



Registrar

National Electric Power Regulatory Authority Islamic Republic of Pakistan

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No. NEPRA/ADG(CAD)/TCD-06/ 12578-80

August 8, 2018

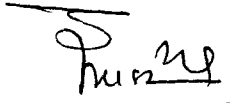
1. Chief Executive Officer
Multan Electric Power Company (MEPCO)
MEPCO Complex, WAPDA Colony,
Khanewal Road, Multan.
2. Mr. Munir Ahmed Daha
GM (Administration), JDW Sugar Mills Limited,
17-Abid Majeed Road,
Lahore Cantt.

Subject: **ORDER OF THE AUTHORITY IN THE MATTER OF MOTIONS FOR LEAVE FOR REVIEW FILED BY MEPCO AND JDW SUGAR MILLS AGAINST THE ORDER OF THE AUTHORITY DATED 24TH NOVEMBER 2017 IN PURSUANCE OF THE JUDGMENT OF LAHORE HIGH COURT IN WRIT PETITION NO. 35230/2015: M/S. JDW SUGAR MILLS VS NEPRA ETC**
MEPCO-56/2014

Reference is made to Review Motions filed by MEPCO and JDW Sugar Mills Limited (JDWSML) against the Order of the Authority dated 24th November 2017 in pursuance of the Judgment of the Lahore High Court, Lahore in Writ Petition No. 35230/2015.

2. Please find enclosed herewith the Order of the Authority (07 Pages) regarding the subject matter for information and further necessary action.

Encl: As above


08 08 18
(Syed Safer Hussain)

Copy to:
C.E./ Customer Service Director
Multan Electric Power Company (MEPCO),
MEPCO Complex, WAPDA Colony,
Khanewal Road, Multan.



BEFORE THE
NATIONAL ELECTRIC POWER REGULATORY AUTHORITY
(NEPRA)

Complaint No. MEPCO-56/2014

Petitioners:

Multan Electric Power Company (MEPCO)
MEPCO Complex, WAPDA Colony
Kanewal Road, Multan

JDW Sugar Mills Limited (JDWSML)
through Mr. Munir Ahmed Daha, GM (Administration)
17 Abid Majeed Road,
Lahore Cantonment, Lahore

Date of Hearing: April 26, 2018

Authority:

1)	Mr. Tariq Saddozai	Chairman
2)	Mr. Saif Ullah Chattha	Member (M&E)
3)	Mr. Himayat Ullah Khan	Member (Tariff)
4)	Syed Masood ul Hassan Naqvi	Member (Consumer Affairs)
5)	Mr. Rehmatullah	Member (Licensing)

On behalf of:

MEPCO:

1)	Mr. M. Arshad Dharala	Addl. Manager
2)	Mr. Badar Iqbal Choudhary	Counsel
3)	Mr. Shazeb Khan	

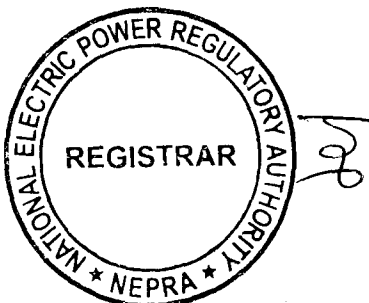
JDWSML:

1)	Mr. Maqsood Malhi,	Sr. Manager (Legal)
2)	Mr. Shehzad A. Elahi	Advocate
3)	Mr. Abdul Mohaimin Zafar	Advocate

Subject: ORDER IN THE MATTER OF REVIEW FILED BY THE MULTAN ELECTRIC POWER COMPANY AND JDW SUGAR MILLS AGAINST THE ORDER OF THE AUTHORITY DATED 24.11.2017 PASSED IN PURSUANCE OF JUDGEMENT OF THE LAHORE HIGH COURT, LAHORE IN WRIT PETITION NO. 35230/2015: M/S JDW SUGAR MILLS VS NEPRA ETC.

ORDER

1. This Order shall dispose of the Review Motions filed by the Multan Electric Power Company (MEPCO) and JDW Sugar Mills (JDWSML) against the order of the Authority dated November 24, 2017 (the 'Impugned Order'). The Impugned Order was passed in pursuance of the directions of the Honorable Lahore High Court, vide order dated April 05, 2017, in Writ Petition No. 35230/2015 titled M/s JDW Sugar Mills v NEPRA etc.



2. Brief facts of the case are that MEPCO signed a power purchase agreement with JDWSML on November 21, 2008 (PPA-1) for purchase of power generated through bagasse for a period of 04 years. On January 27, 2012, the Authority directed all Distribution Companies, including MEPCO, to file Power Acquisition Requests (PARs) before the Authority for procurement of power from Captive Power Plants. In pursuance of these directions, MEPCO filed a PAR for PPA-1, on June 8, 2012, which was approved by NEPRA on December 24, 2012. Subsequently, the same was notified on January 31, 2013.

3. PPA-1 expired as of November 20, 2012, prompting negotiations of a new power purchase agreement between JDWSML and MEPCO. On February 28, 2013, MEPCO and JDWSML signed a new power purchase agreement (PPA-2) for a term of one (1) year, effective from 21.11.2012. The PPA-2 stipulated that the same tariff, as approved by NEPRA, vide order dated December 24, 2012 for PPA-1, shall be incorporated, with *inter alia* the following conditions –

- (i) The fuel cost component will only be adjusted for any decrease in the Reference Gas Price and no higher/upward indexation will be allowed;
- (ii) The decision of NEPRA regarding fuel cost component (dated December 24, 2012) shall be applicable with effect from January 31, 2013; and
- (iii) JDWSML shall not claim arrears for the energy dispersed prior to the date of official gazette notification (i.e. January 31, 2013)

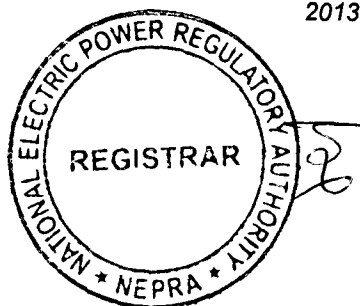
4. After signing PPA-2, MEPCO approached NEPRA for approval of renewing their PPA for a further period of five (5) years, vide letter dated May 20, 2013. NEPRA, vide letter No. R/PAR-87/9364 dated July 31, 2013, granted approval for renewal of PPA on the same terms and conditions as already approved by the Authority for PPA-1, vide order dated December 24, 2012. However, when JDWSML was forwarded a draft of the power purchase agreement (PPA-3) by MEPCO for execution, it was found that the tariff incorporated in contract was not calculated on the basis of the OGRA's Reference Price as had been approved by the Authority for PPA-1.

5. Being aggrieved, JDWSML proceeded to file a complaint with the Authority on January 28, 2014. The complaint stipulated, *inter alia*, that, on August 23, 2013, OGRA announced a revised reference gas price at a flat rate of Rs. 573.28/MMBTU and this was to be incorporated in PPA-3, as per the direction of the Authority dated July 31, 2013. This had not been done and the draft contract (PPA-3) forwarded by MEPCO had incorporated a tariff without using the OGRA Reference Price. However, it is worth mentioning that JDWSML did not raise any issue in initial complaint with respect to amendment in terms and conditions by MEPCO in PPA-2.

6. MEPCO concurrently approached NEPRA, vide letters dated January 22, 2014 and April 23, 2014, seeking an amendment in the bagasse-based tariff of CPPs, namely the price indexation mechanism to be de-linked from Gas and be linked with Coal. NEPRA, vide letter dated November 24, 2014, issued a decision on the matter of revision/modification of fuel cost component indexation, wherein NEPRA's decision dated December 24, 2012 (i.e. approval of PAR for PPA-1) was modified to the extent that the fuel cost component adjustment mechanism was de-linked from Gas and linked with imported Coal.

7. The complaint of JDWSML was disposed of by NEPRA, vide order dated December 23, 2014, with the following orders:

- i. *Upon request of MEPCO, the Power Purchase Agreement was approved by NEPRA on December 24, 2012 and the same was notified on January 31, 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 November 21, 2013 has no legal justification. MEPCO, however, required to seek ex-post facto approval of PPA with reduced rates.

- ii. Subsequent to expiry of second PPA (dated February 28, 2013) on November 20, 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 November 21, 2013 onwards.

8. JDWSML proceeded to file a review motion against the preceding order, which was admitted for hearing. For reasons recorded in its order dated August 11, 2015, NEPRA declined the review motion and the original order was maintained. Being aggrieved by NEPRA's orders in the above complaint and review proceedings, JDWSML proceeded to file Writ Petition No. 35230/2015 at the Lahore High Court, Lahore with the following prayer –

- a) The impugned decisions (dated December 23, 2014 and August 11, 2015) may be declared illegal, ultra vires and without lawful authority and justification.
- b) MEPCO may be directed to adhere to the power purchase agreement and tariff approved by NEPRA on December 24, 2012.
- c) MEPCO may be directed to release the pending and prospective claims of arrears to JDWSML immediately.

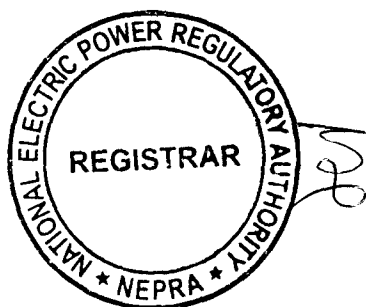
9. The Honorable Lahore High Court disposed of the petition, vide order dated April 05, 2017, with the following directions:

"1. Learned Counsel for Respondent (NEPRA) as per instructions submits that NEPRA is prepared to pass a fresh order after hearing the Petitioner (JDWSML) and Respondent No. 2 (MEPCO) on the matter in dispute between the same. Further submits that the impugned orders dated December 23, 2014 and August 11, 2015 will be withdrawn at the time of passing the fresh order

2. Disposed of accordingly"

10. In compliance thereof, the Authority conducted multiple hearings between the parties, on May 30, 2017 and June 13, 2017. After examining all relevant documents on record and arguments advanced during the hearings, the Authority passed the following order (the **Impugned Order**), dated November 24, 2017:

- i. PPA-2 is a legally valid and binding contract between both parties having consented to the provisions contained therein. Therefore, JDWSML has effectively waived its right. With regard to the issue of arrears, under the



provisions of PPA-2 (relevant sections reproduced below) the parties have agreed that JDWSML shall not claim any arrears prior to January 31, 2013 –

“ I) The Power Producer (JDWSML) shall not be allowed to claim arrear according to newly approved tariff for the energy dispersed for the period prior to the date of official Gazette notification (i.e. January 31, 2013) by Ministry of Water and Power Islamabad”

The provisions of PPA-2 bar JDWSML from claiming any arrears prior to the January 31, 2013, which includes the time period under which PPA-1 was in effect.

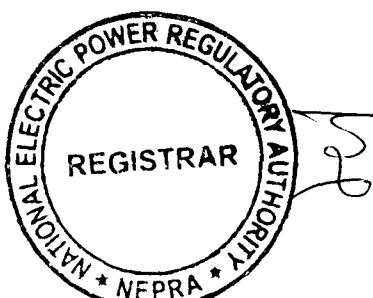
- ii. As per the directions of the Authority, dated July 31, 2013, the PPA-3 was to be signed on the same terms and conditions as PPA-1, which includes the price indexation mechanism approved by the Authority. However, PPA-3 could not be signed due to changes in terms and conditions by MEPCO. Therefore, the indexation mechanism approved by the Authority dated December 24, 2012 (notified on January 31, 2013), and subsequently amended and linked to Imported Coal instead of Gas vide decision issued on November 24, 2014, shall be applied in the PPA-3 accordingly.
- iii. The order of the Authority dated December 23, 2014 & August 11, 2015 and Show Cause Notices dated January 19, 2017 stand withdrawn upon the passing of this order.

11. Being further aggrieved by the impugned order of the Authority, both parties (i.e. MEPCO and JDWSML) filed review motions for the instant proceedings, which were admitted by the Authority and hearings were scheduled for February 15, 2018, February 22, 2018 and March 29, 2018. These hearings were however postponed on request of the parties and finally, a hearing was conducted on April 26, 2018.

12. Written submissions on behalf of JDWSML were given to the Authority, vide letter dated April 30, 2018, wherein it was specified that the presentation given by JDWSML during the hearing should be treated as their written submissions on the impugned matter. A copy of the said presentation was enclosed therewith. As such, the arguments and issues framed therein shall be examined in this order.

13. The first issue raised by JDWSML relates to PPA-2, namely that their plea with regards to the said contract was not considered by the Authority in the Impugned Order. It has been submitted that JDWSML had signed PPA-2 with a legitimate belief that it was in the same form as had been approved by NEPRA. However, this mistake of fact was identified later in time (after the PPA-2 had already been executed) and JDWSML attempted to get the contract revised from MEPCO, vide letters sent to MEPCO dated March 12, 2013 and March 15, 2013. However, MEPCO did not comply with JDWSML's requests and the latter was forced to sell electricity on reduced rates for the duration of PPA-2. These facts were not examined in the Impugned Order and raise legitimate grounds for rendering PPA-2 as illegal. Furthermore, due to this mistake of fact, NEPRA's upholding of PPA-2's legality in the Impugned Order, based on mutual consent of the parties, is also unfounded.

14. Furthermore, PPA-2 itself is void from the outset because it has not been signed in accordance with the tariff approved by NEPRA. Determination/negotiation of tariff is the exclusive statutory mandate of NEPRA and discretionary and unilateral application of an unapproved tariff by MEPCO renders the PPA unlawful. Reliance has been placed on Sections 23 and 24 of the Contract Act 1872.



[Handwritten signatures]

15. Conversely, if PPA-2 is to be upheld by the Authority (on the ground of mutual consent of parties) then PPA-1 (which was also mutually consented by the parties) should also be upheld and JDWSML should be granted arrears for 2011/12 thereunder.

16. Learned counsel on behalf of MEPCO has submitted that the instant review proceedings are tantamount to a second review, which is barred in terms of Order 47 Rule 9 of the Code of Civil Procedure, 1908 (the **CPC**) read with Section 40 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the **NEPRA Act**). The first review was before NEPRA and disposed vide order dated August 11, 2015. The second review was granted to JDWSML by NEPRA in pursuance of the directions of the Honorable Lahore High Court, which was disposed vide the Impugned Order. As such, the instant proceedings are equivalent to a third review, which is barred under law. Reliance has been placed on PLD 2015 SC 354 and 2017 CLC 1539.

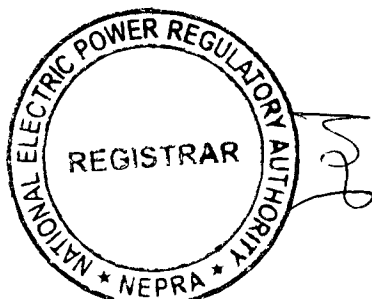
17. MEPCO further argued that NEPRA does not hold the power to determine the validity of agreements, which is the domain of a court of law.

18. On merits, learned counsel for MEPCO argued that the sole contention raised by JDWSML for seeking a declaration of illegality for PPA-2 has been a 'mistake of fact'. This cannot be assailed as the sole criterion for invalidating a contract, as provided under Section 22 of the Contract Act 1872. However, if PPA-2 was to be found unlawful and void, any benefit/advantage drawn by a party is to be restored, as per Section 65 of the Contract Act, 1872. This would mean that JDWSML would not be entitled to any profit/markup gained from PPA-2's operation and MEPCO would be entitled to a refund of all money paid to JDWSML over and above actual generation costs. Reliance has been placed on 2014 CLD 337 and 2012 SCMR 773.

19. On the subject of correct indexation mechanism for PPA-3, MEPCO has submitted that the findings of the Authority on the matter in the Impugned Order are liable to be clarified. Specifically para 18(ii) of the Impugned Order, which simply states that "*the PPA-3 was to be signed on the same terms and conditions as PPA-1, which includes the price indexation mechanism approved by the Authority*". It is unclear whether the '*price indexation mechanism approved by the Authority*' alludes to the earlier price indexation mechanism with Gas (approved vide decision on PAR for PPA-1 dated December 24, 2012) ('**PAR Tariff**') or the revised price indexation mechanism with Imported Coal (approved vide decision to amend original PAR for PPA-1 dated November 24, 2014) ('**De Jure Tariff**'). In this regard, JDWSML has already agreed to application of the De Jure Tariff for PPA-3, which would apply retrospectively for the 2013/14 crushing season. Since the matter had been agreed between the parties, JDWSML cannot now seek application of an alternative tariff for the 2013/14 crushing season. Furthermore, the matter of applicable tariff should not be dictated or influenced by proceedings before NEPRA or the Honorable High Court, by virtue of doctrine of *actus curiae neminem gravabit* (act of court shall prejudice no one). Hence, the correct tariff for PPA-3 is the De Jure Tariff, which should be applied from the date of commencement of proceedings, as the matter has remained *sub-judice* since that time.

20. Furthermore, the order of the Authority dated November 24, 2014 (where the price indexation for PPA-1 was revised from Gas to Imported Coal) has attained finality and has therefore become *res judicata*. Hence, non-application of the De Jure tariff for PPA-3 would be an indirect amendment/rescindment of the above order of the Authority, which cannot be done at this belated stage.

21. This case has been examined in detail, in light of the relevant documents, arguments advanced during the hearings and the applicable law. First off, MEPCO has raised contentions relating to the maintainability of the instant proceedings, by asserting that the instant proceedings are effectively granting the parties a second review, which is barred in terms of Order 47 Rule 9 of the CPC. In this



regard, the Authority is of the view that the Honorable Court has remanded the impugned matter to NEPRA for determination. The matter has now been agitated by way of review filed under Section 7(2)(g) of the NEPRA Act and proceedings have been conducted in accordance with the NEPRA (Review Procedure) Regulations, 2009, that have been prescribed in this regard. As such, the review is maintainable and the provisions of the CPC are not relevant to the instant proceedings.

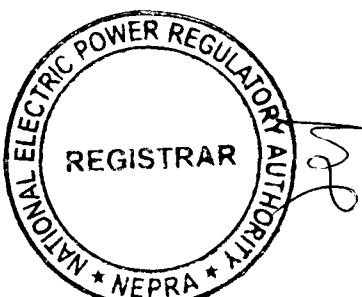
22. It is also the case of MEPCO that determining the validity of a power purchase agreement is beyond NEPRA's authority. Section 7(3)(a) of the NEPRA Act is relevant in this regard, which confers NEPRA with the statutory mandate of determining and regulating terms and conditions of supply of electric power. Power purchase agreements are the predominant legal instruments that prescribe terms and conditions of energy supply throughout the country and therefore explicitly fall within NEPRA's statutory purview. Hence, MEPCO's submissions with regards to maintainability of the instant proceedings are dismissed.

23. With regards to the validity of PPA-2, JDWSML has argued that the contract was invalid since it was entered into on the basis of a mistake of fact and that the main object of the agreement itself was unlawful. MEPCO has argued that mistake of fact does not per se render a contract as invalid, and, even if PPA-2 was to be declared illegal, MEPCO is still owed arrears as restitution (for any advantage or benefit gained by JDWSML for the duration of the 'illegal' contract). In this regard, the Authority has comprehensively appraised the underlying facts and particulars leading up to the execution and implementation of PPA-2, in its order dated November 24, 2017, and given its findings on the legality of PPA-2 based thereon. No new submission has been placed before the Authority that has not already been examined and adjudged upon.

24. On the issue of correct indexation mechanism and terms and conditions of PPA-3, MEPCO has contended that the findings of the Authority in the Impugned Order in this regard are not explicit and are liable to be clarified. In addition, MEPCO argued that both parties had agreed to application of the De Jure Tariff (indexation with Imported Coal) for PPA-3, which should be applied, and JDWSML cannot withdraw from agreed contractual terms at this stage. JDWSML did not submit any written contentions on the subject.

25. In this regard, it is observed that the Authority has directed that PPA-3 shall be signed on the same terms and conditions as PPA-1 (vide letter dated July 31, 2013). The original price indexation mechanism allowed for PPA-1 was with Gas (vide decision dated December 24, 2012 – PAR Tariff). This mechanism was later modified to be linked to Imported Coal (vide decision dated November 24, 2014 – De Jure Tariff). The timelines of the above approvals and authorizations are significant. PPA-2 expired as of November 20, 2013 and PPA-3 is to be signed with an effective date therefrom. However, the change in price indexation was authorized by NEPRA on November 24, 2014. This is a whole year after the contemplated start date of PPA-3. In this regard, the Authority is of the view that change in the price indexation mechanism should not be applied retrospectively so as to prejudice the parties. The applicable tariff (and underlying mechanisms) for PPA-3 during its effective life shall correspond with the tariff in force at the relevant time period. As such, where PPA-3 is signed with an effective date from November 20, 2013, the time period till the change in price indexation (i.e. November 20, 2013 to November 24, 2014) shall be governed under the original price indexation mechanism (i.e. tariff approved vide decision dated December 24, 2012 – PAR Tariff) and the time period thereon (i.e. November 24, 2014 onwards) shall be governed under the amended price indexation mechanism (i.e. tariff approved vide decision dated November 24, 2014 – De Jure Tariff). Reliance has been placed on 2000 SCMR 112 and 1986 SCMR 1917 (affirmed by judgments in C.P. No. D-1259/2013, 2014 PTD 1881).

26. In light of the foregoing, the Authority hereby finds that the parties have not provided sufficient grounds that would result in the Impugned Order to be reversed or altered. The elaboration provided in

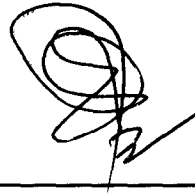


para 25 above is in supplement to the findings in the Impugned Order and is not tantamount to a revision or alteration of said order.

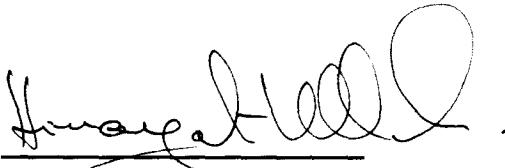
27. The instant reviews filed by the parties are hereby dismissed and the order of the Authority, dated November 24, 2017 on the impugned issue is maintained.

(Retired)

Syed Masood-ul-Hassan Naqvi
Member




Rehmatullah
Member



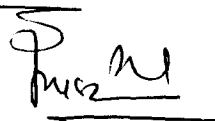
Himayat Ullah Khan
Member



Saif Ullah Chattha
Member 6.8.2018



Tariq Saddozai
Chairman



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