



National Electric Power Regulatory Authority

Islamic Republic of Pakistan

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Registrar

No. NEPRA/TRF-100/MFPA/8391-93

September 19, 2011

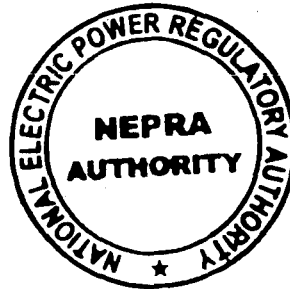
Subject: **Decision of the Authority in the matter of a Petition Referred to NEPRA by Peshawar High Court vide Order dated 19.07.2011 in Writ Petition No. 1772/2011 titled: Human Rights Commission South Asia Vs NEPRA and Others**

Dear Sir,

Enclosed please find herewith the Decision of the Authority (07 pages) in the matter of Petition referred to NEPRA by Peshawar High Court vide Order dated 19.07.2011 in Writ Petition No. 1772/2011 dated 19.07.2011 regarding Human Rights Commission South Asia Vs NEPRA and others, for information please.

Encl: As above

Secretary
Ministry of Water & Power
'A' Block, Pak Secretariat
Islamabad




Registrar

CC:

1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad.
2. Secretary, Ministry of Finance, Islamabad.

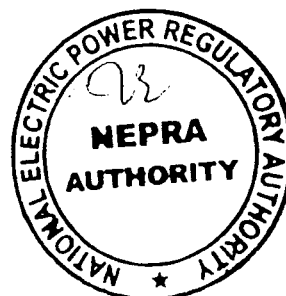


DECISION OF THE AUTHORITY IN THE MATTER OF A PETITION REFERRED TO
NEPRA BY PESHAWAR HIGH COURT VIDE ORDER DATED 19.7.2011 IN WRIT
PETITION NO. 1772/2011: TITLED: HUMAN RIGHTS COMMISSION VS NEPRA AND
OTHERS

1. The Honorable Peshawar High Court vide order dated 19.7.2011 passed in Writ Petition No. 1772/2011 titled: Human Rights Commission South Asia Vs NEPRA and others, has sent the said petition to NEPRA for a decision in accordance with law within two months. Through the said petition, the petitioner has requested to hold that:-
 - All the tariff determinations by NEPRA, till date are illegal unlawful, without jurisdiction and thus of no legal effect upon the rights of 1.7 million consumers of Khyber Pakhtunkhwa and the same may be re-evaluated under the spirit of Article 157(2) of the Constitution and NEPRA Act, 1997 and relief be extended to consumers of Khyber Pakhtunkhwa.
 - Tariff determination for distribution of electricity in Khyber Pakhtunkhwa is within powers and authority of the Provincial Government and NEPRA has no jurisdiction to determine distribution tariff.
 - That respondents be restrained from any further tariff increase of distribution tariff on the basis of impugned determination or otherwise.
 - Interim relief: The operation of the impugned new tariff increase vide SRO 406(I)/2011 dated 17th May, 2011, which will be added in the current bills of PESCO consumers and any subsequent notification, if any, may very graciously be suspended till final disposal of the main petition.
 - Respondents should adopt a comprehensive programmed load shedding if applicable in the context of true figures of electricity acquired by PESCO and its supply to the consumers under the ambit of Article 25 of the constitution of Islamic Republic of Pakistan, 1973.
 - Any other relief, deemed appropriate in the circumstances of the case though not specifically prayed for, may also be granted.
2. The petition was accordingly considered by the Authority and in order to arrive at a just and informed decision, the Authority decided to conduct a hearing into the matter. The date of hearing for the purpose was fixed as 7th of September, 2011 in the NEPRA head Office. Notice of hearing was also published in the national newspaper on 23rd August 2011, beside individual letters were also sent to the parties or the petition as well as other stakeholders.



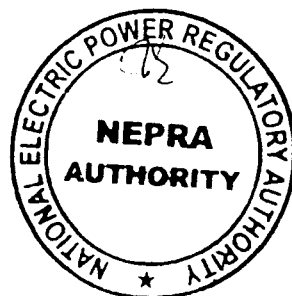
3. The hearing was held on 7th September 2011 in NEPRA main office. Mr. Abdus Samad Khan Marwat, Advocate Peshawar appeared on behalf of the petitioner. The representatives of Peshawar Electric Supply Company, (PESCO) Central Power Purchasing Agency (CPPA) of National Transmission and Despatch Company, (NTDC), Ministry of Water & Power and media also appeared.
4. The interpretation of Article 157(2)(d) of the Constitution of Pakistan, in reference whereof, the NEPRA's jurisdiction to determine electricity distribution tariff in a Province is questioned stood already interpreted by the Honorable Supreme Court of Pakistan vide judgment reported as 1997-SCMR-641 (M/s GADOON Textile Mills and 814 others Vs WAPDA and others) whereby it was held that sub-clause (b) of clause 2 of Article 157 is independent and can be pressed into service without invoking other sub-clauses. However, sub-clause (d) of clause (2) is not independent. The Government of a Province can determine the tariff for distribution of electricity within a Province under sub-clause (d) only when it purchases electricity in bulk from the national grid under sub-clause (a) for distribution within the Province or when it constructs power houses and grid stations and lay transmission lines for use within the Province under sub-clause (c).
5. In the perspective of above legal position, at the very outset of the hearing, it was stated and admitted by learned Counsel of the petitioner that the controversy as to the interpretation of Article 157(2) of the Constitution of Pakistan stood already resolved by the Honorable Supreme Court of Pakistan in case reported as 96 SCMR 641. It was further stated by the learned Counsel that Honorable Peshawar High Court in its order dated 19th of July, 2011 also held that "once this provision has been interpreted by the Apex Court, we have no other option but to follow the same", therefore, the only issue which is left to be decided by NEPRA is whether the fuel adjustment charges can be added in respect of the Hydro Power Generated within the Province?
6. While arguing its case, learned Counsel for petitioner stated that the thermal power plants are located in the Punjab, Sindh and Balochistan and there is no such Independent Power Producer located in the Province of Khyber Pakhtunkhwa. As per the petitioner, the Province of Khyber Pakhtunkhwa is the main source of generation of Hydrel Power wherein more than 5000 Mega Watt is produced and supplied to Peshawar Electric Supply Company (PESCO). It was argued that the fuel adjustment charges relates to the Independent Power Plants which are generating the power in the other Provinces of country; therefore, in no way it is applicable to the consumers of PESCO in Khyber Pakhtunkhwa. It was further argued that aggregate per kWh/unit cost price of Hydrel Power is approximately Rs. 0.4927 paisa



but after its transfer to national Grid, the same power is supplied to PESCO with a direction to charge from the consumers of KPK at the average rate of Rs. 10 kWh/unit.

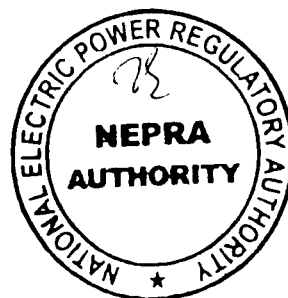
7. Learned Counsel for the petitioner also referred a petition No. D-1380/09 which is pending adjudication before High Court of Sindh at Karachi wherein vide order dated 7.5.2010, it was observed by the Honorable Court that for the hydel power purchased by KESC, there should be no element of fuel adjustment charges. Learned Counsel also referred a suo moto hearing before Mr. Justice Dost Muhammad Khan of Peshawar High Court wherein some official of PEPCO/WAPDA apprised the Court regarding share/quota of PESCO in total generation power to be 16%. As per learned Counsel, a Federal Secretary had apprised the Court that today the generation is 14000 MW, therefore, as per 16% quota for PESCO, its share comes to 2240 MW and it can sufficiently meet the present demand of PESCO which ranges around 1700 MW.
8. Learned Counsel for petitioner was also of the view that in the United States, each state is empowered to determine its consumer-end tariff therefore the consumer-end tariff is different for each state and the consumer-end tariff in United States of America varies from 4.5 US Cents to 11 US Cents due to different generation cost. Similarly in India, distribution tariff varies from state to state.
9. It was also argued that the present tariff determination by NEPRA for the consumers of PESCO is arbitrary and against the provisions of Article 4 and 25 of the Constitution of Pakistan, 1973. In support of its arguments, learned Counsel has relied upon PLD-2010-SC-265, PLD-1997-SC-426, PLD-2000-SC-869. In its written arguments, learned Counsel has reproduced para 25 of a judgment reported as 1996-CLC-1090 which is to the following effect:-

“The argument to the effect that the different rates of tariff fixed for different categories of consumers makes the whole tariff as discriminatory and, hence, being violative of the provisions of Article 25 of the Constitution of Islamic Republic of Pakistan, 1973, as void, suffice it to say that the different rates of tariff have been fixed by the Authority keeping in view the geographical conditions, the nature of purpose for which the electricity is consumed and the extent of units consumed, which division is definitely based upon a reasonable classification and, hence, it cannot be said that the tariff rate is discriminatory in nature. It is well established legal proposition that different rates of tariff are permissible under the law as held in case of State of U.P. and others (supra).”



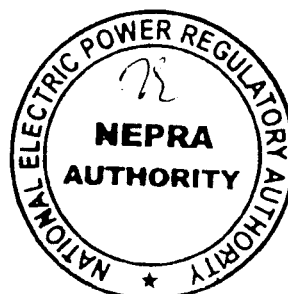
Even, otherwise a consumer of lesser units uses less amount of electricity generated by thermal generation which is six times more costlier to the energy produced by hydel generation and, therefore, he has a right to be treated differently in fixation of the rate to a person who consumes more units of thermal generated energy. Therefore, the above referred argument of discrimination being without any lawful basis and justification, is repelled."

10. Learned Counsel appearing on behalf of NTDC and CPPA argued that the Petitioner's argument with respect to right of the province on the generation facility is not justified since this is against the concept of national grid which means entire generation purchased by NTDC/CPPA. He argued that KPK does not possess any facility of generation, transmission and distribution infrastructure. The only company which is providing the electricity services in the KPK is Peshawar Electric Supply Company (PESCO) which is Federal Government entity and is a licensee of NEPRA under the NEPRA Act, therefore the consumer-end tariff of PESCO is determined by NEPRA. Furthermore, the PESCO is purchasing power from the national grid on the pool price the tariff of which is determined by NEPRA. Every Distribution Company is provided the electricity through national grid. The concept of the consumer is not the consumer of KPK but it is the citizen of Pakistan. Under the constitution of Pakistan, certain rights are guaranteed and in the constitution there is no right given that the electricity produced shall be delivered on the same price from where the electricity will be generated. There is no provision in the Constitution or the agreement made by all the federation units that the electricity generated will be provided to that Province from where it will be generated. Only one right of Net Hydel Profit is given in the Constitution which is allowed by NEPRA. Learned Counsel for NTDC and CPPA argued that the jurisdiction referred by learned Counsel for the petitioner, i.e., USA and India are altogether different from the one prevailing in Pakistan. In the USA and Uttar Pradesh there is a state regulator, state generation, and transmission and distribution facility and there is also a federal regulator and national grid also. When the state purchased the electricity from the national grid, the rates determined by federal regulators applied and when the generation is made by the State, then the state regulator determines the rates which may be varied from state to state.
11. The Authority has heard the arguments and perused the record and it considers that as per the order dated 19.7.2011 passed by Honorable Peshawar High Court in writ petition No. 1772/11 as well as from the opening statement of learned Counsel for petitioner, the scope of this petition is limited only to the extent of a determination of applicability of fuel adjustment charges in the Province of Khyber Pakhtunkhwa



! on the ground that only hydel based generation is there in said Province, therefore, no fuel adjustment charges should be added for the consumers of PESCO. The Authority considered the arguments of the Petitioner and in its opinion the reference of United States in the instant case is not relevant because each state of USA has its own generation, transmission and distribution network therefore the tariff for each state is determined by the state regulator. In the case of Pakistan, the electricity is a Federal subject and all the generation facility in the public sector has been constructed from the Federal resources and is owned by the Federal Government. Similarly, the transmission and distribution network has also been constructed and owned by the Federal Government therefore determination of tariff for generation, transmission and distribution has been entrusted to NEPRA through the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA Act). There may be a case for determination of distribution tariff by a Province provided it constructs its own power houses and transmission and distribution networks. The generation from all sources is transmitted through national grid and delivered to distribution companies on basket rates based on transfer price mechanism approved by NEPRA and notified by the Federal Government in the official gazette of Pakistan. It may be clarified that the entire country is being supplied electricity through a National Grid after procuring electrons based on hydel, gas, RFO and nuclear generation etc. The combined basket rate from all the sources is then charged across the country without considering the location or source of generation. Therefore, the argument of the learned Counsel of petitioner regarding non-application of the fuel charges due to hydel generation is not correct. Furthermore, none of the Independent Power Producer (IPPs) is constructed, owned or operated by the provincial governments of Punjab, Sindh and Balochistan and these IPPs have been given sovereign guarantees by the Federal Government and are operating in accordance with the National Power Policy 2002.

12. Furthermore, NEPRA determines the tariff in accordance with the Tariff Standards and Procedure Rules, 1998 in transparent manner and all the stakeholders are notified through publication of the salient features in the national newspapers. Similarly all stakeholders are invited in the hearings for participation in the tariff setting process. NEPRA determines consumer-end tariff for each distribution company on the basis of its consumer mix, losses and operational cost in accordance with the guidelines for determination of tariff laid down in the Tariff Standards and Procedure Rules -1998. The tariff so determined is different for each distribution company because of its peculiar conditions. Government of Pakistan (GOP), as a policy decided to apply uniform tariff in the country. Accordingly the GOP while notifying the NEPRA determined rates also issues Schedule-II of consumer-end tariff wherein the minimum consumer-end tariff for a particular consumer category!



amongst eight distribution companies is adopted for application. Regarding the benefit of hydel generation for a particular Province, Article 161 sub Article 2 of the constitution of Pakistan may be relevant which deals with the provision of net profit. The benefit of generation of hydel power is already being paid to Khyber Pakhtunkhwa by way of net hydel profit, therefore, a claim that the electricity should also be provided at the same rates does not hold ground. In this regard, the Authority is in agreement with the argument raised by the learned Counsel for CPPA/NTDC that if there is any variation between the rates of electricity, the same is adjusted in the form of net-hydel profit paid to KPK. In this view of the above, the Authority considers that the plea of the learned Counsel of the petitioner on this issue does not hold ground.

13. In so far as the argument of learned Counsel of petitioner that as per the agreed formula the share of KPK in total generation is 16%, it may be clarified that in Pakistan total generation capacity is 19264 MW and current demand is about 16,000 MW and there is gap between supply and demand. The electricity is not generated as per available capacity since fuel is not supplied to IPPs. Representatives of the NTDC and CPPA submitted that one of the major reasons for not fully utilizing the RFO plants is the share in the non-recovery from the consumers of PESCO. In an answer to a query by the Authority as to what is the status of fixation of quota for different distribution companies and its observance, the Representative of NPCC replied that MD PEPCO had constituted a board which laid down the criteria based on the consumption of the Distribution Companies during July 2007 to November 2007 the period during which there was no load-shedding in the country. Based on the consumption average of each DISCO this criteria was made and it was approved by PEPCO. PESCO share in the consumption was 16% and the same is followed till now. Representative of NPCC stated that 700 MW is supplied to KESC and 4% are the transmission losses and net generation is provided to the distribution companies according to their generation. NPCC is still observing the monthly criteria of each DISCO and that criterion is still valid because the PESCO draw 16% share of electricity from the national grid. Representatives of the NTDC and CPPA argued that the 16% share is of PESCO and TESCO because TESCO has been provided electricity through PESCO system. Due to system constraints and in order to avoiding the system collapse the share of load-shedding increases. Having considered the arguments of learned Counsel for petitioner, the Authority is of the view that if the petitioner has any reservations regarding methodology of PESCO in allocating the load-shedding, it may approach the concerned offices.



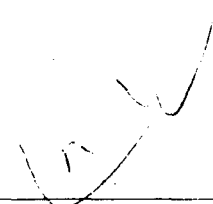


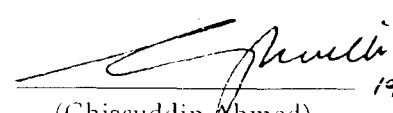
14. The applicable tariff of electricity has to be reviewed and revised by NEPRA on a monthly basis due to variation in the fuel charges in terms of a proviso to section 31(4) of the NEPRA Act, which is reproduced hereunder:-

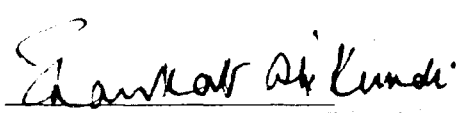
“Provided further that the Authority shall, on a monthly basis, review and revise the approved tariff on account of any variations in the fuel charges and policy guidelines as the Federal Government may issue in this behalf and recommend the tariff so revised to the Federal Government for notification in the official Gazette”

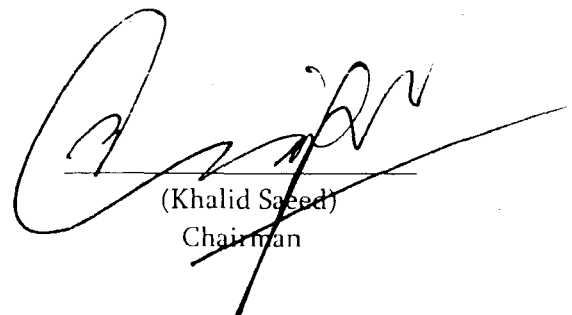
15. The fuel adjustment charges being determined by NEPRA in the applicable tariff are applicable across the board as no exception has been provided in the law regarding exclusion of any area from the application of fuel charges adjustments.
16. For the foregoing reasons, the Authority is of the considered view that the stance of petitioner that hydel generation is being made in Khyber Pakhtunkhwa and fuel adjustment charges should not be passed on to its consumers is without any merits and justification. The petition is accordingly rejected.

AUTHORITY


(Maqbool Ahmad Khawaja)
Member


(Ghasuddin Ahmed) 19/9
Member


(Shaukat Ali Kundi) 19.09.2011
Vice Chairman


(Khalid Saeed)
Chairman

