



Registrar

National Electric Power Regulatory Authority

Islamic Republic of Pakistan

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No. NEPRA/R/ADG(Tariff)TRF-NUR-03/ 8571-75

June 10, 2024

Subject: Decision of the Authority in the matter of Reconsideration request of the Federal Government U/S 31(7) of the NEPRA Act, 1997 read-with all enabling Provisions with respect to the Determination of the Authority in the matter of Decision of Appellate Tribunal regarding modification of Fuel Price Mechanism of Bagasse-Based Power Projects

Dear Sir,

Enclosed please find herewith the Decision of the Authority, along with the Separate Decision of Mr. Mathar Niaz Rana (nsc), Member(NEPRA) (total 07 pages), in the matter of the subject Reconsideration request of the Federal Government for information, please.

Enclosure: As above

(Engr. Mazhar Iqbal Ranjha)

Secretary,
Ministry of Energy (Power Division),
'A' Block, Pak Secretariat,
Islamabad

Copy to:

1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad
2. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad
3. Chief Executive Officer, Central Power Purchasing Agency Guarantee Limited (CPPA-G), Shaheen Plaza, Plot No. 73-West, Faza-e-Haq Road, Blue Area, Islamabad
4. Managing Director, Private Power and Infrastructure Board (PPIB), Plot No. 10, 2nd Floor, Immigration Tower, Mauve Area, Sector G-8/1, Islamabad

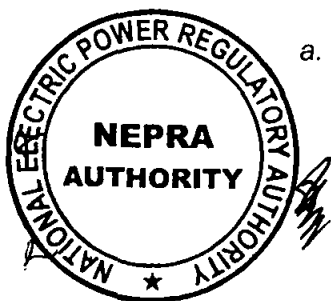
**DECISION OF THE AUTHORITY IN THE MATTER OF RECONSIDERATION REQUEST
OF THE FEDERAL GOVERNMENT U/S 31(7) OF THE NEPRA ACT, 1997 READ- WITH
ALL ENABLING PROVISIONS WITH RESPECT TO THE DETERMINATION OF THE
AUTHORITY IN THE MATTER OF DECISION OF APPELLATE TRIBUNAL REGARDING
MODIFICATION OF FUEL PRICE MECHANISM OF BAGASSE-BASED POWER
PROJECTS.**

BACKGROUND

1. On May 29, 2013, NEPRA determined an Upfront Tariff (2013 Upfront Tariff) for new bagasse-based co-generation Independent Power Projects (**IPPs**). This determination was formally notified through SRO No. 771/(1)/2013 dated September 3, 2013. In 2014, the Authority through *suo moto* proceedings, applied the fuel pricing and adjustment mechanism approved in the 2013 Upfront Tariff to bagasse captive power projects (**CPPs**).
2. In 2018, NEPRA initiated suo-moto review proceedings to amend the bagasse pricing and its adjustment mechanism applicable to both bagasse CPPs and IPPs under the 2013 Upfront Tariff. The Authority's decision in this matter was issued on July 16, 2019.
3. Eight operational bagasse IPPs, aggrieved by the aforementioned decision, filed Writ Petitions under Article 199 of the Constitution of Pakistan, before the Honorable Islamabad High Court. The court suspended NEPRA's decision of July 16, 2019, and subsequently remanded the case to the learned NEPRA Appellate Tribunal.
4. Subsequently, the NEPRA Appellate Tribunal issued a judgment setting aside NEPRA's decision dated July 16, 2019, and remanded the case back to NEPRA for an afresh decision in accordance with the law, after affording the right of hearing to all the concerned parties.
5. Accordingly, the first hearing in the matter was held on March 15, 2023 and subsequently second hearing on September 06, 2023 for which notices were sent to all relevant stakeholders including Ministry of Energy, Power Division (**Ministry of Energy**). A consultative session of the relevant parties i.e. IPPs, Central Power Purchasing Agency Limited (**CPPAGL**), and Ministry of Energy was scheduled on December 13, 2023, since consultation with the affected/interested parties was one of the conditions to review the bagasse price under 2013 Upfront Tariff. The Ministry of Energy chose not to attend any of the abovementioned hearings/ consultative session, nor submit any written comments. Thereafter taking into account submissions of all parties, perusing the record presented before it, and following due process of law, the Authority vide its decision dated February 07, 2024 (**Impugned Decision**) issued the determination in the matter.

SUBMISSION OF RECONSIDERATION MOTION

6. The Ministry of Energy on behalf of the Federal Government, through letter No. F. No. Tariff/BB-2013 dated March 20, 2024 submitted a request for reconsideration of the Impugned Decision under Section 31 (7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (**the Act**). The main contentions of the Federal Government are produced as hereunder:
 - a. *Unreasonable coal price has been used as a reference, i.e. the price of coal for the month of September, 2022 (USD 295.26 per ton), which is*

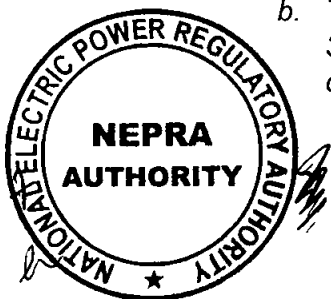


close to the historical peak, has been used as a reference for a 5% indexation in the upcoming years.

- b. The bagasse constitutes an indigenous fuel, and the associated benefits accruing from the nature of fuel are to be accounted and the cost of indigenous and cheap source of fuel as compared to the imported fuel should be holistically considered and the benefits accruing thereof be legitimately passed on to the consumer. NEPRA should devise a built-in mechanism to ensure that the tariffs for bagasse-based power projects do not surpass the marginal cost of electricity generated from imported coal-based power projects.*
 - c. That the basis/assumptions of the Determination engender an ambiguity which touches the root of determination as to its application which has the potential for Wednesbury unreasonableness.*
7. It was prayed to the Authority, *"that the authority may graciously accept the reconsideration request and thus cure the inherent ambiguity of the Determination."*
8. Upon initial examination and scrutiny, it was observed that the instant reconsideration request is not maintainable under Section 31 (7) of the Act, since the said provision circumscribes the power of the Federal Government to file a motion for reconsideration against the approved tariff of public sector licensees involved in the distribution and supply business.
9. Therefore, in the interest of justice the Authority resolved to frame and adjudicate the issue of maintainability and decided to hold a hearing in this regard. In furtherance thereof, notices were issued to the Federal Government and all the concerned parties explicitly mentioning that a hearing on the issue of maintainability is being scheduled on April 25, 2024.

HEARING

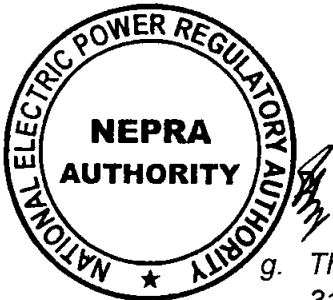
10. The Authority conducted the scheduled hearing on April 25, 2024, which was attended by personnel from the Ministry of Energy and representatives of the bagasse-based IPPs.
11. During the hearing, the representatives of the Ministry of Energy stated that they were not prepared to address the issue of maintainability. They requested additional time to prepare and to seek an opinion from the Ministry of Law and Justice on the matter of maintainability, pursuant to Section 31(7) of the Act.
12. The representatives of the bagasse based IPPs presented their arguments and raised preliminary objections that the Federal Government does not have the powers to file a reconsideration request in case of determination of generation tariff. The submissions of the representatives are stated as hereunder:
 - a. That the impugned determination was issued after exhaustive deliberations and consultation of all stakeholders including CPPA-G.*
 - b. That the Ministry of Energy has filed the reconsideration request under Section 31 (7), which it is not empowered to do and has also requested to condone the delay in filing of the reconsideration request.*



- c. The "Reconsideration" Option was available to the Federal Government (FG) U/S 31 (4) of Act as promulgated in 1997. The relevant provision is reproduced hereunder:

"Provided that the FG may, as soon as possible, but not later than 15 days of receipt of the Authority's intimation, require the Authority to "Reconsider" its determination of such tariff, rates, charges and other terms & conditions made under subsection (1) and the Authority shall reconsider & determine the same anew within a period of fifteen days from the date of reference by the FG."

- d. This provision empowered the Federal Government to file "Reconsideration" against all Tariffs determined by the Authority - IPP Generation Tariff & Public Sector Licenses (Distribution, Transmission. etc.)
- e. Through NEPRA Amendment Act 2018, the "Reconsideration" provision relating to generation, distribution & transmission Tariff under section 31 (4) was omitted altogether.
- f. The NEPRA Act was amended in 2021 and the power of filing "Reconsideration" by the Federal Government was restored but restricted to the "Public Sector Licensees involved in distribution and supply business" only. The Power Generation Companies (IPPs) were not included in the purview of "Reconsideration". The relevant provision is reproduced hereunder:



"31(7) (i) The FG may, as soon as may be, but not later than 30 days of receipt of the Authority's intimation of its approved tariff of public sector licensees involved in distribution and supply business, require the Authority to reconsider its determination of such tariff to the extent of issues common to these licensees".

- g. The "Reconsideration Request" therefore does not fall under Section 31(7) and hence the request of FG is not maintainable, and the "Authority" has no jurisdiction in this matter anymore.
- h. The instant "Reconsideration Request" is also time barred as it has not been filed within 30 days.
- i. The Act does not give any power to the Authority to condone delay in filing the "reconsideration Request". It has to be filed within time.
- j. The Reconsideration Request has not been filed by or under authority of the Federal Cabinet and is not maintainable on this ground as well (Reliance is placed on PLD 2016 SC 808; Mustafa Impex case).
13. During the course of the hearing, the Authority granted the Ministry of Energy a 7-day period to submit its response within this timeframe. Subsequently, the Ministry of Energy, vide its letter dated May 9, 2024 requested a 7-day extension from the date of the letter. The Authority, through its letter dated May 14, 2024 allowed the Ministry of Energy to submit its response not later than May 16, 2024.
14. The Ministry of Energy through its letter dated May 16, 2024 submitted the legal opinion of Ministry of Law and Justice. The opinion is reproduced hereunder:

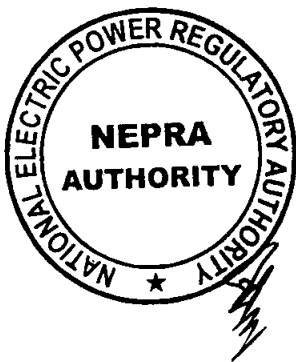
"The matter has been examined. In terms of section 31(7) of the NEPRA Act 1997, the Federal Government, if considers appropriate, may file an application for reconsideration in respect of approved tariff of public sector licensees involved in distribution and supply business within thirty days of intimation thereof The power of Federal Government to file reconsideration request is limited to the approved tariff of public sector distribution and supply licensees.

2. In response to the query at serial No 2, it is pointed out that sub- section 7 of section 31 of NEPRA Act provides a statutory period of 30 days within which a reconsideration application can be filed to the Authority, therefore, in the presence of explicit provision of Law, the Authority is not obliged to consider the application filed by the Federal Government after lapse of the statutory period."

ANALYSIS & FINDINGS OF THE AUTHORITY

15. The Authority considered the arguments presented by the representatives of the IPPs and the Ministry of Energy, as well as their written submissions and the opinion of the Ministry of Law in light of the Act and other applicable documents.
16. At the outset, the Authority is of the view that the question of maintainability is a fundamental issue that must be adjudicated as a preliminary matter. The Authority has noted that the instant reconsideration request has been filed by the Ministry of Energy while exercising its purported rights under section 31 (7) of the Act. In order to understand the issue it is imperative to trace the legislative history of this provision.
17. The right to file a reconsideration request was originally provided to the Federal Government in the Act as promulgated in 1997 under the then section 31 (4) as stated below:

"(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:



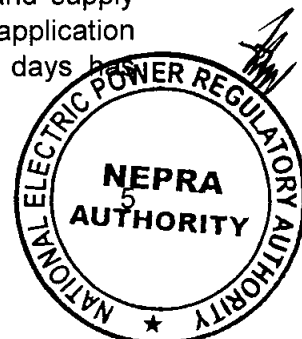
Provided that the Federal Government may, as soon as may be, but not later than fifteen days of receipt of the Authority's intimation, require the Authority to reconsider its determination of such tariff rates, charges and other terms and conditions. Whereupon the Authority shall, within fifteen days,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

18. The aforementioned provision was omitted through the NEPRA (Amendment) Act, 2018 (effective April 27, 2018). However, it was reinstated as the first proviso to Section 31(7) via the NEPRA (Amendment) Act, 2021, as stated below:

"Provided that the Federal Government may, as soon as may be, but not later than thirty days of receipt of the Authority 's intimation of its approved tariff of public sector licensees involved in distribution and supply business, require the Authority to reconsider its determination of such tariff to the extent of issues common to these licensees. Whereupon the Authority

shall, within thirty days, determine these after reconsideration and intimate the same to the Federal Government, (Emphasis Added)

19. The reading of the above provision transpires that the power to file a motion for reconsideration is now expressly limited by the legislature to the cases of the approved tariff of public sector licensees involved in distribution and supply business. Therefore, the instant reconsideration request is not maintainable *per se*. The legislative intent is clearly coming out from the bare reading of the legislative history of this provision.
20. It is a well-established legal principle that remedies such as appeal, revision, and reconsideration are substantive rights, rather than mere procedural matters. These rights must be explicitly provided for in the law. The right to submit a reconsideration request is a statutory creation, available exclusively to the Federal Government in cases involving approved tariff of public sector licensees in the distribution and supply business and not for the tariff of generation companies. Therefore, its scope cannot be expanded beyond the limits set by the statute.
21. Deriving from the aforementioned analysis, it is unequivocally asserted that the Authority's jurisdiction is confined to addressing reconsideration requests filed by the Federal Government, specifically concerning the approved tariffs of public sector licensees engaged in distribution and supply operations.
22. The Authority is of the view that since the instant reconsideration request relates to the generation tariff therefore the Authority has no jurisdiction to adjudicate upon it. It was also held by the Honorable Supreme Court of Pakistan in its Judgment reported as 2023 SCMR 1919 that *"the term 'jurisdiction' in the legal parlance means the command conferred to the Courts by law and Constitution to adjudicate matters between the parties. The jurisdiction of every Court is delineated and established to adhere to and pass legal orders. Transgressing or overriding the boundary of its jurisdiction and authority annuls and invalidates the judgments and orders. In order to deal with the different species of litigation, some Courts and Tribunals are vested with exclusive jurisdiction for taking cognizance of matters which other Courts cannot take under the rigidity or stringency of exclusive jurisdiction to deal with and decide the lis. No Court has the right to decide any lawsuit which is beyond the purview of its jurisdiction and want of jurisdiction conveys an action beyond the domain earmarked to any particular Court or Tribunal which cannot be cured, even by consent or acquiescence of parties."*
23. Without prejudice to the above, the reconsideration request is also time-barred, since, section 31(7) of the Act provides that the Federal Government may file a reconsideration request within thirty days of receiving the Authority's intimation of its approved tariff for public sector licensees in distribution and supply business. The reconsideration request dated March 20, 2024, was filed by the Ministry of Energy, after the lapse of this limitation period, as the Authority intimated its determination to the Federal Government on February 7, 2024. It is pertinent to mention that the Act does not provide for a provision allowing the Federal Government for filing the reconsideration request beyond the statutory time period.
24. The Ministry of Law and Justice has also opined that a reconsideration request can only be filed regarding the approved tariffs of public sector distribution and supply licensees. Furthermore, the Authority is not obligated to consider any application submitted by the Federal Government after the statutory period of 30 days has elapsed.



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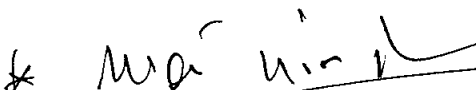
25. Without prejudice to the above, whilst addressing the merits of the reconsideration request is strictly unnecessary, nonetheless, the submissions of the Ministry of Energy claiming that the international price of coal in September 2022 (USD 295.26 per ton), which was close to the historical peak, has been used as a reference for a 5% indexation in upcoming years is incorrect. It is to be noted that the average of monthly international coal prices from October 2020 to September 2021 (~USD 114 per ton), using the exchange rate of September 2021, has been set as a reference, with a 5% indexation to be applicable from October 2022 onwards. Additionally, the new mechanism delinks the bagasse price from the international coal price, which automatically delinks it from the impact of exchange rate variations. Further, the approved annual increase of 5% is lower than local inflation, even when compared to the long-term average of annual inflation of the country. Moreover, the fuel cost component of bagasse projects, computed using the new mechanism, is significantly lower than the fuel cost component of imported coal power plants. These factors indicate that the new mechanism appropriately addresses the Ministry of Energy concern of lower pricing for indigenous bagasse fuel.

DECISION OF THE AUTHORITY


26. There is no doubt that the Federal Government has an important role in the regulation of electric power services. However, this role is clearly delineated in the Act and cannot be supplanted. Similarly, entertaining a reconsideration request regarding a generation tariff in light of clear stipulations of the Act and the interpretation of Ministry of Law and Justice, submitted by the Ministry of Energy will render any ensuing determination as *coram non judice*. The Authority is of a considered view that to perpetuate an error is no virtue but to correct it is a compulsion of judicial conscience.

27. Based on the aforementioned considerations, the Authority in its joint and collective wisdom hereby decides that the instant motion is not maintainable. Therefore, the instant reconsideration request is hereby dismissed.


AUTHORITY



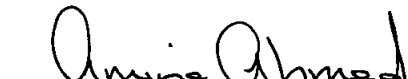
Mathar Niaz Rana (nsc)
Member



Engr. Maqsood Anwar Khan
Member

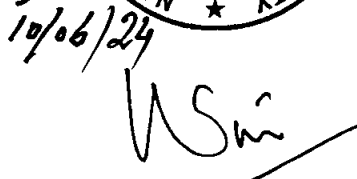


Rafique Ahmed Shaikh
Member

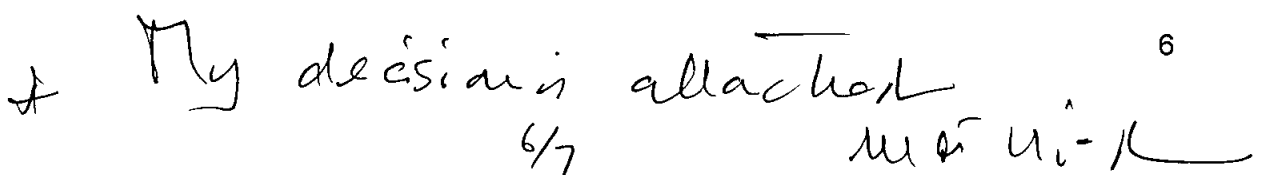


Amina Ahmed
Member



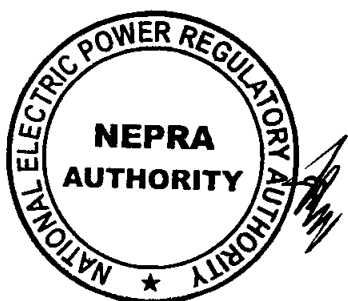


Waseem Mukhtar
Chairman



DECISION OF MEMBER TARIFF

1. The Ministry of Energy (Power Division) has submitted a request for reconsideration to NEPRA under Section 31(7) of the NEPRA Act, 1997. This request pertains to NEPRA's decision following the appellate tribunal's ruling on the modification of the fuel price mechanism for bagasse-based power projects.
2. The Ministry is an important stakeholder and is significantly affected by decisions of the Authority. It safeguards the interests of power producers and consumers. There are nearly 22 public sector companies and 02 statutory bodies including CPPAG and DISCOs working under the Ministry. The Ministry oversees power policies, power finance, tariff, and subsidies matters. It is unusual for the Ministry to raise concerns about a decision of the Authority by filing a reconsideration request in this manner.
3. I believe that when a stakeholder of such prominence makes a request, NEPRA is obligated to thoroughly reconsider such matters. Given the legal framework, it would be prudent to ensure that the Ministry's right to appeal or seek reconsideration on behalf of the companies and statutory bodies is respected, without rejecting their request on legal or procedural grounds, regardless of its eventual outcome. This approach honors the principle of fairness and will allow the Authority a chance to review the decision and correct if there is any short coming, any element that has been overlooked or any bona fide mistake.
4. Furthermore, NEPRA is empowered to revisit its decisions of its own accord, as provided by Section 7(2)(g) of the NEPRA Act, read with Regulation 3(1) of the NEPRA Review Procedure Regulations, 2009. There are recent precedents in which the Authority has discounted shortcomings in filing of review requests. Similar allowances can be made in this case. Consequently, the current request might similarly be regarded as a petition for review.
5. In light of these considerations, I am of the opinion that due to Ministry's request merits that all aspects of the case are examined, detached from the earlier decision to inspire public confidence in the decision making process of the Authority. The case officer may hold consultations with tariff professionals of the Ministry and its subordinate organizations with an open mind to understand the concerns of the Ministry. Dismissing the petition for reconsideration on procedural and legal grounds and not revisiting the merits would inevitably raise public concerns and skepticism about NEPRA's decision challenged by the Ministry.



Mathar Niaz Rana

Mathar Niaz Rana (nsc)
Member Tariff