



Government of Pakistan
Ministry of Law and Justice
(Appellate Tribunal (NEPRA))

*Fw w/agency
LAC (KIP)
- AD (Legal) / 20/x/22
- SP4 E
- AD (CT) cc- Chairman
- LA (KIP) - m (LUT)
- MF - m (M&C)*

Federal Tribunal Complex,
3rd Floor, Roze Plaza, Sector G-10 Markaz

Appeal No. 11/NT/2022/188

Islamabad, the 19th October, 2022.

The Registrar,
National Electric Power and Regulatory Authority,
ISLAMABAD.

Subject: JUDGEMENT IN APPEAL NO. 11/NT/2022 TITLED AS K-ELECTRIC V/S
NEPRA ISLAMABAD.

I am directed to forward herewith a Judgement in Appeal No. 11/NT/2022,
titled as K-Electric v/s NEPRA dated 19th October, 2022 for information and further
necessary action.

Yours faithfully,

(HAMID ULLAH)
REGISTRAR

Encl: As above

REGISTRAR OFFICE
Diary No: 1996
Date: 20.10.2022

Before the NEPRA Appellate Tribunal, Islamabad
Appeal No. 11 / NT / 2022

K-Electric Limited

KE House, 39-B, Sunset Boulevard,
Phase-II, Defense Housing Authority,
Karachi.

.....Appellant

VS

National Electric Power Regulatory Authority (NEPRA),
Through Registrar NEPRA,
NEPRA Tower,
Sector G-5/1, Attaturk Avenue,
Islamabad.

.....Respondent

Date of Institution: 10.06.2022

Date of Decision: 05.10.2022

Present: Barrister Asghar Khan and Mr. Ali Roshan Gillani, Counsel for
Appellant.

M/s Moqem-ul-Hassan, Law Officer, Sajid Akram, Additional
Director General (Tariff) alongwith Muhammad Imran, Deputy
Director (Tariff) for NEPRA / Respondent



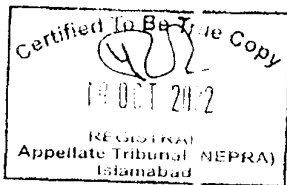
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JUDGEMENT

Member (Electricity). K-Electric Limited [Appellant] (KEL) the public utility company engage in the licensed business of generation transmission and distribution of electricity in Karachi and its adjoining areas, has approached this Appellate Tribunal in accordance with the provisions of 12G of the Regulation of Generation, Transmission & Distribution of Electric Power Act 1997, as amended in year 2018 (the "Power Act") to assail, challenge impugned orders dated May 12, 2022 (in review) passed by NEPRA. The issue flagged by the Appellant before this Tribunal is that NEPRA allowed KEL at its request, to use, its de-licensed, Residual Fuel Oil (RFO) based Bin Qasim Power Station -1 (BQPS-1) on interim basis and amended the Generation License (GL) on September 15, 2021, in the License Proposed Modification (LPM) under section 26, of the Power Act. While allowing LPM in BQPS-1, NEPRA allowed KEL, the Fuel Cost Component (FCC) which was given in tariff of committed power plant of BQPS-III.

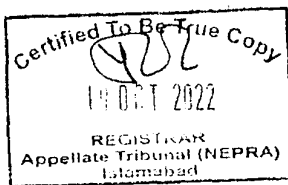
2. In brief, Appellant's case is as under;

- i) Multi Year Tariff (MYT) was awarded to KEL for seven (07) years from year 2016 to 2023 by NEPRA.
- ii) KEL pursued, Bin Qasim Power Station (BQPS)-III 942.32 MW, Residual Liquefied Natural Gas (RLNG) based Combined Cycle Power Plant (CCPP) got included in the generation fleet, through modification IX in the LPM on December 07, 2020 and got excluded its Unit 3&4 (2x210 MW) of BQPS-1, due to low availability, frequent forced outages, high cost of fuel and low efficiency.
- iii) The aggregate installed capacity of K-Electric generation fleet became 2817.114MW.
- iv) Due to delay in commissioning of BQPS-III (RLNG based) power plant and growing demand of electricity during summer season, on April 19, 2021, K-Electric approached NEPRA for instant License Proposed Modification (LPM) on interim basis (June to August 2021) for operating, Unit 3 of BQPS-I (RFO based) power plant. During the arguments in



the instant appeal, the counsel for Appellant informed (not controverted by Respondent) that Unit 3 of BQPS-I, was operated from June 1, 2021 till August 15, 2021.

- v) The LPM application dated April 19, 2021 of KEL for utilization of Unit 3 of BQPS I on April 19, 2021, was decided by NEPRA on September 15, 2021.
- vi) While deciding the LPM modification XI (for BQPS-I & BQPS-II), NEPRA awarded the FCC for Unit 3 of BQPS I, on the basis of FCC determined by NEPRA for its BQPS-III (to be commissioned), which was delayed and yet to achieve its Commercial Operation Date (CoD).
- vii) According to the timelines of BQPS-III Project, it was initially committed by KEL to bring online by July 2018.
- viii) It was also brought before this Tribunal that on account of increased loadshedding, noncompliance / violations stipulated in the license of KEL, including delay in Commissioning of BQPS III under section 27B & 28 of Power Act, NEPRA issued, Show Cause notice to KEL on July 23, 2020. Subsequent to hearing of the Show Cause, NEPRA, through its Order dated August 27, 2020, imposed fine of Rs. 200,000,000/- (Counsel for Appellant informed that Rs. 160 million already paid by KEL).



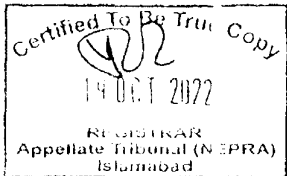
3. The Counsel for Appellant narrated the fact that KEL approached NEPRA in accordance with the Regulation-10(2) of the NEPRA Licensing (Application & Modification Procedure) Regulations, 1999 (the "Licensing Regulations") for LPM in its generation license dated April 19, 2021, wherein, it included request of approval of utilization of earlier de-licensed Bin Qasim Power Station-1 (BQPS-1) Unit 3, (RFO based power plant) 210 MW to run on interim basis, in summer months, initially requested for May to July 2021.

4. It was also explained by the Appellant that the Unit 3 of BQPS-1, was de-licensed earlier and KEL was to add new BQPS-III in year 2018, but could not be completed according to committed timelines given by KEL.

The Respondent issued determination of LPM and Modification no. XI, in the Generation License of KEL dated September 15, 2021, wherein, NEPRA allowed utilization of Unit 3 of BQPS I, on interim basis, during summer months (June 01 to August 15, 2021).

5. The Appellant further added that the project timelines assumed by NEPRA in the Impugned Order for BQPS-III/Unit VI, which is RING based power plant, were on the basis of initial forecasts / estimates and the same were locked by NEPRA in determining the allowed project cost. As per the timelines assumed in MYT of KEL, the first unit of the project was due to come online, in July, 2018. The Appellant attributed the major delay of the project occurred, due to delay in issuance of notification of MYT (applicable for Year 2016 to 2023) for KEL and later due to COVID 19. While going through project timelines given by Appellant, time to time for BQPS III, it was clear that KEL committed initially with NEPRA to bring online BQPS III by July 2018, however, factually this power generation unit is not added to KEL's generation fleet, so far.

6. In view of the above noted facts, submissions made by the learned counsel for the parties and the Impugned Order, the fate of the instant appeal rests on following issue;



Whether the Appellant was entitled for FCC of RFO used in operation of Unit 3 of BQPS-I.

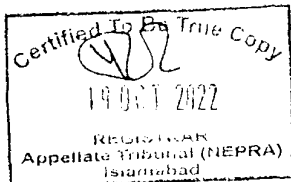
OR

The Authority was justified to grant FCC of the committed upcoming power plant of RFO based unit BQPS III?

7. Before dilating upon above issue, we deemed appropriate to examine, Section (D), para-viii of the Impugned Order, which is reproduced below;

"... the fuel cost of generation from Unit 3 of BQPS-1 is around Rs. 20.6/ kWh based on furnace oil rate of May 2021 i.e 75,710/MT. Further as per decision of the Authority dated October 09, 2017 regarding review motion of KEL on the Multi Year Tariff (MYT) determination, the

first phase of BQPS-III/Plant VI was required to be online by July 2019 and the second phase (combined cycle) was required to be achieved by December 2019. Accordingly, keeping in view these timelines, cost of BQPS-III/Plant VI was built in the MYT tariff of KEL; if the BQPS-III/Plant-VI had been completed timely, its fuel cost would have to be around Rs.9/kWh. However, KEL failed to achieve this milestone, compelling itself to operate inefficient and de-licensed unit (i.e Unit 3 of BQPS-I), resulting in additional cost of Rs. 11.6/kWh. Therefore, the inefficiencies of KEL cannot be passed on the consumers...”



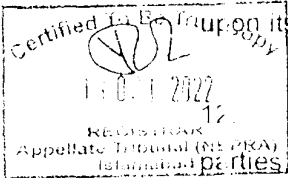
8. Both sides took distinct position on the above posed issue and argued in detail.

9. In view of the above referred para of Impugned Order, the Appellant explained the reason for delay in COD of the BQPS-III and running Unit 3 of BQPS-I on interim basis, mainly due to rise in demand of electricity in summer season and delay of its upcoming Unit which was due to many odds including, COVID 19 pandemic, Law & Order situation etc for which KEL made its best efforts to commission BQPS III, but not successful so far. However, this Tribunal noted that as per proposed LPM, KEL started operation of unit 3 of BQPS I from June 1, 2021 till August 15, 2021, whereas, NEPRA issued its Impugned Order for the instant LPM on September 15, 2021.

10. While being grievant not being allowed by NEPRA the relevant FCC of Unit 3 of BQPS-I (RFO based) in the Impugned Order, the Appellant argued that only allowing FCC of upcoming power plant BQPS III (RLNG based) instead of FCC of existing running power plant Unit3 of BQPS I, was against the normal practice of NEPRA. The Appellant contemplated towards the fact that consequently, financial burden for KEL was of PKR 1,441 million, which had incurred the cost to them, as it was not allowed by NEPRA in the Impugned Order.

11. Whereas, the Respondent side while refuting the points raised by the Appellant has maintained that for the grounds taken in the Impugned

Order, the Order under the attack being speaking one, well-reasoned, logical and legal, passed in the best interest of the consumers is unexceptional one. Moreover, NEPRA's view point is that had Appellant timely completed the BQPS III, the FCC would have to be around Rs. 9/kWh. The Respondent while further defending the Impugned Order, pointed out that KEL did not achieve COD of BQPS III and was short in power generation due to increase in electricity demand in summer season and it has to rely on its de-license RFO based Unit 3 of BQPS I, power plant.



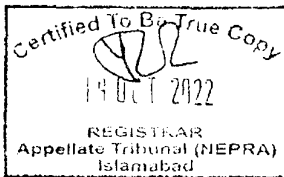
While attending to the above submissions of respective parties we noted that NEPRA admitted in the above referred para of the Impugned Order that the interim use of this Unit 3 of BQPS-1, shall cause additional cost of around Rs. 11.6 / kWh and the Respondent further pointed out that KEL was failed to timely achieve, necessary milestones for bringing BQPS III/plant-VI, on line, therefore, NEPRA authority, while passing the Impugned Order only allowed Rs. 9/kWh FCC, assessed for BQPS III(RLNG based power plant). It was reasoned by NEPRA that due to inefficiencies of KEL for not bringing cheaper power plant on time, it did not allow this additional cost of Rs. 11.6/kWh which it apprehended that this would be passed on to its consumers. But the version of NEPRA is not factually and legally correct as noted further in the concluding paras. The Appellant was allowed by NEPRA in the LPM for interim use of Unit 3 of BQPS-I(RFO based power plant) and was entitled to get FCC for the fuel consumed for operation of Unit 3 of BQPS I. NEPRA in the Impugned Order ignored this fact and instead was much impressed for Appellant failure for not bringing BQPS III(RLNG based power plant) as per commitment. If we take into consideration Section 31, of the Power Act(not being reproduced here for brevity sake), wherein, under sub section -(3) general guidelines were given, applicable to the Authority in the determination, modification, revision of rates, charges and terms of conditions for provision of electric power services. The Authority as per said guidelines is bound to allow the licensee, the recovery in cost incurred prudently. No doubt, Appellant was awarded MYT and its case was covered by proviso of section 31(3) (a)[though it is not a ground taken by NEPRA to deny Appellant's claim] yet the LPM for the interim period and fuel used to run the unit 3 of BQPS I, is not covered in the said proviso, so

in the peculiar facts and circumstances of the case, Appellant was entitled for recovery of prudent incurred FCC cost.

13. The above discussion is concluded as under;

i) Unlike Independent Power Plants (IPPs) NEPRA has awarded MYT to KEL being the vertically integrated organization, for Seven (07) years which includes various costs and investment plans for expansion in generation, transmission & Distribution.

ii) NEPRA is justified to opined that KEL has not made convincing efforts for timely achieving necessary milestones for bringing BQPS III on line, resultantly, NEPRA took the notice and imposed fine upon KEL, for its delay in completion of intended power plant. However, this ground is not sufficient to deprive Appellant from prudent cost, incurred.



iii) In the light of Section 31 of the Power Act, the arguments of Respondent side (explained in the above paras) defending the reason for not allowing KEL the actual FCC of BQPS-I, was not convincing (only on the premise for not bringing the committed RLNG power plant on time)) for the Tribunal. Rather, rationale for award of FCC given in the Impugned Order, is contrary to the guidelines for NEPRA under section-31, of the Power Act, while determining, modifying or revising of rates, charges etc. and also does not hold prudence.

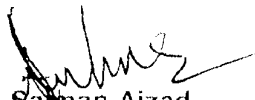
iv) Now it is well settled principle of administration of justice that all judicial, semi-judicial tribunals or adjudicating authorities are bound to decide the cases, falling within their domain, jurisdiction in accordance with law, rules and not on the basis of whims, wishes or liking or disliking or personal feelings, none of such institutions has any power discretion or the authority to by-pass the law. We find support from case *Khyber Medical University and others vs Aimal Khan and others, PLD 2022 Supreme Court 92*.

v) No doubt the Appellant has challenged the Review Order only and not the original one dated September 15, 2021.

However, it is settled law that while adjudicating a Lis, if a party is found entitled for a relief not prayed for, it can grant the same to meet the ends of justice. Safely reliance can be placed on *Mst. Akhtar Sultana vs Major Retd. Muzaffar Khan Malik through Legal heirs and others PLD 2021 Supreme Court 715*.

14. For the aforesaid reasons, this Appellant Tribunal allows the instant appeal, set aside the Impugned Order including original Order dated September 15, 2021 and remand the case to NEPRA for decision a fresh, after giving chance of audience to all stake holders in accordance with law, rules and regulations. Parties and their representatives will appear before the Registrar NEPRA, Islamabad on 25th October, 2022.

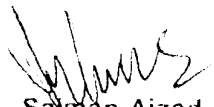
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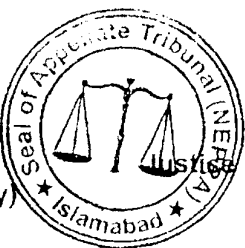

Salman Aizad
Member (Electricity)



Justice (R) Mujahid Mustaqeem Ahmed
Chairman

CERTIFICATE

Certified that this Judgement consists eight pages, each one read, corrected and signed by us.


Salman Aizad
Member (Electricity)




Justice (R) Mujahid Mustaqeem Ahmed
Chairman

