submitted by the CPPA-G for the month of July, 2022 was not in accordance with the

requirements of the authority. Therefore, it was directed to submit the same on the desired format for consideration and in house analysis was made on account of financial impact based on information submitted before it. The financial impact due to system constraint was Rs.464.98 million and due to underutilization of efficient power plants was Rs.16.63 million. The authority calculated the fuel price as follows:-

Actual Fuel Charge Component for July 2022	Rs.10.6314/kWh
Corresponding Reference Fuel Charge Component	Rs.6.2879/kWh
Fuel Price Variation for the month of July 2022-Increase	Rs.4.3435/kWh

In the addition note submitted by Rafiq Ahmad Sheikh (Member) it was mentioned that the merit order was being prepared on old consideration but with indigenous natural (pipe line quality) gas which was not available to the plants since last 2/3 years and thus a defective merit order was placed before the authority. It was also observed that three most efficient RLNG power plants in Pakistan Power Sector were Quaid-e-Azam Thermal Power Plant (QATPL), two power plants of National Power Parks Management Company Limited at Haveli Bahadur Shah (HBS) and Baloki which had the efficiency above 61% whereas their utilization factor were 26% QATPL, 62% HBS and Baloki around 57% during the month of July, 2022 and that its accumulated claim for load operation was Rs.5.086 billion. It was, therefore, recommended to fully utilize these three plants in order to meet the electricity shortfall and minimize the load shedding and to avoid part load charges of Rs.4.086

billion. It is also recommended that effort should be made to improve RLNG to fully utilize the most efficient RLNG power plants as 494 MMCFD against a demand of 900 MMCFD of Rs.6.938 billion. Due to the system constraints, the power plants operated in violation of EMO causing financial impact of 464.98 million which is due to the failure of relevant entities in performing their functions. It was finally observed that utilization factor of power plants at Central Power Generation Company Limited (CPGCL) including the newly commissioned Guddu 747 machine, remained very low despite availability of dedicated cheaper Gas resulting into financial loss due to operation of costlier power plants.

FUEL CHARGES ADJUSTMENT (FCA).

27. It is the case of NEPRA that fuel charges adjustment is a timeline phenomenon and by giving the example in the month of July it is submitted that distribution companies charged the consumers with the predictive fuel rate from July, 2021 to November 2021 and submitted bill of July on 15.08.2022 whereafter the CPPA-G filed difference of actual and predictive bills as fuel cost adjustment with NEPRA on 18.08.2022 after conducting the hearing and verifying the claimed data issued fuel cost adjustment decision on 10.09.2022 but during the month of September the distribution companies sent bill to the fuel cost adjustment consumers and then after collection the amounts were paid to the power producers.

According to NEPRA, fuel cost adjustment is mechanism for recovery of left over fuel cost component. It is determined and notified

under section 31(7)(iv) read with section 7(1) & 7(3)(a) of NEPRA, the fuel price adjustment was determined on monthly basis to settle the variation due to cost of fuel (major component of tariff) and as such one month bill represent the fuel price adjustment of that month only. The fuel price adjustment variations due to generation mix and prices. The variation is subject to the final adjustment and settlement of the obligation of the consumers to pay the fuel charges. The increase of fuel price adjustment is obviously on account of increase of fuel price in the international market.

FUEL PRICE ADJUSTMENT MECHANISM.

28. The actual fuel cost component is the fuel cost component in the pool price on which the DISCOs was charged by the CPPA-G in a particular month whereas the reference fuel cost component is the fuel cost component for the corresponding month projected for the purpose of tariff determination. According to NEPRA, the variable sources (1) Water/Hydro (2) Coal (3) Gas (4) Wind (5) Solar (6) RFO (7) Diesel (8) RLNG (9) Nuclear (10) Mix (11) Bagasse and (12) Import from Iran and according to the Energy Mix of Pakistan in 2020, 29% is received from Hydro, 24% from RLNB, 14% from Furnace Oil, 11% from Natural Gas, 10% from Imported Coal, 6% from Renewable, 4% from Nuclear and 2% from Local Coal. The province of Punjab consumed 61.7 Gwh, Sindh 20.6 Gwh, KPK 11.1 Gwh, Balochistan 5.5 Gwh and AJK 1.1 Gwh.

ADDITIONAL NOTE (PART-II)

29. Learned counsel for NEPRA has placed on record the guidelines for determination of consumer end tariff (2015) which is to be considered by the authority at the time of tariff determination. According to the said policy, there is a specific formula for tariff determination. In the cost categories, (a) Post tax rate of return on rate base, (b) Depreciation Expense (c) Operations, Maintenance and Repairs Expenses, (d) Salary, Wages & other benefits, (e) Travel Expenses, (f) Vehicle Expenses, (g) other expenses and (h) Other Income which to be the guiding factors. In additional conditions, the minimum time was to be utilized to notify the annual and multiyear electricity and user tariff. Tariff methodology including intent of the tariff and the design principles, the power purchase price procedures, the generation plan, quarterly/Bi-Annual PPP Adjustment and also monthly fuel adjustment. According to clause 50 “Monthly Fuel Adjustments”, the same was to be made on fuel cost component which is to be mentioned in the bill as Fuel Adjustment Charges. In view of any abnormal changes the authority could review these references along with any quarterly adjustment. The guidelines also provided for multiyear tariff methodologies.

NATIONAL ELECTRICITY POLICY, 2021.

30. The policy was required to supply of reliable, secure, efficient and affordable electricity ever essential for the sustainable growth of a nation’s economy. In the National Power Policy, 2013, generation, transmission and distribution were encompassed and the policy goals were set to target and provided guidelines for the sector. Therefore, under

section 14A of the NEPRA Act, the National Electricity Policy was developed to reform, improve and sustain the power market and power sector. The vision was to develop the optimal utilization of indigenous resources, to introduce efficient, lucrative and competitive market design and affordable and environment friendly outcome for the consumers. The accessibility of electricity supply to all areas at affordable rates was prescribed in clause 3.1.1. which is reproduced as under:-

“3.1.1. Accessibility of electric supply to all areas, including rural areas, at affordable rates is the cornerstone of socio-economic development. Making power available, when it is not affordable, has limited value. The Government shall strive to ensure that electricity is accessible to all consumers at rates which commensurate with their ability to pay, coupled with development of an efficient and liquid market design. A liquid market design and affordable supply of electricity would also contribute vastly to the financial turnaround and commercial viability of the power sector.”

Energy Security was also ensured for uninterrupted availability of energy sources. The key Guiding Principles was efficiency, transparency, competition, financial viability, indigenization, research and development and environmental responsibility.

The cost reflective tariff to the extent of feasibility and timely passing of the cost to the consumers and the recovery of such cost would make it financially viable. The generation, transmission and distribution of supply through an effective system market development and operation was also emphasized. The cost of service, tariff and subsidies was also emphasized. Clauses 5.6.1, 5.6.2, 5.6.3 and 5.6.4 are relevant which are reproduced as under:-

“5.6.1. Financial sustainability of the sector is premised on the recovery of full cost of service, to the extent feasible, through an efficient tariff structure, which ensures sufficient liquidity in the sector.

- 5.6.2. *The Regulator shall align adjustments in generation-end tariff with the consumer-end tariff, which shall be submitted by the licensees and determined by the Regulator in a timely manner, in respect of both quarterly and monthly adjustments.*
- 5.6.3. *In view of various parameters, including (a) the socio-economic objectives; (b) budgetary targets in field; and (c) recommendations of the Regulator with respect to consumer-end tariff for each state-owned distribution company, the Government may continue to propose uniform tariff across the consumers and regions. In pursuance thereto, the Regulator shall, in public consumer interest, determine a uniform tariff (inclusive of quarterly adjustments) for all the state-owned distribution companies. Additionally, Government may maintain a uniform consumer-end tariff for K-Electric and state-owned distribution companies (even after privatization) through incorporation of direct / indirect subsidies.*
- 5.6.4. *In due course, financial self-sustainability will eliminate the need for Government subsidies (except for any subsidies for lifeline, industry or agriculture consumers, as per prevailing Government considerations). The subsidies that are to be provided by the Government shall be released in a timely manner to contribute to the financial sustainability of the power sector.”*

Last but not least was the Good Governance and Policy Implementation and Monitoring with regular review and updating was made essential component of the said policy.

COMMERCIAL CODE.

31. Under Section 35 of NEPRA Act, 1997 read with Rule 5 of the NEPRA (Market Operator, Registration, Standards and Procedure) Rules, 2015, the Commercial Code submitted by CPPA-G was approved according to which CPPA-G was responsible for administration, maintenance and implementation of the Commercial Code, supervision of compliance by Market Participants to ensure commercial transactions including transfer prices. According to the said Code, Energy Transfer Charge + Energy are without GST. It was CPPA-G which was to be provided with all the metering data collected from respective Market Participants and each energy unit is measured in kWh and monthly

maximum demand or Peak Demand of each Market Participant is to be ascertained.

A process which guides decision making with related functions such as information on the consequences, programs and policies and their alternatives, so that the decision is influenced by such information and it ensures the provisions of a mechanism for ensuring the participation of potentially affected persons as held in Ms. Imrana Tiwana's case.³⁸ For adequate and alternate remedy the test and guidelines for this court under Article 199 of the Constitution lies in efficacious, convenient, beneficial, effective and speedy, inexpensive and expeditious. The alternate remedy if allowed to be resorted to must be able to accomplish the same purpose, which depends upon the circumstances of each case. Obviously, the disputed questions of facts cannot be investigated by the High Court. Para 9 of Dr. Sher Afgan's case (supra) is reproduced as under:-

“9. The learned High Court will have to consider in each case the following tests to be applied to determine the adequacy of the relief:-

- (i) If the relief available through the alternative remedy in its nature or extent is not what is necessary to give the requisite relief, the alternative remedy is not an “other adequate remedy” within the meaning of Article 199.*
- (ii) If the relief available through the alternative remedy, in its nature and extent, is what is necessary to give the requisite relief, the ‘adequacy’ of the alternative remedy must further be judged, with reference to a comparison of the speed, expense or convenience of obtaining that relief through the alternative remedy, with the speed, expense or convenience of obtaining it under Article 199. But in making this comparison those factors must not be taken into account which would themselves alter if the remedy under Article 199 were used as a substitute for the other remedy.*
- (iii) In practice the following steps may be taken:-*
 - (a) Formulate the grievance in the given case, as a generalized category;*
 - (b) Formulate the relief that is necessary to redress that category of grievance;*

³⁸ **Ms. Imrana Tiwana and others Vs. Province of Punjab and others** reported as **PLD 2015 Lahore 522**

- (c) *See if the law has prescribed any remedy that can redress that category of grievance in that way and to the required extent;*
- (d) *If such a remedy is prescribed the law contemplates that resort must be had to that remedy;*
- (e) *If it appears that the machinery established for the purposes of that remedy is not functioning properly, the correct step to take will be a step that is calculated to ensure, as far as lies in the power of the Court, that that machinery begins to function as it should. It would not be correct to take over the function of that machinery. If the function of another organ is taken over, that other organ will atrophy, and the organ that takes over, will break down under the strain;*
- (f) *If there is no other remedy that can redress that category of grievance in that way and to the required extent, or if there is such a remedy but conditions are attached to it which for a particular category of cases would neutralize or defeat it so as to deprive it of its substance, the Court should give the requisite relief under Article 199.*
- (g) *If there is such other remedy, but there is something so special in the circumstances of a given case that the other remedy which generally adequate, to the relief required for that category of grievance, is not adequate to the relief that is essential in the very special category to which that case belongs, the Court should give the required relief under Article 199.*

If the procedure for obtaining the relief by some other proceedings is too cumbersome or the relief cannot be obtained without delay and expense, or the delay would make the grant of the relief meaningless this court would not hesitate to issue a writ if the party applying for it is found entitled to it, simply because the party could have chosen another course to obtain the relief which is due. (Ibrahim T.M. Ltd. V. Federation of Pakistan PLD 1989 Lah. 47, Allah Ditta V. Muhammad Saeed Vattoo PLD 1961 Lah. 479, Shamas Din and Bros. V. Income-tax and Sales Tax Officer PLD 1959 Lah. 955, Khaliq Najam Co. V. Sales-Tax Officer PLD 1959 Lahore 915.

FUEL PRICE ADJUSTMENT/QUARTER TARIFF ADJUSTMENT

32. Learned counsel for the respondent-NEPRA argues that under NEPRA Determination of Consumer-end-Tariff (Methodology & Process) Guidelines, 2015, the generation cost (Generation of Companies) as well as wheeling charges (for Transmission Companies) are recoverable in the bills generated by the Distribution Companies for the end consumers have been provided. Under clause 40, Power Purchase Price Procedures include fuel component, variable O&M, Capacity Charges and Transmission Charges and under clause 42, the authority will include each component

of PPP in the revenue requirement of the company. Under clause 49, Quarterly/Bi-Annual PPP Adjustments, only the capacity and transmission charges, the impact of T&D losses, adjustment of variable O&M shall be taken into consideration but under clause 50, Monthly Fuel Adjustments on fuel cost variation would be done on monthly basis and shall be called as Fuel Adjustment Charges. The following formula shall be applied:-

“Fuel Price variation = Actual Fuel Cost Component – Reference Fuel Cost Component”

According to the learned counsel for the respondent-NEPRA in Fuel Price Adjustment mechanism, the total generation from different sources of fuel is accumulated for the purpose of calculated and distributed amongst the distribution companies (DISCOs) and this is called as “Energy Pool”. The electricity is then provided from the common delivery point (CDPs) which are 791 in total throughout the Pakistan. The consumer is charged the tariff after following the procedure and notification. The Power Purchase Price (PPP) is to be paid by the Distribution Companies. This determination is based on estimate of maximum demand of DISCOs (kw) and the Net Energy (kwh) produced and delivered varies at different time of supply. The price so determined is regarded as sale of energy depending upon the prudent cost and market trend that is effected by external factors and variation in the estimates. It also depends upon the metering data of common delivery points (CDPs) and Fuel Cost Component (FCC) generated during a billing month. As

soon as the data is collected, the CPPA sent a notice to NEPRA who gives 07 days for public hearing and give decision within that time.

This adjustment within the specific time of 07 days has been inserted after a valuable input given by various decisions by NEPRA and the Courts. Any consumer of any product has to make budget whether such commodity is affordable or not and what quantity would be essential for his purpose. This will be possible when only exact cost is calculated or slight permissible and acceptable variation would do harm to the consumer. But when it is exponentially and disproportionately high, the disturbance of the consumer is very natural. This may have been because of the less efficiency in collection of data or calculation of charges not attributed to the consumers default. If late demand of Fuel Price Adjustment is not against past and close transaction then at least it has to be rationalized for the reason that it was already agreed between the consumer and Distribution Companies. It is high time that the Distribution Companies should be efficient and strict on to the timeframe so that timely recovery is effected which shall ensure the smooth supply of the electricity to the consumers.

Keeping in view the above guidelines, the NEPRA authority is required to accord rehearing and then re-fix the charges recoverable from the consumers.

33. Vide Notification No. NEPRA/TRF-100/MFPA/15173-88 dated 12th August 2022 and 12.08.2022, fuel charges in the sum of Rs. 36,052,728-30/- in respect of Ex-WAPDA distribution companies were

demanded for the month of June, 2022. The aforesaid Notification has been issued in the purported exercise of the Authority under sub-clause 7(iv) of Section 31 of the Act.

Obviously, the Authority shall in the determination, modification, or revisions of rates, charges and other terms and conditions for the provision of electric Power Services, be guided by the national Electricity Policy, the National Electricity Plan and such guidelines as may be issued by the Federal Government in order to give effect to the national electricity policy and national electric plan. Section 31(3)(i) provides that the "tariff" should be comprehensible, free of misinterpretation and shall state explicitly each component thereof; provided that the Authority shall strike a balance to the extent possible, among the general guidelines in order to optimize the benefits to all persons likely to be affected by the determination, modification or revision of rates, charges and terms and conditions.

The aims and objectives mentioned in the preamble of the Act shows that the main purpose is to provide for the regulation of generation, transmission and distribution of electric power and matters connected therewith and incidental thereto. In terms of Section 7(6) the Authority in performing its functions under the Act, has to protect interest of consumers and companies providing electric power services in accordance with the principle of transparency and impartiality. Section 31(7)(iv) also provides that the Authority may, on a monthly basis and not later than a period of seven days, make adjustments in the approved tariff on account

of any variations in the fuel charges and policy guidelines as the Federal Government may issue and, notify the tariff so adjusted in the official Gazette.

In the manufacturing process electricity is the main component with regards to the determination of the costs of the products. Suffice to mention even the slightest change in cost of electricity has bearing on the end price of the product. According to the billing procedure the competent Authority of the FESCO record the meter reading of the petitioner's company on 10th of the preceding month in presence of the representative of the petitioner's company. Thereafter, around 15 and 16 of the relevant month the bill is issued and delivered to the petitioner's company with the due date of payment around 26 and 27 of the said month. This is the reason that under section 31 (7)(iv) the Authority on monthly basis and not later than the period of 7 days must make adjustment of the fuel charges of the previous month. Meaning thereby that in the month of July we will receive the electricity consume for the month of June, and the unit consumed for the month of June has to be ascertained by the Authority within a period of 10 days. This is the reason that the charges of the fuel price adjustment under the relevant section has to be determined within a period of 7 days, so that when the bill of a month is issued in the subsequent month it includes the fuel price adjustment of the previous month. In the Corporate Sector, it is well established norms that the untimely decisions or negligence on part of one Corporate Company cannot be unilaterally passed on the consumer.

In terms of section 31(1), of the Act, the Authority is bound to follow the guidelines of the Federal Government particularly, in terms of paragraph No.4.4.1(c) of the National Electricity Policy, 2021, the Authority and relevant DISCO Company is bound to timely pass on the cost of the electricity to the consumers, while netting off any subsidies funded by the Government. Meaning thereby the provision of section 31(7)(iv) of the Act, 1997 is mandatory in nature. The fuel price adjustment for the month of June can only be claimed in the bill issued in the month of July, thereafter, it cannot be claimed.

COLD STORAGE AS INDUSTRIAL CONSUMERS

34. The status of petitioners as cold storages as industrial consumer has been denied by the respondents/ LESCO, MEPCO and NEPRA and had taken a specific stand that prior to change of their nature from industrial to commercial, they were issued notices but none of them participated in the proceedings before NEPRA. It was also contended that under the law if cold storage/petitioners have some grievance they can file an application before the authority to change their status from commercial to industrial. It was argued that industrial supply means the supply for bonafide industrial purposes in the factories including supply for the offices inside the premises for normal working hours and as such poultry farms, fish hatcheries, fish farms, fish nurseries, breeding farms and software houses are entitled to the single metering arrangements which are the industrial consumers.

However, under the recognized definition of industrial business, the activity in which products are produced, manufactured, dismantled, altered, re-packaged, repaired or stored at a scale greater than defined by the retail business. Warehouses where the premises for storage of goods, merchandise, material, materials and large stock which does not include the retail business which displays the business activities. It also includes other than agriculture business or commercial business which also includes industrial parks, public utilities, development activities, conversion and storage without processing activities. The industrial property is a property for processing of finished or partially finished product from raw material or lay of parts involving capital and labour which also includes offices or accommodation. On the other hand, the commercial business involves selling of goods and service, repair of goods, commercial office functions including retail, household services, hotel rooms other than personal or non-personal services. This is the reason why under the Consumer Service Manual the basic document creating relationship between the electricity provider and the consumer and under Appendix V of the Consumer Service Manual titled "Percentage of Load Factor for Different Type of Functions", the cold storages have been categorized for industrial supply at Sr. No. 7, and under clause 7.6 thereof, any application for the correction of tariff can be filed by either party but in the present case no such application was filed by the LESCO since they were earlier recognized as Industrial Consumers. Under clause 2.15 of the said Manual, certain documents for change of tariff have to be filed by the Authority. However, it was also

provided under clause 7.6 that in case where high tariff has been charged to the consumer, the adjustment/credit for six months be allowed retrospectively from the date of pointing out of such discrepancies. Clause 7.6 is reproduced as under:-

APPLICATION OF WRONG TARIFF.

Application of a correct tariff is the responsibility of DISO (DISCO to insert its name) at the time of sanction of connection. In case of application of wrong tariff, which is lower than the applicable tariff, no differential bill will be debited against the consumer account. However, in case where high tariff has been charged to the consumer than adjustment/credit for six (6) months be allowed retrospectively, from the date of pointing out of such discrepancy.

The nature of cold storage as an industrial activity has also been recognized in Factories Act, 1948 and under Section 2(k)(iv) a manufacturing process means any process for preserving or storing any article in cold storage. It means that preservation and storage is not a commercial activity. In Ms. Krishna Poultry Farm's case³⁹ in clause 7 the Agro Industrial Consumers have been recognized as the category to supply of power in horticulture, floriculture, sericulture and other allied agricultural activities including animal husbandry, poultry and cold storage where it can be kept fresh or frozen until it is needed. In Rajasthan Ice & Cold Storage's case⁴⁰ commercial industry has been defined as a manufacturer, producer involving the processing of repair of goods and cold storage used to potatoes, fruits and other goods for refrigeration to

³⁹ **Ms Krishna Poultry Farm Vs. State Of Orissa W.P. (C) No. 22202 of 2010** decided on **18.08.2015**

⁴⁰ **Rajasthan Ice and Cold Storage Vs. The State of Rajasthan** decided on 11.05.1981 reported as **1981 WLN 346**

keep at different temperature to prevent their decay to protect perishable items as an industry. In Radha Nagar Cold Storage's case⁴¹, the expression "cold storage" used in the Webster's Third New International Dictionary is recognized as industrial company. In Delhi Cold Storage's case⁴² it has been held in paragraph No.12 that processing is an action which brings forth some change of alternation of the goods or material which is subject to act of processing whereas in the cold storage vegetables, fruits and several other articles requiring preservation by refrigeration are stored, therefore, it is not to be called as a process resulting into different substance from what a material was at the commencing of the process. In Nandlal Cold Storage's case⁴³ it was held that the manufacturer implies not only a change but transformation to a new and different articles with distinctive name and character, therefore, obviously the cold storage does not provide this results.

JUDICIAL REVIEW

35. The power of Judicial Review is conferred only upon the High Courts and Supreme Court of Pakistan by virtue of the Constitution of Islamic Republic of Pakistan, 1973 and therefore, the Special Tribunals constituted to settle different matters between Governmental Departments do not have the authority to exercise this power. Thus, the unfair regulations, bad workings and illegal/irregular proceedings of NEPRA

⁴¹ **Commissioner of Income Tax Vs Radha Nagar Cold Storage (P.) Ltd.** decided on 04.06.1980 reported as **1980 126 ITD 66**

⁴² **Delhi Cold Storage Pvt. Ltd. vs Commissioner of Income Tax, Delhi-1, New Delhi** reported as **(1991) 4 Supreme Court Cases 239**

⁴³ **Commissioner of Income Tax vs Nandlal Cold Storage** decided on 24.10.1991 by **Allahabad High Court**

and other Government Institutions can be challenged before this court also on the basis of mala fide.

The process, methodology, assessment, observations, calculations of Fuel Cost Component (FCC) and the claim of the Fuel Cost Adjustment (FCA) in the electricity bills which has been carried out without observance of procedure required by law; deserves the attention of this Honourable Court as held in Tariq Aziz-ud-Din's case (supra) by the Apex Court held that all judicial, quasi-judicial and administrative authorities must exercise power in reasonable manner and also must ensure justice as per spirit of law and instruments regarding exercise of discretion.

**NATIONAL ELECTRICITY POLICY AND NATIONAL
ELECTRICITY PLAN**

36. Section 14A of NEPRA (Amendment) Act, 2018 states that '(1) The Federal Government shall, from time to time, with the approval of the Council of Common Interests, prepare and prescribe a 'National Electricity Policy for development of the Power Markets'. As per sub-section (4) of 14(A) 'The Federal Government, in consultation with the Provincial Governments, shall prepare a National Electricity Plan in accordance with the policies prepared and prescribed under sub-section (1) of NEPRA (Amendment) Act, 2018 and notify such plan once in five years'. Further, under Sub-Section (5) of Section 14(A) the Authority is obliged to perform its functions under the National Electricity Policy and National Electricity Plan. Given the above provision of the Act, National

Electricity Policy and National Electricity Plan take the central importance around which the regulatory framework shall be developed. Till the writing of this report, National Electricity Policy and subsequent Plan has not been finalized. The National Electricity Policy and subsequent Plan is inevitable to set the directions for whole power sector and clarity for the investors and decision makers to move.

HIGH COST OF ELECTRICITY

37. The economic and social well-being of a country greatly depends on access to the affordable electricity by all segments of society. The availability of electricity and its indiscriminate access to everybody at affordable rates is hallmark of an efficient power sector. In Pakistan, a large part of the previous decade was plagued with excessive load-shedding due to non-availability of sufficient affordable generation capacity and inefficient transmission and distribution services. With the induction of substantial amount of generation capacity during last few years, though the availability of electricity has improved significantly but the cost of electricity for end-consumers has increased tremendously owing to various reasons like high T&D losses, low recovery, circular debt, huge capacity payments, currency devaluation, fuel cost, under-utilization of efficient power plants etc. The situation indicates lack of integrated approach for planning and implementation of power sector expansion and demands to identify and resolve the basic issues leading to inefficiencies in the system. The efficiency of old GENCOs power plants has deteriorated overtime. Further, due to low efficiency, the plant

utilization factors of these GENCOs have also come down to lower limits. During FY 2019-20, the total generation of GENCOs has been recorded as 7,907.91 GWh which is much lower than the previous year's generation of 13,016.93 GWh. Out of 7,907.91 GWh, two power plants i.e. 747 MW CCPP Guddu of GENCO-II and 567 MW TPS Nandipur of GENCO-III generated combined 5,791.68 GWh while the remaining power plants of GENCOs with 3,539 MW capacity only generated 2,116.23 GWh. GENCO-IV recorded nil generation for second consecutive year. The low efficiencies of GENCOs old plants causes inefficient burning of fuel and increases the cost of generation. Since the tariffs of GENCO-I, II and III are on 'Take or Pay' basis; therefore, their low utilization on one hand is burdening the electricity consumers on account of capacity payment for idle capacity. On the other hand, utilization of GENCOs old power plants is increasing the cost of generation of CPPA-G basket due to their low efficiency. Further, operation of these power plants on part load also qualifies them for Partial Load Adjustment Charges (PLAC) which also adversely affects the cost of electricity. The CPPA-G has verified an amount of Rs. 177.79 million and Rs. 157.35 million on account of PLAC to GENCO-I and GENCO-III respectively for the FY 2019-20 while the PLAC for the said GENCOs during FY 2018-19 was Rs. 894.87 million and Rs. 431.23 million respectively. The operation of inefficient GENCO power plants is a continuous burden on the country. Retaining the old inefficient steam thermal power plants, while having sufficient capacity of efficient power plants, that too on 'Take or Pay' basis is not desirable. It is noted that

unlike the IPPs, the control period of NEPRA determined tariff of GENCOs is not too long. NEPRA has repeatedly emphasized the need to retire the older power plants of GENCOs to reduce financial burden on the sector and diversion of precious fuel to the most efficient power plants.

CASE OF FIRST IMPRESSION.

38. To sum up, the tariff structure in Pakistan is not based on regional and consumer-specific long-run marginal costs. It is used as an instrument to achieve political and socio-economic objectives. Instead of regulating DISCOs, the burden is transferred to the consumers.

When one focuses upon the working and role of NEPRA, one may find an abundance of lack of interest to fix the problem also due to engraved inadequate capabilities that do not match with the role of a good regulator. A regulator makes serious effort to minimize, if not eliminate, inefficiencies in the public sector generation (GENCOs) and distribution companies (DISCOs). The performance of (GENCOs) remained lacking in terms of all Key Performance Indicators (KPI) for the past many years. These GENCOs are running below their net available capacities because the desired maintenance and scheduled outages over the years (as per standard industry practices) are not in place. Lack of maintenance has increased their cost of generation. These power plants have not only poor operational results, the workforce, which is already on the higher side on a per MW basis, remained idle due to their closure and non-operation, contributing towards higher cost of generation. The Framework of

Economic Growth by PIDE (2020) reports a loss of Rs.251.6 billion due to inefficiency in these public sector generation companies.

NEPRA's job as a regulator was to resolve all the power sector problems, including system losses, rising costs, high tariffs, and generation capacity challenges. Again, the outcome of regulatory oversight is that the circular debt emerged for the first time in 2006. Since then, it has been there and rising. NEPRA has not done anything to control this debt from rising in so many years. Increasing costs of generation and sector inefficiencies, anomalies in tariff methods and delays in tariff determinations are responsible for the circular debt issue. If NEPRA had played an effective role, the power sector scenario could have differed. An overall assessment of NEPRA regulatory performance and its effectiveness indicates that the *de jure* performance is high; a regulatory system having many necessary requirements for the power sector. However, *de facto* performance highlights a significantly poor regulatory functioning in practice. The regulatory reform required to transition towards a competitive market has historically been resisted in Pakistan. NEPRA, an autonomous organization (by law), didn't make serious efforts to improve regulatory infrastructure in the power sector. NEPRA has been unsuccessful in developing and pursuing a regulatory framework to guarantee reliable, efficient, and affordable electricity. Effective regulation creates a balance in the interests of all stakeholders. When investors achieve fair returns, consumers receive quality service, and governments are not allowed political exploitation. NEPRA failed in

creating this balance. Only the institutional capacity of a regulator can ensure that all its' regulatory decisions and requirements are met effectively in a timely and correct manner. It is possible only when the regulator has qualified staff, a well-coordinated organizational setup, sufficient funds, and the powers to take decisions autonomously and balance all stakeholders. But at the same time, the regulator should also be accountable for all its decisions.

39. In Said Zaman Khan's case⁴⁴ the Apex Court has referred not only the entire case-law on the subject but has also analyzed the essential yet different ingredients of both mala fide in law and malice in fact. The relevant portions from the said judgment are reproduce hereunder:-

"82.... Where any action is taken or order passed not with the intention of fulfilling its mandate or to achieve its purpose but is inspired by a collateral purpose or instigated by a personal motive to wrongfully hurt somebody or benefit oneself or another, it is said to suffer from malice of facts. In such cases, the seat of the malice or bad faith is the evil mind of the person taking the action be it spite or personal bias or ulterior motive."

"83.....where an action taken is so unreasonable, improbable or blatantly illegal that it ceases to be an action countenanced or contemplated by the law under which it is purportedly taken malice will be implied and [the] act would be deemed to suffer from malice in law or constructive malice. Strict proof of bad faith or collateral propose in such cases may not be required."

In Justice Qazi Faez Isa's case⁴⁵, the Hon'ble Supreme Court held:

"malafide in law involved more than errors of misreading the record or non-application of the law or lack of proportionality in the impugned action. Instead, this was a serious allegation of wanton abuse or disregard of the law."

BALANCE BETWEEN CONSUMER, INVESTOR & OPERATOR.

40. NEPRA was mandated to create a balance between investors and consumers, where it failed therefore the problems faced in the power

⁴⁴ **Said Zaman Khan Vs. Federation of Pakistan through Secretary Ministry of Defence, Government of Pakistan Superintendent HSP, Sahiwal** reported as **2017 SCMR 1249**

⁴⁵ **Justice Qazi Faez Isa and others Vs. The President of Pakistan and others** reported as **PLD 2021 SC 1**

sector in the last two decades are un-exemplary. Consumers remained the worst suffers of the government fiscal and financial issues due to enormous and rising circular debt. While power sector policies allowed unreasonably very high profits to independent power plants, excess payments have been made to power producers because of either misreporting by the producers or regulatory oversight.

Pakistan has the highest cost of electricity across all major consumer groups in South Asia. Some of our low value-added exports rely heavily on electricity consumption. The high cost of electricity has reduced the competitiveness of our exports, thereby impacting the country's trade deficit and balance of payment. Large cross subsidies (especially in favour of domestic and agriculture consumers) and heavy tax incidence are contributing to grid defection by large consumers (industry, commercial and high-end consumers).

41. The relationship of the consumer with the WAPDA is also created on the basis of Abridged Conditions of Supply and according to clause 19 the methods of charging for the supply shall be those prescribed in the authority's schedule of electricity tariff enforced from time to time and no consumer shall be entitled to asked for any change if the method of charging agreed to at the time of obtaining the supply. However, clause 27 the authority has a right to refuse the condition of supply, the schedule of the electricity tariff rates and schedule of service/general charges without giving any previous notice to the consumer to that effect. Meaning thereby that the schedule can be changed unilaterally depending on post

as per the tariff. Besides, the generation tariff is comprised of energy charge; i.e. energy purchase price, a valuable component and relates to the cost born by the power producer. The fuel charges are affected by the price of fuel, thermal efficiency (aging and cleaning of unit) and the valuable parts and the maintenance component is the cost of lubricants and foreign support in the form of spare parts under maintenance. The second factor is capacity charge based on valuable capacity and, therefore, relates to the power producer to produce electricity. Besides, the transmission tariff is also determined by NEPRA and distribution tariff as well as consumer end tariff are all determined by NEPRA.

HUMANITARIAN ELEMENT.

43. The NEPRA authority must keep in mind while deciding about the tariff that interaction between the consumer and the producer should not be excited by the fiduciary relationship for the simple reason that to earn huge profit the performance of the producing company must increase and not the price be increased and, therefore, imposition of various taxes which can be recovered otherwise, amounts to economic strangulation of the consumers. A predatory and soaring price of electricity would be unbearable, therefore, a comprehensive plan must be prepared to address and counter the issues in order to prevent the society from an economic death.

RELIEF.

44. For what has been discussed above, these writ petitions are disposed of while declaring that the demand of Fuel Price Adjustment, Quarter Tariff Adjustment, Change of status of tariff from Industrial to Commercial by the NEPRA not constituted fully under section 3 of the NEPRA Act, 1997 is illegal, without lawful authority and *coram non iudice*, having no legal effect and the respondent/NEPRA is directed

- A. To inform the consumers about the charges on monthly basis and the fuel price adjustment shall not go beyond 07 days and the Quarter Tariff Adjustment shall not go beyond the statutory period..
- B. Not to charge any exorbitant tariff beyond the paying capacity of the domestic consumers.
- C. Fix the responsibility of over-charging on the basis of line losses and the less efficient power plants and the financial burden will also be shared by the companies under a rational proportion.
- D. To explore the cheap modes of producing electricity and will evolve mechanisms for its quick availability.
- E. To ensure the smooth supply of electricity based on demand.
- F. Not to unilaterally change the type of tariff from Industrial to Commercial without hearing such consumers

Whereas the Federal Government is directed

- G. To provide maximum subsidy to the domestic consumers of 500 units per month.
- H. Not to demand extra ordinary taxes having no nexus with the consumption of energy which may be recovered through other modes.

- I. Further explore the Solar, Hydal, Nuclear and Wind sources of producing electricity.
- J. Arrange for cheap purchase of sources of electricity from other countries.

(ALI BAQAR NAJAFI)
JUDGE

Announced in open court on 06.02.2023

Judge

Approved for reporting.

Judge

*Hashmi/Iftikhar/Shehzad/A.Qadoos**