



Registrar

National Electric Power Regulatory Authority
Islamic Republic of Pakistan

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No. NEPRA/ADG(CAD)/TCD 02/ 15316-19

October 2, 2018

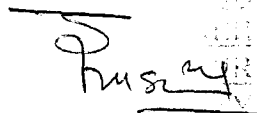
1. Chief Executive Officer
Islamabad Electric Supply Company (IESCO)
Head Office IESCO, Street No. 40, G-7/4,
Islamabad
2. Bestway Cement Limited
19-A, College Road,
F-7 Markaz, Islamabad.

Subject: **ORDER OF THE AUTHORITY REGARDING APPEAL FILED BY BESTWAY CEMENT LIMITED (BCL) UNDER SECTION 12-A OF THE NEPRA ACT, 1997 AGAINST THE ORDER OF THE MEMBER (CONSUMER AFFAIRS) DATED 8TH FEBRUARY 2018 IN THE MATTER OF COMPLAINT OF BCL AGAINST IESCO REGARDING SECURITY DEPOSIT AND CHANGE OF NAME IESCO-01/01/2017**

Reference is made to Appeal filed by Bestway Cement Limited (BCL) dated 6th March 2018 against the order of Member (Consumer Affairs) dated 8th February 2018 in the matter of complaint of BCL against IESCO regarding security deposit and change of name.

2. Please find enclosed herewith the Order of the Authority (06 Pages) regarding the subject matter for compliance within thirty (30) days.

Encl: As above


(Syed Safeer Hussain)
Registrar

Copy to:

- i. C.E./Customer Service Director
Islamabad Electric Supply Company (IESCO)
Head Office IESCO, Street No. 40, G-7/4,
Islamabad.
- ii. General Manager (Works)
Bestway Cement Limited,
22 KM KalarKahar-ChoaSaiden Shah Road,
Village Tatral, Tehsil ChoaSaiden Shah,
District Chakwal.



BEFORE THE
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
(NEPRA)

Complaint No. IESCO-01/01/2017

Bestway Cement Limited **Appellant**
19-A, College Road,
F-7 Markaz, Islamabad

Versus

Islamabad Electric Supply Company (IESCO) **Respondent**
Head Office IESCO, Street No. 40,
Sector G-7/4, Islamabad.

Date of Hearing: 31st May 2018

Authority:

- | | | |
|----|------------------------|----------------------------|
| 1) | Mr. Tariq Sadozai | Chairman |
| 2) | Mr. Rehmatullah | VC/Member (CA)/(Licensing) |
| 3) | Mr. Saif Ullah Chattha | Member (M&E) |
| 4) | Mr. Himayat Ullah Khan | Member (Tariff) |

On behalf of:

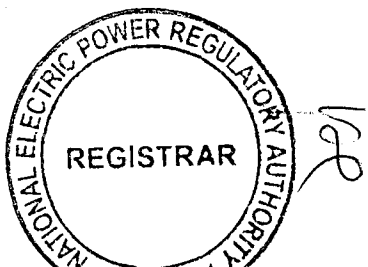
Appellant: 1) Mr. Zakauallah Baloch, Manager
2) Mr. Muhammad Umer K Verdag, Legal Counsel

Respondent: 1) Mr. M. Yaqoob Choudhary, CSD
2) Mr. Waheed Akram, Manager CS
3) Mr. Khawaja Fayyaz, DM
4) Mr. Imam Bakhsh, Addl. Dy. Manager
5) Mr. M. Asif Ali, Advocate

Subject: **ORDER OF THE AUTHORITY REGARDING APPEAL FILED BY BESTWAY CEMENT LIMITED (BCL) UNDER SECTION 12-A OF THE NEPRA ACT, 1997 AGAINST THE ORDER OF MEMBER (CONSUMER AFFAIRS) DATED 8TH FEBRUARY 2018 IN THE MATTER OF COMPLAINT OF BCL AGAINST IESCO REGARDING SECURITY DEPOSIT AND CHANGE OF NAME**

ORDER

This Order shall dispose of the Appeal filed by Bestway Cement Limited (hereinafter referred to as the "Appellant" or "BCL") dated 6th March 2018 against the order of Member



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(Consumer Affairs) dated 8th February 2018 in the matter of complaint of BCL against Islamabad Electric Supply Company Limited (hereinafter referred to as the "Respondent" or "IESCO").

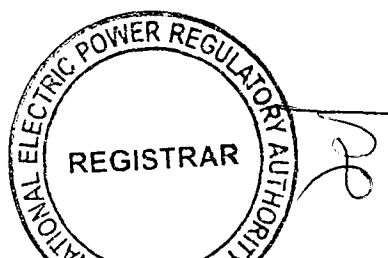
2. The brief facts of the case are that BCL purchased PAKCEM Limited (PCM) in the year 2015 and executed a Scheme of Arrangement for Amalgamation, under the provisions of Sections 284 to 287 of the Companies Ordinance, 1984 for an amalgamation between BCL and PCM. BCL approached Islamabad High Court for approval of the merger. The Honorable High Court sanctioned the scheme of amalgamation and merger of BCL Chakwal and PCM vide Order/Judgement of the Islamabad High Court dated 18th August 2016. Subsequently, BCL informed IESCO about the court-sanctioned amalgamation, vide letter dated 8th September 2016, and communicated that PCM was no longer an independent entity and "*all contracts, agreements, leases, conveyances and instruments of transfer, engagements, commitments and arrangements related to PCM executed by or subsisting in the name or in favour of PCM ... (stood) transferred to and vested in BCL*". In response, IESCO vide letter dated 26th September 2016 informed BCL to apply for proper change of name immediately to avoid complication/ inconvenience in future.

3. In response, BCL vide letter dated 26th October 2016 asserted that the amalgamation between BCL and PCM was sanctioned by the Islamabad High Court vide its order dated 18th August 2016, and that the amalgamation has the effect of BCL being a successor-in-interest of PCM rather than a transferee of ownership. As such, BCL was not making a request for a new electricity connection but rather seeking change in name/title of an existing connection as a successor-in-interest of the now inanimate company, PCM. Therefore, approval of change in name was sought from IESCO by BCL as a successor-in-interest.

4. IESCO again sought application from BCL for change of name on the prescribed application form, along with prerequisite documents and updation of security deposit. In response, BCL proceeded to file a complaint with NEPRA under Section 39 of the NEPRA Act, vide letter dated 22nd November 2016. BCL, in its complaint, submitted that IESCO had directed BCL to apply for a change of name under the relevant provisions of the Consumer Service Manual (CSM), which 'impliedly' refuses the recognition of BCL as a court-sanctioned amalgamated company. BCL requested that IESCO be directed to change the name of PCM to BCL without updation or revision of security deposit, on the basis of BCL being a successor-in-interest of PCM.

5. The matter initially remained sub-judice due to ongoing proceedings on the impugned matter in W.P. No. 4194/2016. However, the Honorable Islamabad High Court, vide order dated 13th February 2017, disposed of the matter and found the complaint filed under Section 39 to be the efficacious remedy available in the matter.

6. Proceedings were then commenced by NEPRA on the matter. A hearing was held on the 30th March 2017 at NEPRA's Head Office, where arguments from both the parties were heard. Further clarifications on the issue were sought vide letters dated 18th October 2017 and 11th December 2017, which were provided by BCL vide letter dated 22nd December 2017. The Member (Consumer Affairs) then proceeded to pass an order, dated 8th February 2018 (the "impugned order") whereby IESCO was directed to "approve

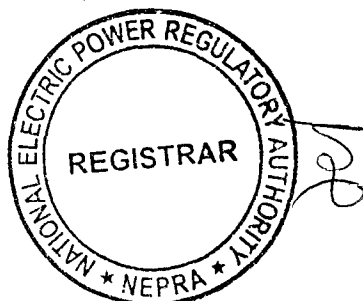


change of name of PAKCEM Limited to Bestway Cement Limited subject to updation of security deposit in accordance with the applicable provisions of the CSM.”

7. Being aggrieved with the decision, BCL filed an Appeal dated 6th March 2018 under Section 12-A of the NEPRA Act, 1997. The Appellant, in its Appeal, raised following arguments:

- i. The Order dated 8th February 2018 is patently illegal and against the facts of the case, excessive, perverse and void abinitio as having no legal or factual basis.
- ii. A merger and amalgamation under a scheme approved by the Honorable Islamabad high Court vide its order dated 18th August 2016 under Section 287 of the Companies Ordinance, 1984 is not a transfer of ownership, it is a merger where neither the old company finishes nor a new one is born; rather it is joining of two corporate bodies into one body which form is neither new nor old.
- iii. BCL had not applied under Consumer Service Manual (CSM) as this document, under the head 5.2 Security Deposit, deals with natural persons. These instructions are not applicable in case of BCL, as they are deficient in scope and content.
- iv. BCL relied upon the definition of Consumer given in Section 2(iv) of the NEPRA Act. BCL also relied upon the trite law that rules or instructions do not override the provisions of a statute and if there is some deficiency, then the provisions of the statutes shall prevail over the instructions or rules or regulations. Hence, there is a legal error floating on the surface of the impugned order and the analogy built by the learned Member (Consumer Affairs) is illegal and ineffective and therefore, the impugned order is required to be set aside.
- v. The law, rules, regulations, instructions do not anywhere mandate that if shareholding of a company changes, then it has to apply for change of name under Clause 5.2 of the CSM. It has always been the case of BCL that this instruction is inapplicable upon it as it deals with natural persons and companies have a perpetual existence, then why would a company need to apply for change of name if its shareholding changes?
- vi. The impugned order is against the order of the Approval Scheme of Amalgamation Order dated 18th August 2016 passed by the Honorable Single Judge of the Honorable Islamabad High Court.
- vii. The facts of the case and law applicable is exactly the same as earlier determined in the cases of Dewan Hattar Cement Limited vs PESCO decided vide orders dated 13th June 2007 and 14th September 2007.

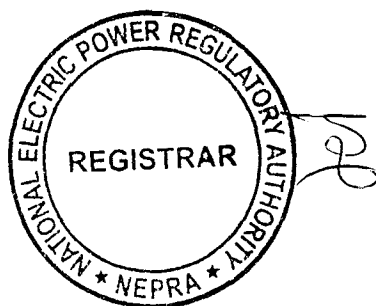
8. The Authority admitted the Appeal and hearing in the matter was held on 31st May 2018, wherein both the parties (i.e. IESCO and BCL) participated and presented their case. During the hearing, representatives of BCL reiterated their earlier version, while the representatives of IESCO, in addition to their earlier stance, informed the Authority that Demand Notice dated 7th August 2017 amounting to Rs. 142,400,000/- was issued to BCL by IESCO on account of change of name. In response, BCL, vide letter dated 25th August 2017, requested IESCO for acceptance of bank guarantee (amounting to Rs. 142,400,000/-) as security deposit for change of name.



9. The case has been examined in detail in light of the relevant documents, arguments advanced by the parties and the applicable law. On the main ground forwarded by the Appellant, namely that a court sanctioned merger cannot be interpreted as a change in ownership, the Authority is of the view that the merger between BCL and PCM is immaterial to the impugned matter, since it took place later in time. As identified in the impugned order, the obligation to submit an application for change of name arose when PCM's ownership had been acquired by BCL, by way of a share purchase dated 24th April 2015 (as admitted by BCL in para (i) of their letter dated 22nd December 2017). This change in ownership, and resulting obligations under Clause 5.2 of the CSM, occurred prior to the concerned court sanctioned merger that took place on 18th August 2016 by the order of the Honorable High Court. Therefore, the subsequent court-sanctioned merger, and any interpretation thereof, has no bearing on the obligation to apply for a change of name, an obligation which was accrued due to a preceding change in ownership by way of a share purchase by BCL. This ground is therefore extraneous to the impugned matter.

10. The second more intuitive ground raised by the Appellant is that the obligation to apply for a transfer of ownership under Clause 5.2 of the CSM is relevant only in the case of natural persons and BCL, being a body corporate and a legal person, is exempt from its applicability. BCL, however, is availing Clause 5.2 for as a 'consumer', which includes a successor-in-interest as per Section 2(iv) of the NEPRA Act. On this subject, it is pertinent to explore Clause 5.2 of the CSM read with Section 2(iv) of the NEPRA Act (reproduced below). The words used in Clause 5.2 include 'consumer' which highlights that the clause's applicability is limited to 'consumer' and any person that fall within its parameters. This is intuitive, since the subject matter of the CSM relates to administration of consumer-related activities (e.g. metering, billing, theft of power, connection, disconnection, reconnection etc.). 'Consumer' is a defined term under NEPRA's parent statute, and it is the second limb of the said definition that the Appellant has relied upon, i.e. successor-in-interest. The Appellant has argued that it does not fall within the first purported category of 'consumer' (i.e. a person) but directly falls within the second purported category (i.e. successor-in-interest). However, a bare reading of Section 2(iv) highlights that the definition does not contain two separate and unrelated 'consumer' categories as has been purported by the Appellant. The definition reads as 'a person or his successor-in-interest'. With the operative word being 'his', it is evident that the only two conceivable categories of 'consumer' can be either a 'person' or a 'person's successor-in-interest'. The definition does not read as 'a person or any successor-in-interest'. For the successor-in-interest aspect of the definition to apply, it is necessary that the successor has to be a successor-in-interest of a 'person' as defined under section 2(iv). As such, the Appellant's argument that he is a 'consumer' as per Section 2(iv) not as a 'person' but as a 'successor-in-interest' of an entity other than a 'person' is untenable, since the two categories are inextricably linked.

"Section 2(iv) 'consumer' means a person or his successor-in-interest who purchases or receives electric power for consumption and not for delivery or re-sale to others, including a person who owns or occupies a premises where electric power is supplied;



5.2 Security Deposit

(a) Security Deposit is non-transferrable except as follows –

i) Relocation of Premises

If the consumer moves to a new location within the Exclusive Service Territory of DISCO and requests for a new connection at that location

ii) Change of Name

If the consumer sells the premises where the connection is installed, it shall be obligatory upon the new owner to apply to DISCO for a change of name. Such an application shall be accompanied by written consent of the previous owner regarding transfer of Security Deposit in the name of new owner

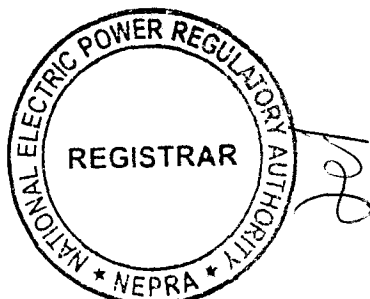
iii) Through Succession

Upon death of the consumer, the Security Deposit shall be transferred according to the Succession Certificate granted by the court of competent jurisdiction.


Provided that the Security Deposit shall be updated and transferred if no arrears are outstanding.

11. Notwithstanding the above, the phrase 'person' used in statutes explicitly includes a company or association or body of individuals (whether incorporated or not) as per Section 2(39) of the General Clauses Act, 1897. Therefore, the ground raised by the Appellant to assert 'successor-in-interest' lacks legal ground.

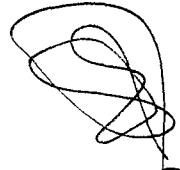
12. Lastly, the Appellant has cited previous orders of the Authority with facts similar to the instant matter and asserted that this appeal may be decided in accordance with precedent. The first order cited is Bestway Cement Private Limited vs PESCO passed on 23rd August 2016. The facts in the matter were that BCL had acquired another company, namely Mustehkam Cement Limited, by way of a court sanctioned merger. The order of the Member (Consumer Affairs) found the merger to be a successor-in-interest and thereby ordered the concerned distribution company to approve the change in name of the acquired company without updation of security deposit. However, the Appellant has failed to appreciate that this order was overturned in appeal, vide an order passed by the full Authority dated 15th March 2017, wherein BCL had previously (in 2005) acquired the concerned company, along with all associated rights and liabilities at the time of purchase, which was followed by a court sanctioned merger later in time (in 2013). Therefore, the 2013 merger was found to not be a successor-in-interest and the Authority directed the concerned distribution company to revise their security deposit since the transaction amounted to a change in ownership. Notably, the second precedent cited by BCL in the instant proceedings, namely the order of the Authority in the matter of Dewan Hatter Cement acquiring Saddi Cement Limited, has also been discussed in the appellate order of the Authority. The Authority found that the Dewan Hattar case has no link with the facts of the instant case, since the matter took place prior to the enactment of the relevant subordinate legislation, i.e. the Consumer Service Manual. In view thereof, the impugned order of the Member (Consumer Affairs) does not upset the principle of *stare decisis* on the basis of the two judgements cited by the Appellant.

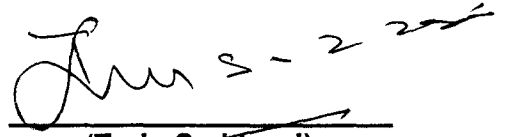


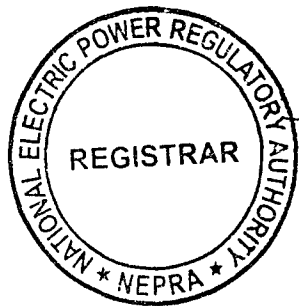
13. Foregoing in view, the Authority finds that the Appellant has not provided sufficient grounds for revising or abrogating the impugned order. The order of the Member (Consumer Affairs), dated 8th February 2018, is hereby upheld. IESCO is directed to approve change of name of PAKCEM Limited to Bestway Cement Limited subject to updation of security deposit in accordance with the applicable provisions of the CSM. A compliance report in this regard is to be submitted within thirty (30) days from the issuance of this order.


(Saif Ullah Chattha)
Member 26.9.2018


(Himayat Ullah Khan)
Member


(Rehmatullah)
VC/Member 25/9/2018


(Tariq Saddozai)
Chairman


(Registrar)
02.9.18

