# IN THE HIGH COURT OF SINDH, KARACHI

**Present**
**Mr. Justice Syed Hassan Azhar Rizvi**
**Mr. Justice Zulfiqar Ahmad Khan**

**C.P. No.D-476 of 2020**
Alongwith
**C.P Nos.D-431, 603, 1961, 2044, 2002, 597, 2108, 2515, 2330, 2101, 1217, 1771, 2052, 607 and 1762 of 2020**

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| Dates of hearing | : | 19.02.2020, 25.02.2020, 12.04.2020, 14.09.2020, 28.09.2020 and 05.10.2020 |
| For petitioners | : | M/s. Muhammad Ahmer and M. Umar Akhund, Advocates for petitioners in C.P No.D-476 and 431 of 2020 |
| | | Mr. Umair Qazi, Advocate for petitioner in C.P No.D-603 of 2020 |
| For respondents | : | M/s. Abid S. Zuberi, Haseeb Jamali and Ayan Mustafa Memon, Advocates for Respondent No.3/K-Electric a/w Syed Irfan Ali Shah, Head Legal Affairs (K-Electric) |
| | | M/s. Kashif Hanif and Sarmad Ali, Advocates for NEPRA |
| | | Mr. Hussain Vohra, Assistant Attorney General |

## JUDGMENT

**Zulfiqar Ahmad Khan, J**. :- Petitioners primarily engaged in the manufacturing of steel and other large-scale industrial products have impugned Determination dated 27.12.2019, whereby National Electric Power Regulatory Authority ("NEPRA") awarded respondent K-Electric (also referred to as "KE") monthly Fuel Charge Adjustment ("FCA") for the period of July 2016 to June 2019 stating it to be arbitrary, unlawful, without jurisdiction and contrary to Section 31(7) of the Regulation of Generation, Transmission and Distribution of Electric Power Act of 1997 (the Act, 1997). It is further alleged that NEPRA was not empowered under the provisions of Act, 1997 to allow three (3) years monthly FCA to KE in one go. It was also submitted that NEPRA instead of acting as a

regulator has colluded with KE in contradiction to its statutory obligations, hence the impugned Determination is liable to be set aside. As several petitions have been filed before us against the impugned Determination and while all such petitions were clubbed together and being decided by this single judgment, facts of Constitutional Petition No. D-431/2020 are used as a reference while deciding these petitions.

2. As alternate remedy under Section 12-G of the Act, 1997 of filing an appeal before the Appellate Tribunal by any person aggrieved from a decision or order of NEPRA has been provided under the said Act, the petition was posed with the inherent challenge as to its maintainability to which the learned counsel for the petitioner submitted that the said Tribunal was not functional nor any Chairman thereof was appointed till the time of filing of the instant petitions. As such, the instant petitions were maintainable, and the alternate remedy is not available at the moment to the petitioners. In this regard reference was made to the judgment reported at 2014 PLC (CS) 1032 and 2012 CLD 1893.

3. In the instant case, the Petitioners are also seeking this Court to interpret Section 31(7) of the Act, 1997, and the proviso thereto vis-à-vis timeframe within which an FCA ought to be applied by KE and approved by NEPRA. Moreover, the Petitioners have also requested this court to examine as to whether NEPRA acted in accordance with the powers conferred upon it under the Act, 1997 or otherwise. With regards to the assertions of NEPRA/K-Electric that the Petitioners were barred from filing the instant petition as they had failed to attend the public hearing held on 21.08.2019 when objections were invited before the grant of FCA to KE, the learned counsel of the petitioners submitted that absence of the Petitioners from the said hearing does not operate as an estoppel against them nor does it amount to waiver or acquiescence on the part of the

petitioners to the award of retrospective recovery of FCA to KE for the last three (3) years. It was submitted that the Petitioners have challenged the impugned Determination as (allegedly) the same was illegal and without jurisdiction, and while passing the same, NEPRA has failed to perform its statutory duty of protecting the interest of consumers.

4. Building their arguments in favour of allowing these petitions, the learned counsel stated that KE and NEPRA are well aware that adjustments in the approved tariff on account of variation in fuel prices have to be charged and notified within a specific time frame as provided in the proviso to Section 31(7) of the Act of 1997. Without prejudice to the above, per learned counsel the Hon'ble Supreme Court has passed Consent Order dated 2.05.2018 in C.A. 807 of 2013 where in paragraph 5(a) the Hon'ble Supreme Court fixed 4 months' time frame for claiming tariff revision on the basis of FCA. Per learned counsel that said consent order is binding on NEPRA being party to the *lis* hence NEPRA at best could have allowed FCA of past four months to KE, thus the award of FCA for previous three years by way of impugned Determination is arbitrary, without jurisdiction and contrary to the directions of the Supreme Court of Pakistan.

5. By placing reliance on the case reported as PLD 2011 (SC) 927, the learned counsel argued that it was an established principle that when the law requires a thing to be done in a prescribed manner it should be done in that manner or not done at all hence, per learned counsel the timeline provided in Section 31(7) of the Act of 1997 was to be considered as directory, which otherwise has been ignored. Per learned counsel, it is also a settled principle of law that timelines provided by a statute must be adhered to in letter and spirit.

6. As an additional line of arguments learned counsel stated that the bills and payments for the period of July 2016 till June 2019 (for which the FCA has been determined through the impugned Determinations) have become a past and closed transaction as the costs and expenses for the productions (for example of steel) during that timeframe had been accounted for by the Petitioners and passed on to the purchasers and the same cannot be reversed at this belated stage. Per learned counsel it was imperative and in fitness of things that KE would have applied FCA on monthly basis so the consumers/petitioners could have adjusted this portion into their costs of production and ought not to have been taken by surprise through the impugned Determination.

7. Learned counsel by placing reliance on 1992 SCMR 1652 and PLD 2001 (SC) 340 to press their point that it was a settled principle of law that executive orders, notifications (including the impugned Determination) which purports to impair an existing or vested right cannot be applied or given retrospective effect. Resultantly, per learned counsel NEPRA could not have implemented or awarded FCA retrospectively for the period of July 2016 till June 2019.

8. Per learned counsel KE had waived its right to collect FCA as it had complete knowledge of its cost of generating electricity and the resultant losses being accumulated on account of its failure to charge provisional FCA. In the circumstances, the consequence of not charging FCA must be borne by KE alone and the Petitioners cannot be burdened at this belated stage.

9. Last line of argument from the petitioners' counsel was that whilst NEPRA had a statutory duty under Section 7(6) of the Act, 1997 to protect the interest of the Consumers, it has failed to explain as to why

provisional FCA was not allowed to KE once MYT Determination dated 20.03.16 was challenged by KE.

10. Learned counsel for respondent K-Electric stated that Act of 1997 provides a comprehensive collaborative mechanism for determination of rate, charges, terms and conditions (tariffs) which allocates defined roles and functions to the K-Electric, NEPRA and the Federal Government acting through the Cabinet. Per learned counsel Section 7 of the Act details out the powers and functions of NEPRA and its clause (3) provides that NEPRA shall determine tariff, rates, charges and other terms and conditions for supply of electric power services by the generation and distribution companies. Per learned counsel Section 31 of the Act of 1997 provides timelines for the discharge of these functions where under its clause (2) NEPRA while making the determinations per standards as referred in this clause is required to protect consumers against monopolistic and oligopolistic prices and to determine tariffs so as to eliminate and minimize economic distortions keeping in view the economic and social policy objectives of the Federal Government.

11. By way of background the learned counsel stated that K-Electric has been awarded Multi-Year Tariff ("MYT") by NEPRA from time to time to charge tariff from its consumers as of 2002 where first MYT awarded to it was for a period of seven years from 2002 to 2009 vide NEPRA determination dated 10.09.2002 thereafter, another seven year MYT was awarded by the Respondent No. 2 vide determination dated 23.12.2009 for the period 2009 to 2016 which was applicable till June 2016 and thereafter vide determination dated 20.03.2017 K-Electric was awarded a seven year MYT for the period 2017 to 2023 by NEPRA which was to be applicable for period ending June 2023.

12. Learned counsel states that FCA is an adjustment allowed on account of monthly variation in fuel prices, generation mix, and volume and the Act 1997 permits it to be passed on to the consumers in their monthly bills under the Multi Year Tariff of a licensee (K-Electric in this case). Record reflects that NEPRA vide its decision dated 27.12.2019 determined FCA for the period July- 2016 to June-2019 and made it applicable to K-E's consumers from January 2020 onwards. There are negative adjustments in some months and the benefit is passed on to consumers by way of reduction in monthly bills in the month of October 2016, November 2016, January 2017 to July 2017, September 2017, November 2017, December 2017, and January 2019 to March 2019. The Respondent No.1 (Federal Government) determined the monthly FCA of around PKR. 0.44/kWh (on average basis) for the K-Electric's consumers for the period of July 2016 to June 2019. The increase is claimed to be mainly due to the increase in fuel prices as the gas price had increased from Rs. 613/MMBTU to Rs. 936/MMBTU and Furnace Oil price had increased from Rs. 27,000/MT to around Rs.70,000/MT, per learned counsel.

13. Learned counsel next states that the impugned determination dated 27.12.2019 as seen from the material available on record has been passed by the NEPRA after following due procedure whereby a Notice for Public hearing was served to all the stakeholders. It is to be noted that the Petitioners neither participated nor filed any objections at that given time, learned counsel states.

14. Per learned counsel the preceding MYT was issued to K-Electric vide NEPRA's Determination dated 23.12.2009 for a period of seven years which expired on 30.06.2016. However, prior to its expiry K-Electric filed its new MYT petition with NEPRA through on 31.03.2016. Further, while

the new MYT of K-Electric was under consideration, the K-Electric filed its monthly FCA requests for each month from July 2016 to November 2016 separately, on provisional basis, which were duly approved by the NEPRA on provisional basis. FCA for the month of December 2016 was filed within prescribed timelines, for which after due publication on website as well as newspaper notices a public hearing was also conducted, however, NEPRA through its decision dated 12.04.2017 decided that FCA from December 2016 will be processed as per the new MYT mechanism, which was yet to be finalized by NEPRA. Per learned counsel the said procedure was in the knowledge of the Petitioners who were well aware that provisional FCAs were not final and that they were subject to revision, after finalization of a new MYT.

15. The learned counsel points out that the petitioners have not challenged the calculation of the FCA amount but merely pray that those FCA charges cannot be recovered at this stage. It was submitted that the adjustment of FCA of prior periods is not a new phenomenon as NEPRA vide its Decision dated 04.06.2010 allowed K-Electric FCAs for a period of 9 months i.e., July 2009 to March 2010, which were duly recovered over a period of 7 months (June 2010 to December 2010). Similarly, in case of Ex-WAPDA distribution Companies (XWDISCOs), FCAs for the period July 2012 to May 2013 were allowed by NEPRA vide its determination dated 29.11.2013, which were recovered over a period of 6 months (December 2013 to May 2014).

16. To show that KE acted diligently, learned counsel drew court's attention to the following timeline:-

- March 31, 2016 – KE filed MYT Petition
- March 20, 2017 – NEPRA's Determination of MYT @ 12.07/kWh
- April 20, 2017 – Review Petition filed by KE
- October 09, 2017 – NEPRA allowed KE's Review Petition and increased the MYT to 12.77/kWh

- October 26, 2017 – Reconsideration Request filed by the GoP
- July 05, 2018 – NEPRA allowed on GoP's Reconsideration Request on KE's MYT and further increased the MYT to 12.82/kWh
- July 13, 2018 – KE filed Appeal before the Appellant Tribunal
- July 26, 2018 – KE filed Suit 1467 of 2018 and stay was granted by the Honorable High Court
- April 03, 2019 – Suit 1467 of 2018 withdrawn by KE
- May 22, 2019 – MYT notified by the GoP
- May 27, 2019 – KE filed for FCA for the period July 2016 to April 2019 within five days of notification.

17. Per learned counsel K-Electric filed a Review Motion seeking increase in the initial MYT of 12.07/kWh to 12.77/kWh which was later increased to 12.82/kWh after a Reconsideration Request was filed by the Government of Pakistan. Whereafter K-Electric filed an appeal before the Appellant Tribunal however due to the non-availability of the Learned Bench, the K-Electric having no other option, filed Civil Suit 1467 of 2018 where this High Court vide its order dated 26.07.2018 was pleased to suspend the operation of the impugned determination of NEPRA dated 05.07.2018. However, per learned counsel as the plans of development, growth, improvement of generation system and transmission and distribution networks, credit lines from financial institutions as well as investment plans of K-Electric were being hampered, K-Electric withdrew the said Suit and decided to continue with their case before the Appellate Tribunal, which is still pending adjudication. Learned counsel next states that the new MYT was notified by the GoP on 22.05.2019 and the K-Electric without any delay filed for the FCAs within seven (07) days of the notification, as per timelines defined in the new MYT. Therefore K-Electric cannot be penalized for exercising its lawful rights.

18. It was further submitted that the disallowance of FCA will have catastrophic impact on the financial viability of K-Electric as these amounts have already been paid by it at the time of purchase of the fuel.

19. Per learned counsel the petitioners admittedly knew that no FCA is being charged to them by K-Electric for the subject period (not even the

provisional FCA) but the petitioners never placed a request before NEPRA in this regard to reduce any sudden impact of such call rather enjoyed the benefit of reduced electricity costs. It was even shown to the court that when FCA was reduced to zero the petitioners did not reduce prices of their commodities and pocketed the FCA differential aimed to unjust enrichment.

20. It was prayed that the instant petitions being meritless be dismissed and at best petitioners may agitate their grievances through civil suits as question of facts are posed through these petitions.

21. Learned Asst. Attorney General supported the version of the counsel for respondent K-Electric and denied that NEPRA had colluded with the said respondent or has committed any legality or irregularity while deciding the impugned determination.

22. Heard the learned counsel of the respective sides, the Addl Attorney General and reviewed the material on record.

23. Let us first look at the legal and factual submission from the petitioner's counsel where they have referred to proviso to Section 31 (7) of the Regulations of Generation, Transmission and Distribution of Electric Power Act 1997 ("Act 1997") wherein NEPRA is empowered to make adjustments in the approved tariff on account of variations in the fuel charge. The petitioners have submitted that they are aggrieved by the Respondents' violation of these timelines as envisaged in the above-mentioned provision of law. The petitioners further argued that the provisional determination of the FCAs after awarding of MYT to KE became final determination and could not be subsequently charged by K-Electric or be allowed by NEPRA and that the previous determinations have become past and closed transactions.

24. To understand the intent of the legislature, we reproduce text of Section 31(7) which runs as under:-

> Section 31(7) – Notification of the Authority's approved, tariff, rates, charges and other terms and conditions for the supply of the electric power services by generation, transmission and distribution companies shall be made by the Federal Government in the official Gazette, within fifteen days of intimation of the final tariff by the Authority:
>
> Provided 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.

25. As it could be seen, in terms of Section 31(7) of the Act of 1997, a licensee can, on a monthly basis, file petition with NEPRA to adjust and revise the approved tariff to account for fuel cost component due to variation in fuel prices and generation mix and thereafter pass the same to the consumers in the form of FCAs. We note that such mechanism follows the structure laid down through the Multi Year Tariffs (MYT) which lastly concluded on 30.06.2016. Record shows that since FCA is a significant portion of tariff, K-Electric continued to file the monthly FCAs provisionally to NEPRA, for the individual months from July to December 2016, within prescribed timelines, to ensure that K-Electric timely recovers fuel costs incurred by it. The Respondent NEPRA admittedly allowed and issued five (05) monthly provisional FCA decisions from July 2016 to November 2016 but from December 2016 onwards it directed K-Electric that further FCA decisions will only be issued after new MYT is implemented, which for one reason or the other could not be finalized for more than two years. Petitioners have failed to show that they were unaware that they only paid provisional FCA for the months of July-Dec 2016 and no FCA charges were asked from them thereafter.

26. We also observe that since 2008 NEPRA has from time to time been allowing its licensees, including K-Electric FCAs. It is pertinent to note

here that while awarding tariffs, NEPRA in its determination provide the mechanism and method to the licensees as to how and when they will apply to NEPRA for the FCA. K-Electric has also from time to time applied to NEPRA for such determination which was duly allowed. NEPRA in its MYT awarded to KE in its determination dated 20th March 2017 and by its revised determination on 5th July 2018 in Annex II (Mechanism for Adjustment in Tariff Due to Variation in Fuel Price) and Annex III (Mechanism for Adjustment in Tariff due to Variation in Power Purchase Price ('PPP')) required that K-Electric shall apply within seven days for FCA determination in the following month. It is pertinent to mention here that similar clauses were also available in previous MYT awarded to KE and KE was awarded FCA's in similar terms within the timeframe so provided. Relevant clauses of determination dated 5th July 2018 are reproduced hereunder:-

> **Annex-II**
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> v. For the purpose of above adjustment the Current Month would mean the month for which adjustment is required and the Reference Month would mean the last month of the preceding quarter.
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> vi. For the purposes of adjustments for the months from July 01, 2016 to September 2016, the determined fuel cost component of Rs.2.9265 per kWh, calculated on total units sent out basis, shall be used as reference.
>
> xi. K-Electric shall submit its monthly adjustment request within seven days following the current month. The request shall be submitted on a prescribed format as provided in this Mechanism. KE shall submit the following information/data for verification.
>
> xii. The approved monthly FCA shall be notified by the Authority and shall be charged in the month intimated by the Authority in the respective monthly FCA decision. The determined FCA shall be charged on the basis of units consumed by each consumer in the month for which it is calculated.
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> **Annex- III (PPP)**
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> iv. For the purpose of above adjustment, the Current month would mean the month for which adjustment is required and the Reference month would mean the last month of the preceding quarter. For the purpose of adjustment for the months from July 01, 2016 to September, 2016 the fuel cost component of PPP of Rs.2.2622 per kWh, calculated on units sent out basis, shall be used as reference.

vi. K-Electric shall, within seven days following the Current Month, request for FCA to compensate for variations in fuel component of PPP. The request shall be submitted on a prescribed form as provided in this Mechanism.

viii. The approved monthly FCA shall be notified by the Authority and shall be charged in the month intimated by the Authority in the respective monthly decision. The determined FCA shall be charged on the basis of units consumed by each consumer in the month for which it is calculated.

27. It appears that in terms of the above mechanism K-Electric, while its petition for award of current MYT was pending, applied for the FCA to NEPRA on monthly basis for the month of July, 2016 (applied on 29th August, 2016 to be charged in the month of November, 2016 determined by NEPRA by its decision 3rd November 2016), August 2016 (applied on 30th September, 2016 to be charged in the month of November, 2016 determined by NEPRA by its decision 3rd November 2016), September 2016 (applied on 21st October 2016 to be charged in the month of December 2016 determined by NEPRA by its decision 1st December 2016), October, 2016 (applied on 18th November 2016 to be charged in the month of December 2016 determined by NEPRA by its decision 2nd December 2016), November 2016 (applied on 15th December 2016 to be charged in the month of January 2017 determined by NEPRA by its decision 3rd November 2016) which were added to the petitioners' bills as provisional FCA.

28. It is noted from the record that the Decision for FCA for December 2016 was issued after public hearing and Public Notice whereby NEPRA directed that FCA going forward will only be determined after Notification determining KE's new MYT. Thus, the Petitioners were aware that FCAs pertaining to such months will be charged subsequent to determination and notification of KE's new MYT, hence in our view such FCA remained as a debt on the petitioners and at this belated stage the petitioner's cannot sustain their plea of not paying it. It is also important

to note that the petitioner never impugned NEPRA's decision dated 12.04.2017 passed on KE's FCA application for the month of December 2016 hence the same attained finality and the question of applicability of FCA for the months of July 2016 to June 2019 did not turn into a past and closed transaction either.

29. The petitioners submitted that the licensee has to apply on monthly basis so that the consumers could adjust the monthly FCA into their costs and productions, in this regard it could be seen that the decision of NEPRA dated 12.04.2017 and MYT determination dated 05.07.2018 have been publicly available and the petitioners ought to be aware of the same and of the expected variations in FCAs. Therefore, the Petitioners were at full liberty to revise their costs of productions in case they had reduced those to pass on the benefit of zero FCA to the customers, which never transpired.

30. From perusal of the record we observe that K-Electric as per the mechanism prescribed in its MYT 2009 submitted its FCA request to NEPRA for the month of December 2016 on 16.01.2017 whereafter NEPRA vide its decision dated 12.04.2017 provided that the proceedings for provisional FCA of K-Electric for the month of December, 2016 shall be initiated in accordance with the mechanism prescribed in the new MYT determination thereafter NEPRA passed its decision dated 27.12.2019 whereby it determined that the FCA for the period July 2016 to June 2019 would be recovered in 9 months from January 2020 as per the mechanism provided by it. To us the said order of NEPRA is in accordance with the applicable law and does not violate the scheme installed by the legislation. Moreover, the stated decision has been passed by NEPRA after following due procedure whereby Notice for Public hearing was served by

publications in newspapers of wide circulation however the petitioners did not file any objections at that time.

31. With regards petitioners' claim that K-Electric could have applied for FCA on monthly basis during the pendency of the Suit No. 1467 of 2018 whereby KE had challenged the MYT determination dated 05.07.2018, it is to be noted that K-Electric being aggrieved with MYT decision dated 05.07.2018 initially filed an Appeal before the Appellate Tribunal as a first remedy. However, as no Bench for the said Tribunal was constituted by the Federal Government, K-Electric filed Civil Suit No. 1467 of 2018 before this Court. Prayers made in the said suit shows that K-Electric sought direction for NEPRA to regularly hold monthly and quarterly tariff adjustment hearings in accordance with the MYTD 2009-2016, and duly notify any such determination in the official gazette in a timely manner. Stay order passed by a Hon'ble Single Bench of this court while at one hand suspended the operation of the impugned determination of NEPRA dated 05.07.2018 but it also did not allow charging of provisional FCA by K-Electric, which per learned counsel hurt cashflows hence K-Electric withdrew the said Suit on 03.04.2019 and decided to continue with their case before the statutory Appellate Tribunal. Effect of said withdrawal (and recall of the inunction) was that NEPRA determined MYT for the period of July 2016 to June 2023 along with new mechanism for FCA pending since July 2016 vide its MYT determination dated 05.07.2018 which was duly notified in the official gazette on 22.05.2019. Accordingly, based on the Notification dated 22.05.2019, K-Electric through its letter dated 27.05.2019 applied for FCA for the period July 2016 to April 2019 as per the prescribed new mechanism i.e., within seven (07) days of the Notification, as per timelines defined in the new MYT.

32. The Petitioners' counsel has argued that NEPRA having allowed K-Electric FCAs for nearly three years has acted contrary to the principle of reasonable timeframe by placing reliance on judgement rendered by this court in the case of Farooqui Ice Factory Vs. Revenue Officer Sepco reported PLD 2014 Sindh 443. To us between the period July-2016 to June-2019 the Petitioners seem to have had a free ride at the cost of the licensee K-Electric. It's just like a tourist choosing to take a tour of a city in a rented car where the arrangement was that the tourist would provide for the fuel, and where in good faith, the rent-a-car company sent the car with full fuel tank in continuance of the business, and after having taken tour of the city when the fuel tank became empty the tourist leaves the car by only paying wages of the driver. Who will pay cost of the fuel? The driver, owner of the car, ministry of tourism or the tourist?

33. With regards timeframe provided in Section 31, in our view in all practical terms it could not be construed as mandatory or carved in stone. Whatever it is, it never proposes that if there is a failure in adhering to the said timeline for reasons beyond the control of the licensee, no FCA charges will have to paid by the consumer. Reliance in this regard is paced on the following judgments:-

***2020 CLC 851***
***Sindh Petroleum and CNG Dealers' Association & Others Vs. Federation of Pakistan & Others***

*"20. In the present facts and circumstances, it is apparent that SSGC had no control over the actions of the Federal Government, caretaker or otherwise. It is also apparent that it was never the case of failure of the Federal Government to advise; as the first advice of the Federal Government (caretaker) was to hold prices pending a decision by the incoming elected government and the same was followed by the advice (elected Government) to notify prices.*

*29. We have already observed that there are no penal consequences provided in the governing law in so far as non-adherence to the timelines are concerned. It is also gleaned that the object of the provisions, under scrutiny herein, that the intent is to protect the ultimate user / consumer from any further costs supplemental to the contemplated costs of natural gas and it is also gathered from the three-stage process, initial determination, review and final determination, that the legislative intent is to keep the tariff structure responsive to any fluctuations in its determinants. The legislative intent may*

*also be gleaned from consideration of Rule 21 of the Tariff Rules, which saves proceedings even in the event of defects or irregularities provided that such an infraction is not declared by the authority as having caused substantial injustice. It is thus maintained that mere employment of the term shall, in the provision/s under consideration, does not render it mandatory."*

***PLD 1974 Supreme Court 134 @ page 138***
***Niaz Muhammad Vs. Mian Fazal Raqib***

*"It is the duty of the Courts to try to get at the real intention of the Legislature, by carefully attending to the whole scope of the statute to be construed. As a general rule however, a statute is understood to be directory when it contains matter merely of direction, but not when those directions are followed up by an express provision that, in default of following them, the facts shall be null and void. To put it differently, if the Act is directory, its disobedience does not entail any invalidity; if the Act is mandatory disobedience entails serious legal consequences amounting to the invalidity of the act done in disobedience to the provision."*

***2017 SCMR 1427 @ page 1437 & 1438 @ (Para 4 – 7))***
***The Collector of Sales Tax, GUJRANWALA and others Vs. Messrs Super Asia Mohammad Din and Sons and others***

*"4. … The word 'shall' as oppose to 'may' has been used on both occasions when prescribing the maximum time period in the first proviso. It is settled law that when the word 'shall' is used in a provision of law, it is to be construed in its ordinary grammatical meaning and normally the use of word 'shall' by the legislature brands a provision as mandatory, especially when an authority is required to do something in a particular manner. Reference in this behalf may be made to the case of Haji Abdul Karim and others v. Messrs Florida Builders (Pvt.) Limited (PLD 2012 SC 247) wherein, whilst interpreting Order VII Rule 11 of the Code of Civil Procedure, 1908, this Court held that the Courts were bound by the word 'shall' used therein which made it mandatory to reject a plaint if it appeared from the statements in the plaint that it was barred by any law. In effect the deployment of the word 'shall' in this context denuded the Courts of their discretion in this behalf. Similarly, in the judgment reported as Safeer Travels (Pvt.) Ltd. v. Muhammad Khalid Shafi through legal heirs (PLD 2007 SC 504) it was held with regard to section 16(2) of the Sindh Rented Premises Ordinance, 1979 that the word 'shall' made it obligatory for the Court to strike off a defence in case of default. Therefore, we find that the use of the word 'shall' is a strong indicator that the provisos in question are mandatory in nature.*

*5. Learned counsel for the appellants argued that the word 'shall' is not always to be construed as mandatory but rather the determining factor is whether non-compliance with a provision entails penal consequences or not. He stated that since no such consequences flowed from section 36(3) of the Act thus the proviso was directory notwithstanding the fact that the word 'shall' was used therein.*

*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…*

*7. From the plain language of the first proviso, it is clear that the officer was bound to pass an order within the stipulated time period of forty-five days, and any extension of time by the Collector could not in any case exceed ninety days. The Collector could not extend the time according to his own choice and whim, as a matter of course, routine or right, without any limit or constraint; he could only do so by applying his mind and after recording reasons for such extension in writing. Thus, the language of the first proviso was meant to restrict the officer from passing an order under section 36(3) supra whenever he wanted. It also restricted the Collector from granting unlimited extension. The curtailing of the powers of the officer and the Collector and the negative character of the language employed in the first proviso point towards its mandatory nature. This is further supported by the fact that the first proviso was inserted into section 36(3) supra through an amendment (note the current section 11 of the Act, on the other hand, was enacted with the proviso from its very inception in 2012). Prior to such insertion, undoubtedly there was no time limit within which the officer was required to pass orders under the said section. The insertion of the first proviso reflects the clear intention of the legislature to curb this earlier latitude conferred on the officer for passing an order under the section supra. When the legislature makes an amendment in an existing law by providing a specific procedure or time frame for performing a certain act, such provision cannot be interpreted in a way which would render it redundant or nugatory. Thus, we hold that the first proviso to section 36(3) of the Act [and the first proviso to the erstwhile section 11(4) and the current section 11(5) of the Act] is/was mandatory in nature."*

***2000 SCMR 1305 @ page 1311 (Para 7)***
***Maulana Nur-Ul-Haq Vs. Ibrahim Khalil***

*"…There is yet another aspect of the matter to which it is necessary to refer to section 32 of. the Act appears to be mandatory, in view of the expression 'shall' used therein, but in fact is directory for want of a penal clause. No doubt there exists no faultless acid test or a universal rule for determining whether a provision of law is mandatory or directory and such determination by and large depends upon the -intention of Legislature and the language in which the provision is couched but it is by now firmly settled that where the consequence of failure to comply with the provision is not mentioned the provision is directory and where the consequence is expressly mentioned the provision is mandatory. It was held in Niaz Muhammad Khan v. Mian Fazal Raqeeb (PLD 1974 SC 134) that as a general rule a statute is understood to be directory when it contains matters merely of direction, but it is mandatory when those directions are followed by an express provision that in default of following them the facts shall be null and void. In Major Shujat Ali v. Mst. Surrya Begum (PLD 1978 SC (AJ & K) 118) it was held that in the absence of a penalty for failure to follow the prescribed procedure the provisions are to be taken to be directory and not mandatory. The provisions of section 32 of the Act being directory cannot in any manner override or dilute the provisions of section 31 of the Act which are mandatory by all standards."*

34. It appears that the litigation that culminated in PLD 2014 Sindh 443 was also simultaneously carried out before the Hon'ble High Courts of Islamabad and Balochistan. Both the Hon'ble Courts of Islamabad and Balochistan (2014 CLC 28 and PLD 2014 Bal 173) rejected the arguments of retrospectivity. Research reveals that the Hon'ble Divisional Bench at

Islamabad was pleased to allow an Appeal against judgement of the single bench in respect of the subject matter and was pleased to uphold the FCAs applied by the DISCOs. The relevant findings are reproduced as under.

***2014 CLC 28 @ Pages 42 (para 46 & 48) & 59 (para 67, 68 & 69)***
***LESCO and 501 others Vs. North Star Textile Mills and Others***

*"46. From the bare perusal of the above proposition of law, we are of the firm view that no time scale with regard to the issuance of notification provided by subsection (4) and its proviso while determining tariff with Fuel Adjustment Charges as an operational price being an addition to the cost of generation.*
*48. The very important aspect, which is required to be specified here is that NEPRA in its report has shown the variation of the cost of the power generation, which somewhere reduces and somewhere exceeds month-wise. The cost of generation when reduces, the consumers were adjusted in the bill of next month.*
*67. Under the circumstances, we are of the view that the material aspects have been skipped from the learned Single Judge in Chambers, therefore, the judgment is not based upon sound reasoning. The material placed on record, leads to the conclusion that the Fuel Adjustment Charges are not additional charges only, but are based upon Fuel Consumption cost, which can be adjusted every month by increasing or by decreasing on the basis of actual cost of fuel consumption.*
*68. As far as the applicability of Fuel Adjustment Charges with retrospective effect is concerned, record does not reflect that the charges were made with retrospective effect and they were included in the bills as current charges.*
*69. In view of above discussion, the Intra-Court Appeals are allowed and in consequence thereof, impugned judgment dated 24-10-2012 is set aside. Resultantly, all the writ petitions are dismissed. Likewise writ petitions mentioned at Serial No.392 to 424 in view of above findings are dismissed, with no order as to costs."*

35. The Hon'ble Division Bench at Balochistan was pleased to dismiss the Petitions and held that the fuel price adjustment and the equalization surcharge were neither illegal nor unconstitutional. Moreover, by the imposition of FPA and equalization surcharge QESCO did not seek to recover anything beyond the cost of the electricity consumed by the petitioners. Reference was made to the judgment passed in the case of Messrs. Bolan Steel Industries (PVT) LTD. through Managing Director and others Vs. Water and Power Development Authority (WAPDA) Through Chairman and others reported as PLD 2014 Balochistan whereas in the Judgment reported as 2014 PLD Sindh 443 (Supra) it was held the Petition was maintainable and that the levy being retrospective was unlawful. All the above-mentioned judgments were impugned by the respective parties

before the Hon'ble Supreme Court in Civil Appeal No. 807 of 2013 and connected appeals wherein the Hon'ble Supreme Court was pleased to pass a judgment dated 02.05.2018. The appellant in the said appeal challenged the retrospective application of the second proviso to Section 31(4) of the 1997 Act and claimed that the dues for 11 months could not be claimed. The Respondent/NEPRA maintained that the delay was due to a restraining order passed by a Court of competent jurisdiction and the delay could not be attributed to any act or omission on the part of the distribution company or NEPRA. The Hon'ble Apex Court accepted NEPRA's argument and the retrospective application argument by the appellant was repelled. This finding of the Hon'ble Supreme Court did not form part of the consent arrangement between the parties in those cases as this argument was repelled on merits after due consideration of the respective arguments of the parties. Thus, it was conclusively held by the Hon'ble Supreme Court that ***when there is a delay in application of FCA due to a restraining order passed by a competent court then such delay will not hamper the applicability of the FCA, and the argument of retrospective argument is not sustainable.*** Similar is the situation before us. Here too FCA could not be applied to the consumer bills due to the fact that the K-Electric was restrained by an order of this court. It is also pertinent to note that the Hon'ble Supreme Court allowed the charging of FCAs in these appeals and whilst the Hon'ble Supreme Court gave these findings on merits, the respective parties also came to agreement whereby FCAs were allowed, as pointed out to us by the learned counsel for the Petitioners. It is also worth observing that on the date when that Judgment was passed, the NEPRA Amendment Act 2018 was also enacted, hence the law adjudicated upon, and the prevailing law are slightly different. We also cannot lose sight of the fact that a consent arrangement is not binding on third parties.

36. As to the legal question that a party cannot be prejudiced by an act of court or public functionary, guidance could be sought from the case of Mumtaz Ijaz Vs. Muhammad Shafi reported as 2016 SCMR 834 where the Apex Court held that "*there is a well-known maxim "Actus Curiae Neminem Gravabit" (an act of the court shall prejudice no man) thus, where any court is found to have not complied with the mandatory provision of law or omitted to pass an order, required by law in the prescribed manner then, the litigants/parties cannot be taxed, much less penalized for the act or omission of the court. The fault in such cases does lie with the court and not with the litigants and no litigant should suffer on that account unless he/they are contumaciously negligent and have deliberately not complied with a mandatory provision of law*." Case of Khushi Muhammad through L.Rs. and others Vs. Mst. Fazal Bibi and others reported as PLD 2016 Supreme Court 872 is also relevant.

37. With regards a consent order not being binding on any third party, the Apex Court's judgment rendered in the case of Muhammad Iqbal and others Vs. Khair Din through L.Rs. and others reported as 2014 SCMR 33 is beacon of light where it was held that "*..a consent decree is a kind of agreement/contract between two parties with a superadded command of the court but it would not bind a third party who was not party to the said suit*."

38. With regards maintainability of these petitions, we could seek guidance from the Apex Court's judgment rendered in the case of Collectors of Customs Valuation Vs. Karachi Bulk Storage & Terminal Ltd (reported as 2007 SCMR 1357) where the Apex court ruled that in connection with fixation and enhancement of values, Court must consider ***as to whether the enhanced value was without disclosing adequate material or reasons therefor, or it was arbitrary, whimsical, capricious.*** None of these ingredients are present in the claim of the petitioners.

39. With regards Petitioners' counsel argument that the impugned determination purported to impair an existing or vested right, hence cannot be applied or given retrospective effect, we beg to differ from such an assertion. Not paying FCA component of a consumer's electricity bill could never be held as a vested or existing right. To us, it remains a debt and unless satisfied, there would be no release.

40. In light of the foregoing, we reach to an irresistible conclusion that the exercise of passing monthly FCA on to the petitioners on the basis of NEPRA's determination dated 27.12.2019 is in accordance with law and the timeline provided under Section 31(7) of the Act, 1997 be adhered to, unless any party is restricted for a reason beyond its control, which is a case at hand. The Petitioners clearly failed to avail statutory remedies under the law while the impugned determination was being made and even thereafter, nonetheless there is no cavil that the petitioners owe FCA component to K-Electric and liable to satisfy this debt. These instant Petitions being devoid of merit are accordingly dismissed.

Judge

Judge

Karachi,
Dated: 23.08.2021
Barkat Ali, PA