



Registrar

National Electric Power Regulatory Authority
Islamic Republic of Pakistan

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No. NEPRA/TRF-72/EPQL-2007/9672-9674
June 25, 2015

Subject: **Decision of the Authority in the Matter of Gas Infrastructure Development Cess (GIDC)**

Dear Sir,

Please find enclosed herewith the subject decision of the Authority (07 pages) in the matter of Gas Infrastructure Development Cess (GIDC) for information.

Enclosure: As above


(Syed Safeer Hussain)^{25.06.15}

Secretary,
Ministry of Water & Power,
Government of Pakistan
Islamabad.

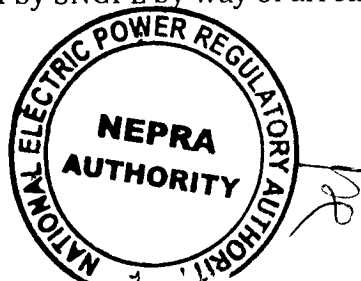
CC:

1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad
2. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad.



**DECISION OF THE AUTHORITY IN THE MATTER OF GAS INFRASTRUCTURE
DEVELOPMENT CESS (GIDC)**

1. Copy of order dated 4th of June, 2015 passed by Honorable Lahore High Court in Writ Petition No. 16814/15 titled: Engro Powergen Qadirpur Limited (EPQL) Vs Federation of Pakistan etc was received in NEPRA for compliance. The petition filed against Gas Infrastructure Development Cess Act, 2015, (GIDC Act 2015) and it was pleaded by the petitioner that the demand raised by SNGPL for recovery of GIDC due from 2013 to May 2015 in lump sum cannot be met in view of the fact that, the petitioner, had never recovered the same from NTDC, which is the sole purchaser of the Electricity produce by the petitioner. It was further pleaded that said recovery could not be affected in view of the fact that NEPRA had not revised the tariff of petitioner to factor in GIDC due to various restraining orders passed by different High Courts. Ministry of Petroleum and Natural Resources had also issued letters directing that GIDC may not be recovered.
2. The Honorable Lahore High Court in its decision, dated June 04, 2015, in the matter of aforementioned petition of EPQL, noted that the dispute relates to the ability of the petitioner to pay the amount being claimed by SNGPL, which is a pass-through item and is to be recovered from NTDC, and the inability of NTDC to pay such amount on account of the fact that it did not recover the same from Distribution Companies. The Distribution Companies were to recover the same from consumers of Electricity. This seems a complicated situation having serious and long term implications for all concerned parties. It needs resolution at policy level involving all necessary parties including the petitioner and other similarly placed power producers, NTDC, the MoP& NR and the Regulatory Agency i.e. NEPRA, which is the competent forum to do so. NEPRA can in consultation with all stakeholders, spell out a workable solution. Accordingly, the matter was referred to NEPRA with the direction that NEPRA shall issue notices to the afore noted parties, examine the matter and decide the same in accordance with the law keeping in view the grievance of petitioner. The Court, owing to the urgency and importance of the matter as well as the fact that the petitioner is being pressed to pay substantial amounts by way of GIDC from 2013 to May 2015 in lump sum by June 15, 2015, directed that NEPRA shall consider the possibility of passing fair and equitable orders under the law and resolving the matter in a manner, which is in consonance with the law, rules and regulations as expeditiously as possible and preferably by 15.06.2015, which is the due date for payment of the amounts being claimed by SNGPL by way of arrears of GIDC.



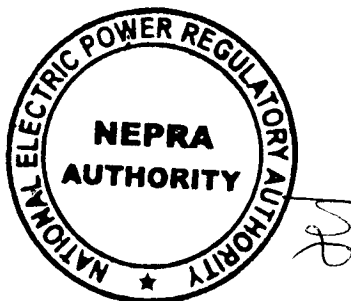


3. In compliance of the directions of the Honorable Lahore High Court, a hearing into the matter was conducted on June 18, 2015, wherein all the stakeholders were invited to present their views and also written comments/suggestions in the matter were invited. Notice of hearing was published in newspapers on June 13, 2015. Separate notices were also issued to the stakeholders.

4. On the date fixed for the hearing, representatives from Central Power Purchasing Agency (CPPA), Engro Powergen Qadirpur, Foundation Power Company Dharki, KAPCO, Saif Power, UCH Power, Rousch Power, Altern Energy, Fauji Kabirwala Power Company and Sapphire Electric Power Company were present; however, no representative from Sui Southern Gas Company Limited (SSGCL), Sui Northern Gas Pipelines Limited (SNGPL), Ministry of Water & Power and Ministry of Finance attended the hearing despite service of notice.

5. During the course of hearing, the brief background of the levy of Gas Infrastructure Development Cess was explained which is summarized as under:-

- Gas Infrastructure Development Cess Act, 2011 was promulgated in 2011 which provided for the imposition and collection of infrastructure development Cess on natural gas, to be collected by the "Company" as specified in the First Schedule and as per the rates specified in the 2nd Schedule to the afore said Act.
- The rate of GIDC was revised with effect from July 01, 2012 through Finance Act 2012, which was enhanced from Rs. 27/ MMBTU for WAPDA/ KESCL and Rs. 70/ MMBTU for IPPs to Rs.100/ MMBTU for WAPDA/ KESC/ GENCOs and IPPs.
- Oil and Gas Regulatory Authority (OGRA), communicated the imposition of category wise rates of Cess, through its press releases dated January 01, 2012 and June 30, 2012.
- Different Petitions were filed in different Courts on the issue of levy of GIDC. The Honorable Peshawar High Court Peshawar in WP 2514-P of 2012 allowed the Constitution Petitions on June 13, 2013, declaring the levy, imposition and recovery of the Cess unconstitutional, with the direction to refund the Cess so far collected





within a reasonable time, either in lump sum or to be adjusted in monthly gas consumption bills.

- Pursuant to the decision of the Honorable Peshawar High Court, NEPRA vide its letter No. NEPRA/R/TRF-72/11408 dated September 19, 2013, directed the Central Power Purchasing Agency (CPPA) that since the IPPs are not paying GIDC to gas suppliers due to stay orders by the Courts, therefore, there is no justification to claim it from the power purchaser. Accordingly CPPA was directed to recover the amount of aggregate GIDC along-with markup paid to IPPs from the month when stay order was issued and subsequently GIDC was not paid to Gas Supplier by IPPs. NEPRA also conveyed the revised Gas Cost Components for the gas based IPPs, without taking into account the impact of GIDC, to CPPA.
- Honorable Supreme Court of Pakistan vide its Judgment dated December 30, 2013 suspended the impugned judgment of Peshawar High Court regarding the GIDC.
- Consequent upon judgment of the Honorable Supreme Court of Pakistan, NEPRA vide its letter No. NEPRA/R/TRF-72/855 dated January 22, 2014, directed the CPPA to process the energy invoices of IPPs and arrears of GIDC keeping in view the afore referred judgment of the Supreme court. Since there was no change either in price of gas or GIDC, therefore, the rates of Fuel Cost Component already determined by NEPRA w.e.f. January 01, 2013 remained applicable.
- The Honorable Supreme court of Pakistan in its Judgment dated August 22, 2014, on the appeals filed by Federation of Pakistan (FoP), Ministry of Petroleum & Natural Resources & another, finally concluded that;
"to conclude GIDC is the fee not a tax, in the alternative it is not covered by any Entry related to imposition or Levy of tax under part I of the federal Legislative List. On either count the cess could not have been introduced through a money bill under article 73 of the constitution. The same was therefore, not validly levied in accordance with the constitution. For the forgoing reason, the impugned judgment are not liable to be reversed. The appeals are therefore dismissed."
- Subsequent to the judgment of Supreme Court of Pakistan dated August 2014, which upheld the judgment of Peshawar High Court declaring the levy of GIDC as

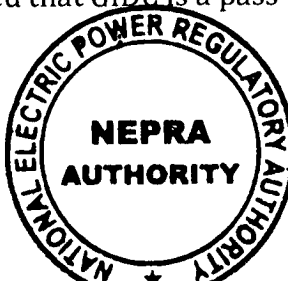




unconstitutional and illegal, a new ordinance namely Gas Infrastructure Development Cess Ordinance, 2014 ("Cess Ordinance") was promulgated by president of Pakistan with immediate effect.

- As per section 5 of the Cess Ordinance, the Cess paid by a company shall be an expenditure for which allowance is to be made under the income Tax Ordinance, 2001 in computing the profits or gains of that company. Further section 8 of the Cess Ordinance validated the Cess collected under GIDC Act, 2011 notwithstanding the judgment or decree of the Court. As per referred provision of the Cess Ordinance, GIDC became applicable and the Cess levied /collected under the previous law was deemed to be validly levied /collected.
- The GIDC Ordinance 2014 was also challenged in different Courts and the Honorable Lahore High Court, Lahore (LHC) suspended the levy and collection of GIDC under the Ordinance, 2014.
- NEPRA, in pursuance of the decision of the LHC, directed CPPA/ NTDC vide letter No. NEPRA/R/SAT-I/TRF-100/IPP dated February 16, 2015 that Interim order of the LHC in the matter of GIDC shall be strictly followed and that the matter will be decided in the light of final decision of the LHC.
- Subsequently new GIDC Act 2015 has been enacted , whereby GIDC has again been levied and as per section 8 of the GIDC Act, 2015, the Cess levied, charged, collected or realized by the Company from Gas Consumers under the GIDC Act 2011 and GIDC Ordinance 2014 has also been allowed to be validly levied, charged, collected or realized under the provisions of this Act.
- Pursuant to the GIDC Act 2015, some of the IPPs namely Engro Power Qadirpur Limited , Saif Power Limited , Foundation Power and Sapphire Electric requested the Authority to direct CPPA/ NTDC to process their monthly invoices by including the impact of GIDC in their Fuel Cost Component.

6. During the course of hearing, M/s Fauji Kabirwala Power Company (FKPC) submitted that GIDC may be treated as a change in law and should be allowed as pass through. FKPC further submitted that it should not be charged as a part of price because it will attract extra 17% on account of Sales Tax. On behalf of M/s Engro Pwergen Qadirpur Limited (EPQL), it was submitted that GIDC is a pass through and not to be borne by IPPs as





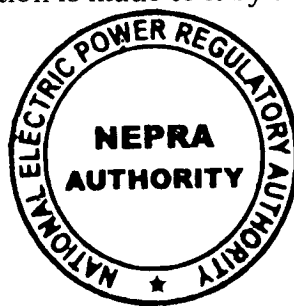
mentioned in the PPAs and the IA. EPQL further submitted that NEPRA has already allowed this in the past as a part of fuel cost component. EPQL proposed that CPPA should start paying the GIDC back log to IPPs in installments and simultaneously the IPPs should pass the same to gas suppliers, and till such time the entire back log is settled, gas supplier be asked not to take any adverse action i.e. gas disconnection / calling of bank guarantees. Uch power submitted that NEPRA should have a consistent policy towards IPPs established under the 1994 as well as 2002 power policy. Sapphire Electric Company Limited (SECL) submitted that GIDC is a part of gas price and is notified by OGRA.

7. All the participants of the hearing were directed to file their written comments, if any, within three (03) days from the date of hearing. CPPA was directed to provide party wise financial impact of the arrears of GIDC that is to be recovered from the consumers. CPPA, as per directions of the Authority, has submitted that an amount of around Rs. 11.10 Billion (Provisional) has been accumulated on account of arrears of GIDC for the period from January 2013 to April 2015. Party wise detail of arrears provided by CPPA is as under;

Name of IPP	Estimated Amount of GIDC Arrears
	Rs. In Millions
Engro Powergen	2,400
Foundation Power	2,300
Saif Power	462
Sapphire Electric	424
Orient Power	434
Halmore Power	445
Rousch Power	3,992
Habibullah Costal	644
Total	11,101

8. In response to the directions of NEPRA, M/s Rousch (Pakistan) Power Limited (RPPL) submitted the written comments which are to the following effect:-

- GIDC Act 2015 has given exemption to Industrial Sector from payment of arrears. NEPRA may suggest to the court for having this anomaly corrected as otherwise this law would be discriminatory in nature.
- NTDC will not be in a position to pay the amount of arrears using its own sources unless a special allocation is made to it by the Ministry of Finance.



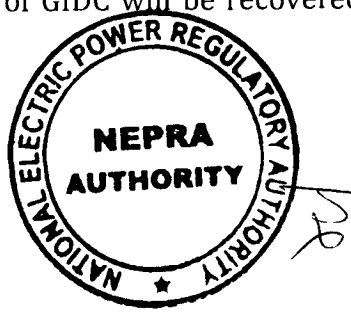


- iii. It is essential for viability of RPPL, that it must be able to collect the whole amount of GIDC from NTDC in a similar manner in which it is required to pay to the SNGPL i.e. RPPL should neither gain nor lose on account of being an agent to recover GIDC on behalf of Federal Government.
- iv. SNGPL must be restrained to collect GIDC arrears in one instance and be directed not to take any coercive measures.
- v. NTDC may be directed to submit a plan for payment of GIDC arrears and SNGPL be required to follow the plan accordingly.

9. Having gone through the contents of available record, the input provided by the stakeholders and the directions of the Honorable Lahore High Court, Lahore as referred in para 1 above, the Authority is of the view that precisely the issue in hand pertains to the recovery of amount of arrears of GIDC that has accumulated over the period from 2013 to May 2015 owing to various restraining orders passed by various High Courts in the matter of GIDC. As per the definitions provided in the GIDC Act 2015, "cess means the gas infrastructure development cess levied and chargeable from gas consumers, other than the domestic sector, consumers over and above the sale price....." As far as the determination of the sale price, the Authority believes that the competent authority for the purpose is the Oil and Gas Regulatory Authority (OGRA) and as per information, it has already included the category wise rates of Cess in the gas price, through press releases.

10. The Authority is of the view that being part of Gas Price, GIDC has to be passed on to the consumers as part of fuel price and is to be reflected in the Fuel cost Component of gas based IPPs. The Authority also believes that, due to non inclusion of impact of GIDC in the Fuel Cost Component of gas based IPPs, being a pass through item, consumers have availed extra benefit on account of monthly fuel price adjustment in the previous months, which needs to be adjusted through future adjustments.

11. In view of the foregoing and in order to provide a workable solution for recovery of arrears in question as per directions of the Honorable Lahore High Court, the Authority is of the view that the recovery of arrears could be managed through monthly Fuel Price Adjustment (FPA), in the future period whenever a negative FPA variation is determined by the Authority. The arrears of GIDC will be recovered in installments depending upon the





amount of monthly FPA. This is being done in order to protect the consumers from additional burden on account of arrears of GIDC. Accordingly, CPPA shall adjust the arrears of GIDC of Rs. 11.10 Billion in accordance with the decisions with respect to future monthly FPA, treating this as under recovery of fuel cost during the period in question.

12. To ensure future recovery of GIDC, as per the GIDC Act 2015, the Authority observed that there is no change in the price of gas and the rate of GIDC for IPPs since January 01, 2013, therefore, the fuel cost components already determined by the Authority w.e.f. January 01, 2013 will remain applicable, as mentioned hereunder;

Name of IPP	Gas Price	GIDC	Gas Price with GIDC	Fuel Cost Component With GIDC
	Rs. / MMBTU	Rs. / MMBTU	Rs. / MMBTU	Rs. / kWh
Engro Powergen	488.23	100	588.23	4.8898
Foundation Power	488.23	100	588.23	4.5505
Saif Power	488.23	100	588.23	4.3432
Sapphire Electric	488.23	100	588.23	4.3428
Orient Power	488.23	100	588.23	4.3429
Halmore Power	488.23	100	588.23	4.3431

AUTHORITY

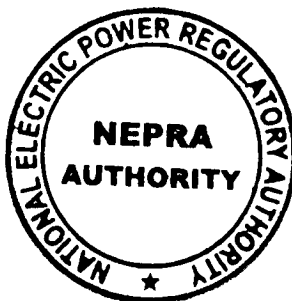
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Member

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25.06.15