



National Electric Power Regulatory Authority
Islamic Republic of Pakistan

Registrar

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No. NEPRA/R/D(CAD)/TCD.06/14 332-33

September 29, 2015

Mr. Munir Ahmed Daha
GM (Administration)
JDW Sugar Mills Limited
17-Abid Majeed Road,
Lahore Cantt.

Subject: DECISION OF THE AUTHORITY REGARDING MOTION FOR LEAVE FOR REVIEW FILED BY JDW SUGAR MILLS (JDWSML) AGAINST NEPRA'S DECISION DATED 23RD DECEMBER 2014 IN THE MATTER OF COMPLAINT FILED BY M/S JDWSML AGAINST MEPCO REGARDING RENEWAL OF POWER PURCHASE AGREEMENT (PPA) AND DETERMINATION OF TARIFF BETWEEN MEPCO AND JDWSML
Complaint # MEPCO-56/2014

Reference is made to Review Motion filed by JDW Sugar Mills Limited (JDWSML) dated 9th March 2015 against the decision of NEPRA dated 23rd December 2014 in the matter of complaint of JDWSML against MEPCO regarding renewal of PPA and determination of tariff.

2. Please find enclosed herewith the decision of the NEPRA regarding the subject matter for information and necessary action, please.

Encl:/As above

Copy to:

Chief Executive Officer
Multan Electric Power Company Limited
MEPCO Complex, WAPDA Colony,
Khanewal Road, Multan

29/9/15
(Syed Safeer Hussain)
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**BEFORE THE
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
(NEPRA)**

Complaint No. MEPCO-56-2014

JDW Sugar Mills Limited (JDWSML), Rahim Yar Khan Petitioner
17 - Abid Majeed Road,
Lahore Cantonment.

Versus

Multan Electric Power Company (MEPCO), Respondent
MEPCO Complex, WAPDA Colony,
Khanewal Road, Multan.

Date of Hearing: 5th May 2015

Date of Decision: 11th August 2015

Present:

- | | | |
|----|------------------------------|------------------------------|
| 1) | Brig. (Retd.) Tariq Saddozai | Chairman |
| 2) | Maj. (Retd.) Haroon Rashid | VC/Member (Consumer Affairs) |
| 3) | Khawaja Muhammad Naeem | Member (Tariff) |
| 4) | Mr. Himayat Ullah Khan | Member (Licensing) |
| 5) | Syed Masood-ul-Hassan Naqvi | Member (M&E) |

On behalf of:

- Petitioner:**
- 1) Mr. Maqsood Malhi, Sr. Manager
 - 2) Mr. Shehzad A. Elahi, Legal Advisor
 - 3) Abdul Mohaimin Zafar, Legal Advisor

Respondent: Mr. M. Arshad Dharala, Addl. Manager (M,T&CM)

Subject: DECISION OF THE AUTHORITY REGARDING MOTION FOR LEAVE FOR REVIEW FILED BY M/S JDW SUGAR MILLS LIMITED (JDWSML) AGAINST THE DECISION OF NEPRA IN THE MATTER OF COMPLAINT FILED BY M/S JDWSML AGAINST MEPCO REGARDING RENEWAL OF POWER PURCHASE AGREEMENT AND DETERMINATION OF TARIFF

DECISION

This decision shall dispose of the review motion dated 9th March 2015 filed by M/s JDW Sugar Mills Limited, Rahim Yar Khan (hereinafter referred to as the "Petitioner" or "JDWSML") against the decision of NEPRA dated 23rd December 2014 in the matter of complaint of M/s JDWSML against Multan Electric Power Company (hereinafter referred to as the "Respondent" or "MEPCO") filed under Section 39 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997.



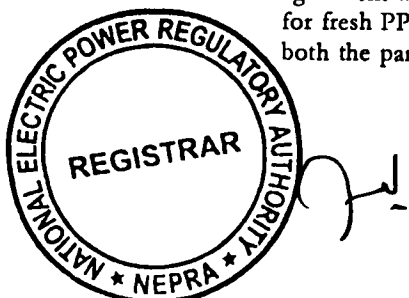
2. Brief facts of the case are that NEPRA received a complaint dated 28th January 2014 from JDWSML against MEPCO regarding renewal of power purchase agreement and determination of tariff. JDWSML in its complaint stated that MEPCO entered into a Power Purchase Agreement (PPA) with JDWSML on 21st November 2008 for purchase of bagasse-based power for a period of four (04) years. On 27th January 2012, NEPRA directed all DISCOs to file Power Acquisition Requests (PAR) in respect of energy to be purchased from all Captive Power Plants (CPPs). NEPRA also directed all CPPs which were selling/intending to sell electric power to DISCOs, to either approach NEPRA directly or through respective DISCOs for determination of tariff. Accordingly, MEPCO filed a PAR for purchase of 10 MW bagasse-based electric power from JDWSML on 12th June 2012, and after fulfillment of procedure provided in NEPRA Interim Power Procurement (Procedure & Standards) Regulations 2005, NEPRA approved MEPCO's PAR on 24th December 2012 and same was notified on 31st January 2013. On 28th February 2013, MEPCO and JDWSML entered into a second PPA wherein it was agreed that MEPCO would purchase electric power from JDWSML for a further period ending on 20th November 2013. Before its expiry, MEPCO and JDWSML decided to renew the agreement for a further period of five (05) years. On 20th May 2013, MEPCO requested NEPRA for renewal of PPA with JDWSML, and NEPRA granted permission for the same vide letter dated 31st July 2013. On 25th October 2013, MEPCO provided the copy of draft PPA to JDWSML in which MEPCO had calculated the tariff without using the OGRA reference price. JDWSML vide letter dated 26th October 2013 brought to MEPCO's notice that the tariff had been calculated in contravention of the formula stipulated by NEPRA in the Order. On 19th November 2013, JDWSML informed MEPCO that its reservations i.r.o draft PPA would be sent to NEPRA for consideration. Further, JDWSML requested MEPCO to purchase electric power from it on an interim basis on the rate as per the PPA dated 28th February 2013 (i.e. Rs. 8.515/kWh) until clarification from NEPRA was received. The Complainant further informed that at a meeting between MEPCO and JDWSML on 18th November 2013, it was agreed to go ahead with the provisional arrangement proposed by JDWSML and MEPCO has also apprised NEPRA in this regard vide petition dated 22nd January 2014. MEPCO is not accepting calculation of the tariff based upon the formula stipulated by NEPRA. NEPRA's determination on the tariff is binding on both CPPs and DISCOs and any deviation by MEPCO from NEPRA's determination would be a contravention of the NEPRA Act, Distribution license granted by NEPRA to MEPCO and NEPRA Licensing (Distribution) Rules, 1999. The Complainant prayed that MEPCO may be instructed to comply with the Order and follow the formula for calculation of tariff stipulated by NEPRA.

3. The matter was taken up with MEPCO for submission of parawise comments. In response, MEPCO vide its letter dated 25th February 2014 reported that the adjustment of fuel cost component has been linked with gas price of Rs. 460/MMBTU; as such, the rate comes to Rs. 8.515/kWh delivered. After negotiation and mutual agreement on the additional terms and conditions, PPA was signed for purchase of 07 MW bagasse-based power on the tariff thereby, incorporating the fuel cost component adjustment mechanism as determined by NEPRA vide order dated 24th December 2012. The power producer (i.e. JDWSML) has agreed not to claim arrears for the energy dispersed for period prior to the date of official gazette notification by Ministry of Water and Power. Accordingly, the claim of JDWSML is not acceptable as the power producer has agreed and signed the PPA. Further, MEPCO requested NEPRA to review the tariff for bagasse-based CPPs in light of afore-stated facts and de-link the indexation tariff of bagasse-based CPPs from gas and link it with coal by taking into account the heat value as in the case of upfront tariff for new bagasse-based co-generation or consider any other formula for indexation.

4. The report of MEPCO was sent to JDWSML for information/comments. In response, JDWSML vide letter dated 24th March 2014 raised observations on the report of MEPCO and reiterated its earlier version. In addition, JDWSML informed that the draft of second PPA was not provided to them in advance and the same was made to be signed in undue haste, however, upon realization that the second PPA was in violation of NEPRA's decision, they communicated their reservations to MEPCO. This stance of JDWSML was not part of their initial complaint. To further explore the matter, a hearing was held on 6th May 2014 at NEPRA Head Office, Islamabad which was attended by both the parties who advanced their respective arguments. Subsequent to the hearing, both parties were directed to file their written arguments and any additional facts in support of their case before NEPRA. In response, JDWSML and MEPCO filed their written arguments/documents vide letters dated 20th May 2014 and 23rd May 2014 respectively. Since the information provided by both the parties was not sufficient enough, therefore, another hearing was held on 1st October 2014 at NEPRA Head Office, Islamabad which was attended by both the parties.

5. The case was examined in detail in light of the documents provided by both the parties, arguments advanced during the hearings and applicable law. The case was decided by the Authority vide decision dated 23rd December 2014 (conveyed to MEPCO for compliance vide letter dated 13th February 2015). The decision is reproduced as under:

- i. Upon request of MEPCO, the Power Purchase Agreement (PPA) was approved by NEPRA on 24th December 2012 and the same was notified on 31st January 2013. However, the parties entered into fresh agreement with reduced rates as compared to the rates approved by NEPRA. Since both the parties agreed for fresh PPA with reduced rates, therefore, considering the fact that it was beneficial for the consumers, both the parties may observe the terms and conditions as per rates agreed between them; therefore, the

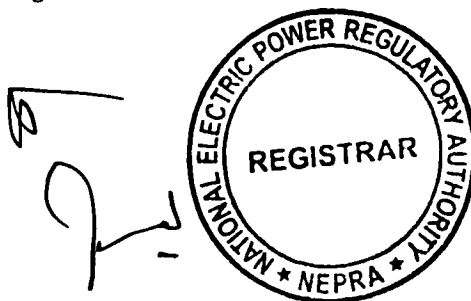


claim of JDW Sugar Mills Limited with respect to arrears prior to 21st November 2013 has no legal justification. MEPCO, however, is required to seek ex-post facto approval of PPA with reduced rates.

- ii. Subsequent to expiry of second PPA (dated 28th February 2013) on 20th November 2013, third agreement could not be signed due to dispute over reference gas price, therefore, both parties decided to sale/purchase power on interim arrangements subject to decision on purchase price by NEPRA. In this regard, MEPCO is directed to file a request with NEPRA in terms of NEPRA Interim Power Procurement (Procedures & Standards) Regulations, 2005 for approval of PPA for the period from 21st November 2013 onward.

6. Being aggrieved with the impugned decision, JDWSML filed Review Motion dated 9th March 2015. Main contents of the Review Motion are as under:

- i. It is trite law that when a power to adjudicate has been vested in a statutory authority, it is performing quasi-judicial functions which cannot be delegated. At best, the Authority could have delegated to Director (CAD) the power to investigate and conduct the hearings for the purposes of presenting facts and its recommendations to the Authority, but the Applicant (JDWSML) should have been given an opportunity to confront the evidence and recommendations against it and present its case directly to the Authority as well. Since this opportunity was not given, JDWSML has been condemned unheard, which is contrary to principles of natural justice.
- ii. The process that led to the passing of the decision dated 23rd December 2014 (Impugned Decision) is flawed and contrary to law. Director (CAD) conducted and heard the parties at the hearings, however, it is the Authority that gave the Impugned Decision without even directly hearing the parties. This is in contravention to the right of a fair hearing as envisaged by Article 10-A of the Constitution as well as principles of natural justice.
- iii. The Authority, which was not present at the hearings, has merely relied upon the report of Director (CAD) (who did not have any authority to reach a decision on the matter) without granting a chance to JDWSML to present its case directly to the Authority.
- iv. The way the complaint was conducted by the Authority and its officers is not in accordance with law. Section 7(3) of the NEPRA Act provides that the Authority shall determine tariff rates and Section 12 of the NEPRA Act further prohibits the Authority from delegating the power to determine tariff to even its own members and representatives. In light of this, the Authority's rejection of the complaint and ratification of MEPCO's unilateral and unlawful self-determination of tariff in the Second PPA is entirely against the letter and spirit of the NEPRA Act. In effect, in condoning MEPCO's unilateral determination of tariff and modification of PPA in this manner, the Authority has abdicated its responsibility and made its own functions redundant. The Authority cannot allow MEPCO and/or any other DISCO to unilaterally modify tariffs determined by the Authority in this manner and if DISCOs are allowed to unilaterally modify tariffs and the terms of PPAs, the whole purpose of regulation of power sector through NEPRA Act and its provisions would be frustrated.
- v. The sole power to determine tariff is that of the Authority. If the Authority has already determined and notified the tariff pertaining to any particular electricity producer and DISCO, and such DISCO does not comply with the Authority's decision, then electricity producers like JDWSML have no option but to approach the Authority against such non-compliance by the DISCO and seek proper implementation of notified tariff.
- vi. Pursuant to Regulation 4 of NEPRA Interim Power Procurement (Procedures & Standards) Regulations, 2005 (the Regulations 2005), power acquisition programmes must be approved by the Authority and the form of power acquisition agreements must also be approved under Regulation 5 of the Regulations 2005. The purpose of this whole exercise is defeated if DISCOs are allowed to unilaterally modify the tariff or the PPAs in the manner that MEPCO has done (in contravention of earlier Order of the Authority dated 24th December 2012 regarding approval of MEPCO's PAR). In light of this, the Impugned Decision is mistaken and erroneous as it has been made in contravention of the Regulations 2005 as well as the NEPRA Act.
- vii. Under Section 7(6) of the NEPRA Act, the Authority shall protect the interests of consumers and companies providing electric power services. If DISCOs are allowed to unilaterally dictate tariff and the terms of PPAs in the manner that MEPCO has done, this shall have a highly adverse effect on power production and will, in the long run, harm the interests of end-consumers as well. Consequently, the Authority has committed a material error in finding that MEPCO's unilateral and illegal tariff determination and PPA modification is beneficial to the consumers.

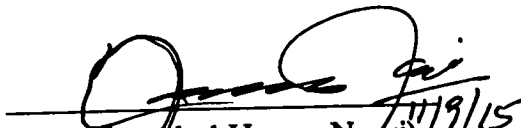


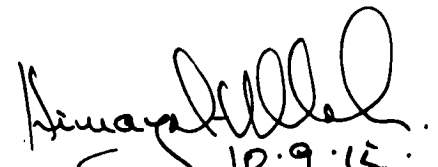
- viii. In the present case, JDWSML has no option but to sell electricity to MEPCO, and therefore, the unilateral, unfettered and illegal act of tariff determination by MEPCO, which has been incorrectly ratified by the Authority vide the Impugned Decision, is clearly an exploitation of JDWSML's rights. One of the reasons that tariff determination is the exclusive responsibility of the Authority under NEPRA Act is so that exploitation of weaker party is avoided. In fact, the Authority has a duty to ensure that tariff is determined by it in a manner that eliminates exploitation under Section 31(2)(f) of NEPRA Act. Not only has the Authority rendered its own functions redundant by ratifying MEPCO's unlawful actions, but has also ratified such exploitative tariff determination in contravention to NEPRA Act.
- ix. Section 31(3)(b) of NEPRA Act provides that interested parties should be given an opportunity to meaningfully participate in the tariff approval process. If DISCOs are allowed to unilaterally modify approved tariff rates in the manner that MEPCO has done in the present case, power producers lose the right to have any meaningful participation in the tariff determination process.
- x. Under Section 24 of the Contract Act, 1872, an agreement is void if its objects are unlawful. Section 23 of the Contract Act, 1872 specifies that the objects of a contract are unlawful if they are forbidden by law or are of such a nature that, if permitted, would defeat the provisions of law. If MEPCO and/or any DISCO and/or any generation company is allowed to re-negotiate the tariff and provisions of the power acquisition agreement after the Authority's approval of the terms of the same, the provisions of NEPRA Act and the Regulations 2005 would be defeated.
- xi. JDWSML signed the Second PPA with the legitimate belief that it would be in the form approved in the Order by the Authority, therefore, JDWSML entered the Second PPA under a mistake of fact and the Second PPA is void ab initio. In light of this, the Impugned Decision is clearly unlawful and erroneous.
- xii. Deprivation of the arrears to JDWSML by MEPCO and its subsequent approval by the Authority in the Impugned Decision is a deprivation of JDWSML's property which was lawfully due to it in light of the Order and is contrary to the fundamental rights of JDWSML as granted by the Constitution.
- xiii. Due to non-implementation of the Order by MEPCO, JDWSML has suffered heavy financial losses starting from the crushing season 2011-12 to date. In these circumstances and due to the Impugned Decision, JDWSML has to bear incremental losses to the tune of Rs. 86,703,094/- from 2011-12 to 2013-14.
- xiv. All other DISCOs, while entering into PPAs with sugar mills for bagasse-based power, including JDWSML, remain fully compliant with the orders of the Authority and calculate rates only on the basis of the tariff determined by the Authority. Therefore, any variation in gas price is factored in tariff calculation by such DISCOs and payments to electricity producers are made in accordance with the notified tariff. However, MEPCO's actions are in complete violation of the Order and MEPCO should be directed to comply with the Order in the same manner as other DISCOs are complying with the Authority's directions.
- xv. The manner in which MEPCO has been allowed to unilaterally dictate the terms of its PPA with JDWSML, without affording JDWSML any substantial right to negotiate or be heard in respect of the same, is highly discriminatory and prejudicial to JDWSML and therefore, the Impugned Decision should be declared void and of no effect.
- xvi. The actions of MEPCO and the Authority's approval of the same vide the Impugned Decision, which are illegally interfering with JDWSML's right to lawfully conduct its business, are infringing the fundamental rights of JDWSML as granted by the Constitution.
- xvii. The Authority has not determined the issue regarding the arrangement during the 2011-12 crushing season, where MEPCO refused to allow further indexation of tariff on account of increased gas price and froze the tariff at the same rate as that applicable to the 2010-11 crushing season, notwithstanding the fact that the First PPA, which expressly allowed for indexation on account of increase in gas price, was still in force.
- xviii. The reasoning given by the Authority in upholding the terms of the Second PPA was that the parties had mutually agreed to its terms (which is denied as JDWSML entered into the Second PPA with the legitimate expectation that it would have the same terms as those already approved by the Authority vide the Order). Based on this reasoning, it is unfathomable how the Authority has not directed MEPCO to pay JDWSML the arrears due during 2011-12 season when the First PPA, which had actually been entered into by the parties with mutual consent (unlike the Second PPA), expressly allowed indexation of tariff on account of increase in gas price.



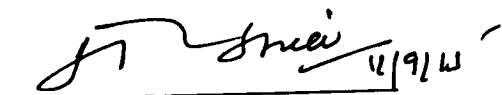
- xix. The Impugned Decision is not a speaking order as no cogent reasons have been given by the Authority for sustaining the illegal actions of MEPCO and the Impugned Decision is in violation of Section 24-A of the General Clauses Act, 1897.
- xx. The Authority was required to judge the legality of the actions of MEPCO and whether public benefitted from the illegal actions of MEPCO should not have been a criteria. Even otherwise, since MEPCO was not permitted to increase its consumer tariff on account of price payable by DISCOs/MEPCO, any savings would only benefit MEPCO and not be passed onto the consumers. Therefore, the argument/reasoning in the impugned decision that end-consumers would benefit from MEPCO's illegal actions is flawed and factually incorrect.
- xxi. Under Section 7(2)(g) of NEPRA Act, the Authority has the statutory power to review its orders, decisions and determinations. No fetters, constraints, conditions or limitations have been imposed in the NEPRA Act on exercise of such power of review. Therefore, in accordance with established principles of statutory interpretation, such power of reconsideration and review should be exercised by the Authority in the present case in a reasonable manner and in order to advance the purpose and intent of the law.
- xxii. JDWSML requested the Authority to (i) review the Impugned Decision and give effect to JDWSML's rights in accordance with NEPRA Act and the Regulations 2005, (ii) direct MEPCO to adhere to the PPA and tariff approved by the Authority vide the Order, and (iii) direct MEPCO to release the pending and prospective claims of arrears to JDWSML immediately.


7. The review motion filed by JDWSML was considered by the Authority and the same was admitted for hearing. Accordingly, hearing in the matter of review motion filed by JDWSML was held on 5th May 2015 at NEPRA Head Office, Islamabad wherein both parties participated and advanced their arguments before the Authority. In terms of Regulation 3(2) of NEPRA (Review Procedure) Regulations, 2009, a motion seeking review of any order of the Authority is competent only upon discovery of new and important matter of evidence or on account of some mistake or error apparent on the face of record. Perusal of the decision sought to be reviewed clearly indicates that all material facts and representations made were examined in detail and there is neither any occasion to amend the impugned decision nor any error inviting indulgence as admissible in law has been pleaded out. Therefore, the Authority is convinced that the review would not result in the withdrawal or modification of the impugned decision. Hence, the motion for review is declined and the decision dated 23rd December 2014 is maintained.


 (Syed Masood-ul-Hassan Naqvi)
 Member


 10.9.15
 (Himayat Ullah Khan)
 Member

ON TOUR - ABROAD.
 (Khawaja Muhammad Naeem)
 Member


 (Maj. (Retd.) Haroon Rashid)
 VC/Member


 (Brig. (Retd.) Tariq Saddozai)
 Chairman
 21/9/15
 29-9-15

