

ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

**C. P. No. D-2649 of 2020**

DATE	ORDER WITH SIGNATURE OF JUDGE(S).
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Priority

1. For hearing of CMA No.11937/2020 (Stay).
2. For hearing of main case.

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**Dated 31.10.2024**

Mr. Ravi Pinjani, Advocate, for the petitioner in  
C. P. No. D-2649/2020 and for respondent No.7 in  
C. P. No. D-2644/2020.  
Mr. Altamash Arab, Advocate for the petitioners in  
C. P. No. D-2644/2020.  
Mr. Mohamed Vawda, Advocate for respondent/NIPD&MC.  
Mr. Waseem Akhtar, Advocate for NEPRA.  
Mr. Hassaan Qamar, Advocate for respondent/K-Electric.  
Ms. Wajiha Mahdi, D.A.G.

JAWAD AKBAR SARWANA, J.: At the outset, Counsel for the Petitioners in C.P. No.D-2649/2020 and D-2644/2020 each submitted that the two writ petitions are in respect of different subject matters and may be de-tagged. Respondent Counsels have no objection. We have perused the two dockets, and the petitions are hereby de-tagged. The hearing of C.P. No.2644/2020 is adjourned as recorded therein. We will now proceed with the hearing and disposal of C.P. No.D-2649/2020.

2. The Counsel for Petitioner, Power Station (Private) Ltd. ("PSPL") submitted that during the Coronavirus (COVID-19) pandemic,<sup>1</sup> on 21.05.2020, PSPL, filed C.P. No.D-2649/2020 in the High Court of Sindh against NEPRA/Respondent No.1<sup>2</sup> and others, including inter alia, NIPD-MC/Respondent No.3,<sup>3</sup> and KEL/Respondent No.5.<sup>4</sup> By way of background in 2014/2015, PSPL had emerged as the successful bidder of a tender for installing and commissioning a captive-plant over power plant of about 48MW at KCIP<sup>5</sup> (notified as a

<sup>1</sup> Pursuant to the High Court of Sindh Notification dated 15.04.2020, for the purpose of Section 4 of the Limitation Act, 1908, the period of limitation stipulated in the "Act" and its "Schedules" or any other law at the material time in force, the High Court was deemed to be closed from 22.03.2020 till 30.04.2020

<sup>2</sup> National Electric Power Regulatory Authority ("NEPRA")

<sup>3</sup> National Industrial Parks Development and Management Company ("NIPD-MC") is/was required to develop, establish and operate KCIP in accordance with the Special Economic Zone Act, 2012.

<sup>4</sup> K-Electric Limited

<sup>5</sup> Korangi Creek Industrial Park, Karachi ("KCIP")

SEZ<sup>6</sup>). NIPD-MC (the Developer at KCIP) and PSPL executed a Concession Agreement to generate electricity for the SEZ enterprises within KCIP in the first instance, and any spill-over to be sold to a bulk purchaser outside KCIP. In this connection, PSPL submitted an Application for Generation License dated 20.06.2018 filed under Section 14-B of the NEPRA Act, 1997,<sup>7</sup> to NEPRA, which Application was rejected by the Authority vide its determination dated 15.04.2020 (received by PSPL via courier on 22.04.2020).<sup>8</sup> PSPL Counsel argued that the impugned determination was (i) “devoid of application of mind [by the Authority]”, (ii) contrary to Regulation 5 of the NEPRA Licensing Regulations, 1999<sup>9</sup> and Rule 3(5) of the NEPRA Generation Rules, 2000,<sup>10</sup> and (iii) that PSPL had no choice but to invoke the writ jurisdiction of this Court, as the Appellate Tribunal to be notified under Section 12-G of the NEPRA Act, 1997, was yet to be notified/was not functional on the date of filing of the said petition.<sup>11</sup>

3. The learned Counsel for NEPRA vehemently opposed Petitioner’s submission and submitted that (i) PSPL, before filing this Writ Petition, did not avail the review motion against the impugned determination available to it under Section 7(2)(g) of the NEPRA Act, 1997 read with the NEPRA (Review) Regulations, 2009,<sup>12</sup> and (ii) in the alternative, the Government of Pakistan, Law and Justice Division, vide Notification dated 19.05.2020, had already established an Appellate Tribunal under the NEPRA Act, 1997<sup>13</sup>, hence as an alternative and efficacious remedy was already available to the petitioner in the form of a statutory appeal before the Appellate Tribunal under Section 12-G of the NEPRA Act, 1997, the petition was not maintainable; (iii) the petition was time-barred too having been filed after the expiry of the 30 days period for filing an appeal against the decision of NEPRA; and (iv) the impugned determination provided valid and cogent ground and reasons leading up to the conclusion reached by the Authority. Hence, the petition is liable to be dismissed.

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<sup>6</sup> Special Economic Zone (“SEZ”)

<sup>7</sup> The Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the “NEPRA Act, 1997”)

<sup>8</sup> NEPRA’s Cover letter dated 15.04.2020 bearing acknowledgement receipt dated 22.04.2020 is available on page 19 of the Petition.

<sup>9</sup> NEPRA Licensing (Application and Modification Procedure), Regulations, 1999 (the “Licensing Regulations”)

<sup>10</sup> NEPRA (Generation) Rules, 2000 (the “Generation Rules”)

<sup>11</sup> Paragraph 12 on page 9 of the Petition.

<sup>12</sup> NEPRA’s Written Comments dated 22.03.2021, “Preliminary Objections”, “I” available on page 5 of the said Written Comments filed in CP No.D-2649/2020

<sup>13</sup> Notification dated 19.05.2020 available on page 989 of CP No.D-2649/2020

4. Ms Wajiha Mahdi, learned D.A.G., adopted the arguments of Mr Mohamed Vawda, Advocate, for NEPRA, whereas Mr Hassaan Qamar, holding brief for Mr Ayan Mustafa Memon, Advocate, on behalf of KEL, kept quiet and did not make any submissions.

5. Heard Counsels and perused the record in C.P. No.D-2649/2020. At the outset, we have read the impugned determination and found that the Authority has not given any reason for rejecting PSPL's application. Instead, after considering the comments of stakeholders, the Authority observed that since the award of the contract to PSPL and the Concessional Agreement are sub-judice before the High Court, it found it inappropriate to proceed further in the matter and, on the said terms, rejected PSPL's said application determining that the matter stands closed thereof. No application of the mind in reaching this decision is articulated in the impugned determination.

6. The record shows that about six months after PSPL filed its Application for Generation License with the Authority, on 22.12.2018, it filed Suit No.2396/2018 seeking a declaration, specific performance and permanent injunction against KEL to restrain KEL through NIPD-MC from supplying electricity until such time as the internal demand of KCIP is not more than 48MW of electricity. As a counter-blast, KEL filed Suit No.533/2019, challenging the constitution of the Concession Agreement and seeking an injunction against NIPD-MC, NEPRA, PSPL, etc., to prevent the determination of the Application. In the impugned determination, while the Authority referred to the litigation, it entirely avoided explaining how such legal proceedings led the Authority to reject PSPL's application.

7. It is now well-settled law that an Authority exercising statutory powers of adjudication affecting valuable rights of the parties acts as a quasi-judicial authority and, while exercising these powers, must pass a speaking decision duly supported by reasoning showing the due application of mind to the facts in hand as well as the law applicable. Any decision lacking these essential prerequisites is illegal, without lawful authority, and of no legal effect. The Superior Courts, in a number of judgments, have time and again disapproved of the passing of such perfunctory orders in the causes involving valuable rights of the parties and have also settled that to maintain the sanctity

of both quasi-judicial and administrative proceedings, an adjudicating Authority, such as NEPRA must pass a speaking order.

8. It is apparent that the Authority passed the impugned determination without assigning any reason and/or discussing how it arrived at its conclusion to reject the application and close the matter. There is not even an explanation of what “the matter stands closed” means for the applicant: Is the application rejected forever? Can the applicant re-apply? If so, at what point? If not, what are its consequences, etc.? Further, as per PSPL’s Counsel, no injunction was in the field restraining the Authority to the detriment of PSPL to wholly reject its Application for Generation License, which had to be considered on its own merits with reasoning resulting in any number of outcomes available to the Authority, some of which we have set out in the form of the question above. However, the determination by the Authority was entirely silent, with no reasons for rejection verbalised in the Order, with a mere reference to PSPL’s Suit No,2396/2020 only. Any determination regarding an individual’s rights sans articulating its reasons also violates the fundamental principle of due process and fairness and may well be considered unconstitutional and illegal. Even otherwise, a determination must demonstrate the application of the mind by the decision-maker and actively respond to the parties’ contentions, setting out its opinion on such contentions raised before it and not simply parrot them. This is exactly what is exhibited in paragraphs (i) to (ix) in the impugned determination, containing a repetition and regurgitation of the facts and events without any consideration or consequences or analysis of such facts and events on the determination. Numerous judgments by the Pakistani constitutional courts have emphasized the importance of stating reasons in a written order or decision. Section 24-A of the General Clauses Act of 1897 also calls for it. The impugned determination of the Authority by no stretch of the imagination can be considered a determination with reasons on the part of the Authority. In the circumstances, the impugned determination cannot be sustained and must be decided de-novo.

9. Before we dilate on the contours of a de-novo trial before the Authority, we must address another aspect of this matter, namely, the consequences of the Notification dated 19.04.2020 establishing the Appellate Tribunal and its non-functionality as on the date of filing of

the petition, including the implication of the 30-days period provided under the NEPRA Act, 1997, for filing an appeal.

10. We have carefully perused the record and have not found any rebuttal or denial on the part of the Respondents to PSPL's assertion that it did not receive the impugned determination of the Authority dated 15.04.2020 via TCS Courier until 22.04.2020. It is well understood the coronavirus (COVID-19) pandemic was in full swing at the time. Normal life had slowed down. Opening and closing of business hours were wholly unpredictable. Courier and delivery services were shaken and not operating as per routine. Given this background, PSPL alleged that the impugned determination was received by it through TCS courier on 22.04.2020. In support of its contention, PSPL produced NEPRA's cover letter of 15.04.2020 attaching the copy of the impugned determination endorsed with a rubber stamp indicating that the said letter was received by PSPL via courier on 22.04.2020. NEPRA did not deny it. There is nothing in its written comments to controvert PSPL's assertion. It could have filed the computer printout of the TCS Invoice indicating the dispatch date, but it did not exhibit it. It could have downloaded the TCS Delivery Report from the TCS website, disclosing the couriered package's delivery date as reported by TCS's staff member delivering the package, including the name of the person at PSPL who received the package. But, once again, it did not do so. Instead, NEPRA accepted PSPL's assertion, accepting that PSPL got knowledge of the impugned determination on 22.04.2020. We are inclined to accept the facts submitted by the petitioner at the prima facie level. It is not our domain to conduct a factual inquiry in writ jurisdiction and we are constrained from doing so. As such, we find that the CP No.D-2649/2020, filed on 21.05.2020, is within the 30-day time limit for filing an appeal before the Appellate Tribunal.

11. We now come to the matter of the Appellate Tribunal and PSPL's submission that as the Appellate Tribunal was neither notified nor functional, there was no efficacious alternative remedy available to it against the impugned determination but to file this petition. We have sight of a Notification dated 19.05.2024 informing that "the Federal Government is pleased to establish an Appellate Tribunal for exercising jurisdiction under NEPRA Act at Islamabad having

territorial. . .whole of Pakistan with immediate effect.”<sup>14</sup> While NEPRA filed its Parawise Comments on 22.03.2021, it has not cross-referenced this Notification in its comments. Instead, on 12.10.2002, NEPRA filed a further Statement informing this Court that NEPRA’s Appellate Tribunal became fully functional and operational as of 31.05.2022. Additionally, PSPL’s Counsel relied on two Judgments of the Supreme Court heard on 11.08.2000<sup>15</sup> and 01.09.2020<sup>16</sup>, wherein the apex Court observed that while, on the one hand, the NEPRA Appellate Tribunal had been constituted, but, on the other hand, its members had not been appointed and the Tribunal was not functional. In these circumstances, it would be highly prejudicial to the petitioner to return this petition for filing an appeal before the NEPRA Appellate Tribunal, especially when, as discussed above, we believe that the impugned determination is not a reasoned order.

12. Given the above, we deem it appropriate to dispose of this petition directing the Authority to decide PSPL’s Application for Generation License dated 20.06.2018 de novo. The Authority must give the petitioner a full opportunity of hearing as a de novo proceeding independent of the hearing given earlier and provide reason(s) for its determination. Such hearing is to be concluded by the Authority within 90 days from the date of this judgment without being influenced or prejudiced by any observations made by us herein.

13. Petition, CP No.D-2649/2020 and its pending application(s) are disposed of in the above terms.

JUDGE

CHIEF JUSTICE

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<sup>14</sup> Notification attached to the Counter-Affidavit of NIPD-MC filed on 22.06.2020

<sup>15</sup> *Naimatullah Khan Advocate and Others v. Federation of Pakistan and Others*, 2020 SCMR 1488.

<sup>16</sup> *Excessive and Unannounced Load Shedding in Sindh: In the matter of*, Human Rights Case No.20883/2018, 2020 SCMR 1702