



Registrar

National Electric Power Regulatory Authority

Islamic Republic of Pakistan

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No. NEPRA/ADG(CAD)/TCD-02/40/50-52

November 9, 2020

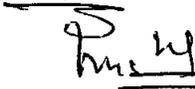
1. Chief Executive Officer
Islamabad Electric Supply Company (IESCO)
Street No 40, G-7/4, Islamabad.
2. Bestway Cement Limited,
19-A, College Road, F-7 Markaz, Islamabad.

Subject: **DECISION IN PURSUANT TO THE ORDERS OF THE HONORABLE ISLAMABAD HIGH COURT DATED JULY 30, 2020 IN WRIT PETITION NO. 1274/2019; M/S BESTWAY CEMENT LIMITED (BCL) VS NEPRA ETC. IN THE MATTER OF COMPLAINT FILED BY BCL AGAINST IESCO FOR UPDATION OF SECURITY DEPOSIT ON ACCOUNT OF CHANGE OF NAME**
IESCO-01/2017

Reference is made to the orders of the Islamabad High Court (IHC) July 30, 2020 in Writ Petition No. 1274/2019 whereby the Court held that the appeal filed by the petitioner company shall be treated as pending before the Authority and be decided after providing an opportunity of hearing to the parties.

2. In view of the foregoing, an opportunity of hearing was provided to the parties on September 15, 2020. Accordingly, the Decision of the Authority in the subject matter is enclosed herewith for necessary action and compliance, please.

Encl: As above


09/11/20
(Syed Safer Hussain)

Copy to:

Assistant Registrar (Writ), Islamabad High Court (IHC), Islamabad.
[with reference to the Writ Petition No.1274/2019]



BEFORE THE
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
(NEPRA)

Complaint No. IESCO-01/01/2017

Bestway Cement Limited,
19-A, College Road,
F-7 Markaz, Islamabad

Appellant

Versus

Islamabad Electric Supply Company (IESCO)
KE House No. 39-B,
Sunset Boulevard, Phase-II,
Defence Housing Society, Karachi

Respondent

Date of Hearing: September 15, 2020

Present:

- | | |
|-------------------------|----------------------|
| 1) Tauseef H. Farooqi | Chairman |
| 2) Saif Ullah Chattha | Vice Chairman/Member |
| 3) Rehmatullah Baloch | Member |
| 4) Engr. Bahadur Shah | Member |
| 5) Rafique Ahmed Shaikh | Member |

On behalf of:

Appellant:

- | | |
|---------------------------|------------------------------------|
| 1) Mr. Irfan Anwar Sheikh | Director & Chief Financial Officer |
| 2) Mr. Umer Khan Vardag | Legal Counsel |

Respondent:

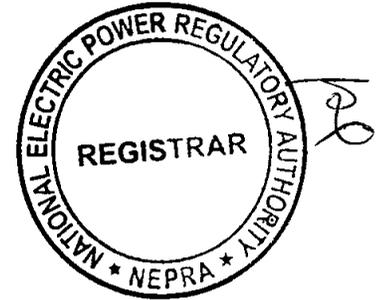
- | | |
|----------------------|---------------------------|
| 1) Mr. Altaf Hussain | Chief Engineer (Planning) |
| 2) Raja Ishtiaq | DG (Legal) |
| 3) Mr. Waheed Akram | Manager (Commercial) |
| 4) Mr. Imam Baksh | Additional Deputy Manager |

Subject:

DECISION IN PURSUANT TO THE ORDERS OF THE HONORABLE ISLAMABAD HIGH COURT DATED JULY 30, 2020 IN WRIT PETITION NO. 1274/2019; M/S BESTWAY CEMENT LIMITED (BCL) VS NEPRA ETC. IN THE MATTER OF COMPLAINT FILED BY BCL AGAINST IESCO FOR UPDATION OF SECURITY DEPOSIT ON ACCOUNT OF CHANGE OF NAME

DECISION

In pursuance of the Orders of the Honorable Islamabad High Court, Islamabad dated July 30, 2020, in W.P.No.1274/2019, this decision shall dispose of the appeal filed by M/s Bestway Cement Limited (hereinafter referred to as the "Appellant" or "BCL") against the decision of Member (Consumer Affairs), dated February 08, 2018. The operative part of the Order of the Honorable Islamabad High Court is as under:-



"The appeal filed by the petitioner company shall be treated as pending before the Authority. The latter after affording an opportunity of hearing to the parties is expected to decide the same in accordance with law."

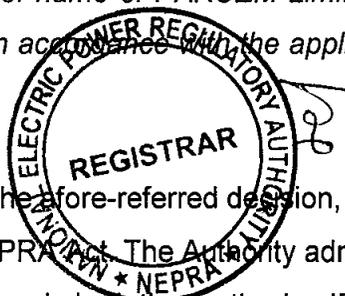
2. The brief facts of the case are that BCL is a public limited company. It purchased PAKCEM Limited Chakwal (PCM) in the year 2015 and executed a Scheme of Arrangement for Amalgamation, under the provisions of Sections 284 to 287 of the Companies Ordinance, 1984 for an amalgamation between BCL and PCM. The Honorable Islamabad High Court sanctioned the scheme of amalgamation and merger of BCL Chakwal and PCM vide Order dated August 18, 2016. Subsequently, BCL informed IESCO about the court-sanctioned amalgamation, vide letter dated September 08, 2016, and requested for change of name on electricity bill. In response, IESCO informed BCL to apply for proper change of name to avoid complication/inconvenience in future and update the security deposit.

3. BCL filed a complaint with NEPRA under section 39 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (NEPRA Act). In its complaint, BCL submitted that IESCO had directed BCL to apply for a change of name under the relevant provisions of the Consumer Service Manual (CSM), which 'impliedly' refuses the recognition of BCL as a court-sanctioned amalgamated company. BCL requested that IESCO be directed to change the name of PCM to BCL without updation or revision of security deposit, on the basis of BCL being a successor-in-interest of PCM.

4. The matter initially remained sub-judice due to ongoing proceedings on the impugned matter in W.P.No.4194/2016 before the Islamabad High Court, therefore the matter was held in abeyance and the Appellant was duly informed vide this office letter dated February 10, 2017. Later, the Honorable Islamabad High Court, vide Order dated February 13, 2017, disposed of the matter and found the complaint filed under Section 39 to be the efficacious remedy available in the matter.

5. The orders of the court were provided by the Appellant vide letter dated February 24, 2017. Proceedings were then commenced by NEPRA on the matter. A hearing was held on March 30, 2017 at NEPRA's Head Office, wherein arguments from both the parties were heard. Further clarifications on the issue were sought from the Appellant vide letters dated October 18, 2017 and December 11, 2017 which were provided by BCL vide letter dated December 22, 2017. The Member (Consumer Affairs) then proceeded to pass an order, dated February 08, 2018 whereby IESCO was directed to *"approve change of name of PAKCEM Limited to Bestway Cement Limited subject to updation of security deposit in accordance with the applicable provisions of the Consumer Service Manual (CSM)."*

6. Being aggrieved with the before-referred decision, BCL filed an Appeal dated March 06, 2018 under Section 12-A of the NEPRA Act. The Authority admitted the Appeal and hearing in the matter was held on May 31, 2018 wherein both the parties i.e. IESCO and BCL participated and presented



representatives of IESCO, in addition to their earlier stance, informed the Authority that Demand Notice dated August 07, 2017 amounting to Rs. 142,400,000/- was already issued to BCL by IESCO on account of change of name. In response, BCL, vide letter dated August 25, 2017 requested IESCO for acceptance of bank guarantee amounting to Rs.142, 400,000/- as security deposit for change of name in lieu of cash security deposit. The Authority vide its Order dated October 02, 2018 uphold the Order dated February 08, 2018 after due deliberation and rejected the Appeal filed by the BCL.

7. Subsequently, BCL filed the Writ Petition bearing No. 1274/19 in the Honorable Islamabad High Court, Islamabad. The submissions of the Appellant in the Writ Petition are; inter alia as under:

- i. The Order/Decision dated February 08, 2018 is illegal, pervasive and against the facts of the case and void ab-initio having no legal or factual grounds.
- ii. The merger and amalgamation scheme approved by the Honorable Islamabad High Court vide its order dated August 18, 2016 under Section 287 of the Companies Ordinance, 1984 (Now Section 282 of the Companies Act 2017) is not a transfer of ownership, it is a merger where neither the old company finishes nor a new one is born; rather it is joining of two corporate bodies into one body which form is neither new nor old.
- iii. The Appellant had relied upon the definition of 'Consumer' given in Section 2(iv) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 that is; *a consumer means a person or his successor-in-interest who purchases or receives electric power for consumption and not for delivery or re-sale to others, including a person who owns or occupies a premises where electric power is supplied.* Consumer Service Manual (CSM) deals with natural persons. These instructions are not applicable in case of BCL.
- iv. It is also a matter & law that the BCL or PAKCEM Directors are not owners of the Company, Shareholders are the owners of the shares of the Company to the extent of their shares and they elect Directors to run the affairs of the Company according to the Articles of Association and Memorandum of the Company and the directors have been elected by the shareholders for these purposes only.
- v. The CSM or the NEPRA Act 1997 nowhere mandates that a Company/Consumer is under obligation to report changed in shareholding of the Company to the Regulator of the Electricity matters i.e. NEPRA. These impugned orders suffers from want of an application of legal mind. Hence, the impugned orders are pervasive and are required to be set aside.



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shareholding of a company changes, then it has to apply for change of name under Clause 5.2 of the CSM. It has always been the case of BCL that this instruction is inapplicable upon it as it deals with natural persons and companies have a perpetual existence, then why would a company need to apply for change of name if its shareholding changes?



vii. The law applicable in the present case are exactly the same as earlier determined in the cases of Dewan Hattar Cement Ltd versus PESCO decided vide Orders dated June 13, 2007 and September 14, 2007 by the NEPRA. The Respondents (NEPRA & IESCO) have no competency to declare statute law i.e. Regulation of Generation, Transmission and Distribution of Electric Power Act of 1997 as illegal after issuance of CSM issued under Section 21 of the NEPRA Act 1997 read with NEPRA Licensing (Distribution) Rules 1999 which actually they have done in the impugned orders.

viii. The impugned order is against the order of the Approval Scheme of Amalgamation Order dated August 18, 2016 passed by the Honorable Single Judge of the Honorable Islamabad High Court.

ix. The Appellant has requested for setting aside the Order dated October 02, 2018 and requested for change of name of PAKCEM Ltd into Bestway Cement Ltd on the bills and record maintained by IESCO without updating security deposit being a successor-in-interest of PAKCEM Ltd., the Company that merged into the Appellant Company. The Appellant has further prayed that no adverse action be taken against them.

8. The Honorable Islamabad High Court, Islamabad vide its Order dated July 30, 2020 referred the matter to NEPRA for decision. Accordingly, an opportunity of hearing was provided to both the parties on September 15, 2020. The IESCO representatives attended the hearing in person and the representatives of the Appellant through video link. During the hearing, IESCO submitted that amalgamation between BCL and PCM has occurred due to change in ownership, therefore updation of security deposit is required. The representatives of BCL reiterated their earlier stance that the said amalgamation has the effect of BCL being a successor-in-interest of PCM, therefore updation of security deposit is not required. They further submitted that NEPRA has categorically mentioned the updation of security deposit in case of merger in the Revised Consumer Service Manual, meaning thereby that there was no such clause regarding updation of security deposit in case of merger in the Old Consumer Service Manual as it only dealt with natural persons and not companies. Moreover, the representatives of BCL stated that the Authority has already decided in the matter of Dewan Hattar Cement Limited vs PESCO that in case of successor-in-interest, security deposit is not required to be updated.

9. The case has been examined in detail in light of written/verbal arguments of the parties and applicable law. The following has been concluded:

- i. The main ground submitted by the Appellant is that the merger and amalgamation scheme approved by the Honorable Islamabad High Court vide its Order dated August 18, 2016 under Section 287 of the Companies Ordinance, 1984 is not a transfer of ownership, it is a merger where neither the old company finishes nor a new one is born; rather it is joining of two corporate bodies into one body. In this regard, the Authority observes that the merger between BCL and PCM is immaterial to the impugned matter, since it took place later in time. As identified in the impugned order dated February 08, 2008 the obligation to submit an application for change of name arose when PCM's ownership was acquired by BCL, on April 24, 2015 which was admitted by BCL in their letter dated December 22, 2017. From April 24, 2015 till August 18, 2016 PCM and BCL continued to operate as separate, distinct and functioning corporate bodies, with separate and distinct Board of Directors (as illustrated below).

Board of Directors of BCL and PCM as of April 24, 2015 (i.e. at the time of purchase/acquisition of PCM)		
S.No.	PAKCEM Limited (PCM)	Bestway Cement Limited (BCL)
1.	Maj. Gen (R) Rehmat Khan	Sir Mohammad Anwar Pervez
2.	Mr. Amr Ali Reda	Mr. Zameer Mohammad Choudrey
3.	Mr. Shafqat Mahmoon Malik	Mr. Mohammad Younus Sheikh
4.	Mr. Fabrizio Angelo Olivares	Mr. Muhammad Irfan Anwar Sheikh
5.	Mr. Hugues Boissel Dombrevail	Ms. Najma Naheed Pirzada
6.	Mr. Jeannine Saleh	Mr. Dawood Pervez
7.	Mr. Shahid Anwar (Nominee NIT)	Mr. Arshad Mehmood Chaudhary

Reference: BCL's letter dated December 22, 2017



As such, it is untenable to presume that during this time period, the companies had executed a transaction amounting to succession-in-interest. The purchase of PCM's shares by BCL was a traditional and straightforward share acquisition transaction, where the ownership of PCM was acquired by BCL as its shareholder. This change in ownership occurred prior to the court sanctioned merger that took place on August 18, 2016 by the Order of the Honorable Islamabad High Court.

- ii. The second ground raised by the Appellant is that BCL relies upon the definition of 'Consumer' in Section 2(iv) of the NEPRA Act that is; a consumer means a person or his successor-in-interest. According to BCL, it had not applied under CSM as this document, under the head 5.2 Security Deposit, deals with natural persons and these instructions are not applicable in case of BCL, as they are deficient in scope and content. In this regard, it is pertinent to refer Clause 5.2 of the then CSM read with Section 2(iv) of the NEPRA Act which are reproduced as under:

Section 2(iv) of the NEPRA Act

“Consumer” means a person or his successor-in-interest who purchases or receives electric power for consumption and not for delivery or re-sale to others, including a person who owns or occupies a premises where electric power is supplied;

Clause 5.2(a) of the then CSM

Security Deposit is non-transferable except as follows:

- i) **Relocation of Premises:** If the consumer moves to a new location within the Exclusive Service Territory of DISCO and requests for a new connection at that location.
- ii) **Change of Name:** If the consumer sells the premises where the connection is installed, it shall be obligatory upon the new owner to apply to DISCO for change of name. Such an application shall be accompanied by written consent of the previous owner regarding transfer of Security Deposit in the name of new owner.
- iii) **Through Succession:** Upon death of the consumer, the Security Deposit shall be transferred according to the Succession Certificate granted by the court of competent jurisdiction.



Provided that the Security Deposit shall be updated and transferred if no arrear, are outstanding.

Clause 5.2(b) of the then CSM

In case of change of tariff category, shifting of site and change of ownership, the security amount shall be updated according to prevailing rates. In case of extension of load, the amount of security at prevailing rates shall be recovered to the extent of incremental load and not on the entire load.

It is evident from above that Clause 5.2 of the then CSM includes 'consumer' which highlights that the said clause's applicability pertains to 'consumer' and any person falling within its parameters. 'Consumer' is a defined term under NEPRA's parent statute, and it is the second limb of the said definition that the Appellant has relied upon, i.e. successor-in-interest. The Appellant has argued that it does not fall within the first purported category of 'consumer' i.e. a person, but directly falls within the second purported category i.e. successor-in-interest. However, a bare reading of

contain two independent and unrelated 'consumer' categories as has been alleged by the Appellant. Hence, the only two conceivable categories of 'consumer' can be either a 'person' or a 'person's successor-in-interest'. For the successor-in-interest aspect of the definition to apply, it is necessary that the successor has to be a successor-in-interest of a 'person' as defined under Section 2(iv) of the NEPRA Act. Moreover, Clause 5.2(a) of the then CSM inter alia provides **that in the event of change of name owing to sale of premises or through succession, the security deposit is transferable and is required to be updated**. Further, according to Clause 5.2(b) of the then CSM, the security deposit is updated in case of change of ownership. In the instant case, change in ownership was occurred while acquiring the PCM by BCL on April 24, 2015. Foregoing in view, the Authority observes that the argument raised by the Appellant lacks legal ground.

iii. Moreover, the Appellant has submitted that NEPRA has categorically mentioned the updation of security deposit in case of merger in the revised CSM, meaning thereby that there was no such clause regarding updation of security deposit in case of merger in the old CSM as it only dealt with natural persons and not companies. In this regard, the Authority observes that there is no force in the arguments of the Appellant because it is a matter of fact that the CSM is applicable to all consumers served by the distribution companies and the subject matter of the CSM relates to administration of consumer-related activities (e.g. provision of connection, metering, billing, theft of power, disconnection, and reconnection, etc). All the consumers including the Appellant are governed under the provisions of CSM. The revised CSM depicts the updation of security deposit including but not limited in the following cases:

- a. Change of name due to change in ownership of a premises.
- b. Change of name due to merger/amalgamation of a company with another company.

iv. The Appellant has further submitted that the law applicable in the instant case is exactly the same as earlier determined in the cases of Dewan Hattar Cement Limited versus PESCO decided by NEPRA vide Orders dated June 13, 2007 and September 14, 2007 that in case of successor-in-interest, security deposit is not required to be updated. In this regard, the Authority observes that there is no force in the version of the Appellant because it is a matter of fact that the decision of the Authority in the case of Dewan Hattar Cement Limited was prior to promulgation of CSM. The then CSM envisaged that even in case of succession, the security deposit was required to be updated.



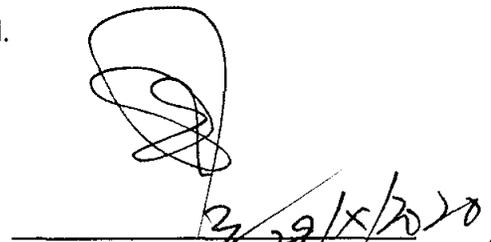
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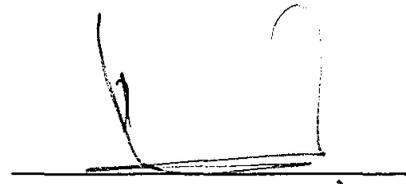
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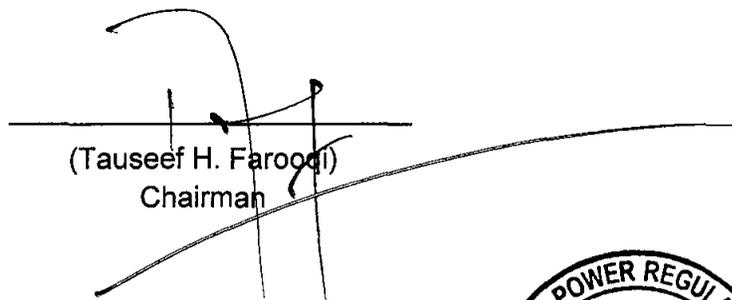
10. In view of the foregoing, the Authority has perused the case, written/verbal arguments of the parties and the applicable law. Any order of the Authority can only be modified upon the discovery of new and important matter of evidence or on account of some mistake or error apparent on the face of record. The perusal of the impugned order clearly indicates that all material facts and representations made were examined in detail and there is no occasion to amend the impugned order. Moreover, the Appellant has not provided sufficient grounds for revising the impugned order. Therefore, the Authority is convinced that the appeal would not result in withdrawal or modification of the impugned order. Resultantly, the appeal is dismissed.

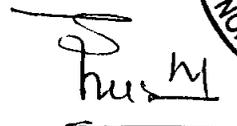

(Rafique Ahmed Shaikh)
Member


(Rehmatullah Baloch)
Member


(Saif Ullah Chattha) 3.11.2020
Vice Chairman/Member


(Engr. Bahadur Shah)
Member


(Tauseef H. Farooqi)
Chairman


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