

SUPREME COURT OF PAKISTAN

(Appellate Jurisdiction)

PRESENT:

Mr. Justice Umar Ata Bandial, CJ

Mr. Justice Syed Mansoor Ali Shah

Mrs. Justice Ayesha A. Malik

CIVIL APPEALS NO.1011 TO 1119 OF 2020 & 1185 TO 1191 OF 2020 AND CIVIL PETITIONS NO.3428 OF 2020, 1145-K OF 2020 & 3775 TO 3780 OF 2020

[Against the judgment dated 28.09.2020 and 05.10.2020 of the High Court of Sindh, Karachi passed in C.P. Nos.D-2253, D-2295, D-2287, D-2291, D-2293, D-2296, D-2297, D-2298, D-2300, D-2031, D-2304, D-2398, D-2343, D-2356, D-2393, D-2424, D-2406, D-2329, D-2451, D-2351, D-2358, D-2412, D-2313, D-2385, D-2336, D-2396, D-2370, D-2335, D-2410, D-2386, D-2400, D-2344, D-2366, D-2493, 2324, D-2337, 2436, D-2310, D-2357, D-2353, D-2328, D-2704, D-2340, D-2397, D-2364, D-2371, D-2381, D-2327, D-2392, D-2634, D-2342, D-2581, D-2635, D-2362, D-2383, D-2354, D-2624, D-2361, D-2323, D-2315, D-2435, D-2705, D-2698, D-2627, D-2446, D-2584, D-2613, D-2638, D-2369, D-2700, D-2399, D-2332, D-2341, D-2374, D-2363, D-2466, D-2326, D-2349, D-2314, D-2359, D-2334, D-2382, D-2352, D-2309, D-2355, D-2312, D-2360, D-2522, D-2600, D-2684, D-2396, D-2438, D-2363, D-2698, D-2780, D-3281, D-2725, D-2724, D-2725, D-2971, D-2720, D-2835, D-2338, D-2339, D-2345, D-2253, D-2365, D-2394, D-2395, D-2653, D-2741, D-2579, D-2295, D-2313, D-2627, D-2342, D-2438, D-2291, D-2393, D-2339 and D-2338 of 2020, respectively]

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| CA.1011 of 2020 | K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others |
| CA.1012 of 2020 | K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others |
| CA.1013 of 2020 | K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others |
| CA.1014 of 2020 | K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of |

	Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1015 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1016 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1017 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1018 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1019 of 2020	K-Electric Limited through its CEO, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1020 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1021 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1022 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation

	of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1023 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1024 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1025 of 2020	K-Electric formally through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Chairman, National Electric Power Regulatory Authority, NEPRA, Islamabad and others
CA.1026 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1027 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1028 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
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CA.1030 of 2020	K-Electric Limited through its Chief

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CA.1031 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
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CA.1110 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
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CA.1116 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1117 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1118 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1119 of 2020	Majeed & Sons Steels (Pvt) Limited, Karachi and others Vs. Federation of Pakistan and others
CA.1185 of 2020	K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
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CA.1189 of 2020		K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1190 of 2020		K-Electric Limited through its Chief Executive Officer, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CA.1191 of 2020		Attock Cement Pakistan Limited, Karachi and another Vs. Federation of Pakistan through Secretary, Ministry of Energy, Islamabad and others
CP.3428 of 2020		Crystal International Trading (Pvt) Limited, Karachi and others Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Islamabad and others
CP.1145-K	of	Mondelez Pakistan Limited Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
2020		
CP.3775 of 2020		Keystone Enterprises (Pvt) Limited, Karachi Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CP.3776 of 2020		Umer Works (Pvt) Limited, Karachi and others Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others
CP.3777 of 2020		Baz Knitwear Industries (Pvt) Limited, Karachi and others Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and

others

CP.3778 of 2020 Friction Material Components (Pvt) Limited and others Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others

CP.3779 of 2020 Knitex International, Karachi and others Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others

CP.3780 of 2020 Richa Leather, Karachi and others Vs. Federation of Pakistan through Secretary, Ministry of Energy and Secretary, Ministry of Finance, Pakistan Secretariat, Islamabad and others

For the Appellant(s) : Mr. Abid S. Zuberi, ASC
Mr. Ayan Mustafa Memon, ASC
(For K-Electric)

Mr. Haider Waheed, ASC
(in CA.1119/2020)

Mr. M. Omer Soomro, ASC
(in CA.1191/2020)

For the Petitioner(s) : Mr. Haider Waheed, ASC
(in CPs.3428 & 3775 to 3780/2020)

Barrister M. Abdur Rehman, ASC
(in CP.1145-K/2020 via video link from Karachi)

For Official Respondent(s) : Mr. M. Ayaz Shaukat,
Deputy Attorney General for Pakistan

Syed Asif Hyder Shah,
Secretary, Ministry of Energy
(Power Division)

Barrister Umar Aslam, ASC
Sajid Awan, Additional Director General
(Tariff)

Irfan Gill, Director Legal
Mubashar Bhatti, Director Tariff
(All for NEPRA)

For Private Respondent(s) : Mr. Haider Waheed, ASC
(in CAs.1011, 1014, 1027, 1035, 1064, 1105, 1116 and 1117/2020)

Mr. M. Omer Soomro, ASC
(in CA.1012/2020)

Mrs. Navin Salim Merchant, ASC
(in CAs.1013, 1016, 1018, 1030 and 1066/2020 via video link from Karachi)

Ms. Sofia Saeed Shah, ASC
(in CAs.1045 and 1049/2020 via video link from Karachi)

Barrister M. Abdur Rehman, ASC
(in CA.1077/2020 via video link from Karachi)

Mr. Hassan Khurshid Hashmi, ASC
(in CA.1096/2020)

Mr. Abdul Sattar Pirzada, ASC
(in CAs.1023, 1093, 1099 and 1100/2020)

Date of Hearing : 19.01.2023

JUDGMENT

AYESHA A. MALIK, J:- The Appellants before the Court are K-Electric Limited (**K-Electric**) and the consumers of electricity supplied by K-Electric, who have all collectively challenged the impugned judgment dated 28.09.2020, passed by the High Court of Sindh, Karachi (**High Court**). Leave was granted on 27.11.2020 to consider whether the disputed Corrigendum dated 22.01.2020 (**Corrigendum**) is enforceable against the consumers of K-Electric.

The Facts:

2. A dispute arose between the parties when the Corrigendum was notified by the Ministry of Energy (Power Division) which provided the schedule for electricity tariff for

consumers of electricity supplied by K-Electric on the basis of SRO No.810(I)/2019 dated 12.07.2019 (**SRO 810**). By way of SRO 810, the Federal Government modified the Industrial Support Package (**ISP**) introduced through SRO No.12(I)/2019 dated 01.01.2019 (**SRO 12**) and a dispute arose on the manner in which the ISP was to be adjusted in the tariff. By way of background, the facts leading to the dispute are as follows:

- i. The Federal Government notified an ISP for industrial consumers of all DISCOs and K-Electric vide SRO 12 such that their tariff was reduced by Rs.3/kWh, for *peak hours* and *off-peak hours*, which reduction was inclusive of any downward revision of fuel price. This was in effect a subsidy offered by the Federal Government as a relief package for industrial consumers of all DISCOs and K-Electric.
- ii. This subsidy was modified by the Federal Government vide SRO 810 whereby it was made applicable only for *peak hours*. Essentially, SRO 810 amended the ISP granted vide SRO 12 to the extent of *peak hours*, which meant that it was no longer applicable for *off-peak hours*.
- iii. The Federal Government then issued the disputed Corrigendum on 22.01.2020 in which it provided the Schedule of Tariff (**SOT**) for K-Electric for giving effect to SRO 810, without recourse to the National Electric Power Regulatory Authority (**NEPRA**). This SOT adjusted the subsidy in the uniform tariff

earlier notified by the Federal Government vide SRO No.575(I)/2019 dated 22.05.2019 (**SRO 575**).

- iv. The consumers of electricity supplied by the K-Electric challenged the Corrigendum before the High Court essentially on the ground that the subsidy could not be withdrawn as it had become a part of the tariff, on account of SRO 575. Hence, it was applicable to *peak hours* and *off-peak hours*. Also, that the Corrigendum was illegal as the SOT notified thereunder was neither considered nor approved by NEPRA. As per their contentions, only NEPRA could issue an SOT and adjust the tariff and that the ISP was built into the tariff vide SRO 575, hence, the same could not be withdrawn by the Federal Government. Consequently, the Corrigendum issued by the Federal Government without recourse to NEPRA was illegal.
3. The petitions were decided vide the impugned judgment in the following terms:-

"42. It is for these reasons, we dispose of all of these connected petitions and those directed to be treated as reserved with the connected bunch in the following terms:-

(a) The Corrigendum dated 22.01.2020 is declared to be illegal, void, issued in excess of authority hence quashed. K-Electric is restrained from enforcing the same in any manner whatsoever as it has resulted in a determination (higher than NEPRAs determined tariff) and it is not correcting any errors.

(b) Industrial consumers of K-Electric to be charged tariff as per the left hand column (K-Electric Tariff) of SRO 575(I)/2019 dated

22.05.2019 as determined vide determination dated 05.07.2018 in respect of variable "off-peak hours" charges, and right hand column (Uniform Tariff) in respect of variable "peak hours" charges, as long as subsidy for "peak hours" provided through SRO 12(l)/2019 dated 01.01.2019 holds the field. At any point in time when the "peak hour" subsidy is withdrawn, values shown in the right hand column would become meaningless and tariff will completely fall back to the left hand column (unless any new determination has taken the field).

(c) SRO 810(l)/2019 dated 12.07.2019 is lawful as GoP is solely competent to provide or withdraw any subsidy.

(d) Any sums charged and paid by the Petitioners per the rates specified in the corrigendum after deducting the rates provided in the left hand column (K-Electric Tariff) of SRO 575(l)/2019 as determined vide determination dated 05.07.2018 in respect of variable "off-peak hours" charges shall be refunded or adjusted towards the future bills.

(e) Petitioners who have not paid any previous bills or ISP component for the period July-2019 to Jan-2020 be reissued bills for this period on the basis of the values provided in the left hand column (K-Electric Tariff) of SRO 575(l)/2019 dated 22.05.2019 as determined vide determination dated 05.07.2018 in respect of variable "off-peak" hours charges and be given a reasonable period to make payments as per the foregoing."

The Arguments:

4. The Consumers are aggrieved by the impugned judgment because even though the Corrigendum has been declared illegal, SRO 810 was declared lawful which means that the ISP/subsidy offered by way of SRO 12 has partially been withdrawn. They claim that as SRO 12 was incorporated in their tariff, the Federal Government cannot withdraw any part of the

subsidy and cannot issue an SOT without recourse to NEPRA. Learned counsel for the Appellants (Consumers) argued that the Appellants have a vested right with respect to the ISP offered by SRO 12 as this subsidy is built into the uniform tariff notified by the Federal Government vide SRO 575. They also argue that when the subsidy becomes a part of the tariff then it cannot be withdrawn unilaterally by the Federal Government, that too without prior approval from NEPRA, as required under Section 31 of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (**Act**). They further argued that SRO 810 could not amend SRO 12, as it became ineffective once SRO 575 was notified and the same incorporates the ISP notified in SRO 12 in the tariff. Consequently, it is their case that SRO 810 cannot amend the consumers' tariff as it amends SRO 12, which is no longer operative against K-Electric. Also in dispute is the fact that the Corrigendum was issued on 22.01.2020 but was given effect from 01.07.2019, hence, the Appellants' (Consumers) case is that tariff cannot be charged retrospectively. As per their argument, the tariff becomes effective once it is notified and the retrospective applicability by way of the Corrigendum is against the law.

5. The Appellant, K-Electric is aggrieved by the impugned judgment which has set aside the Corrigendum yet upheld SRO 810, consequent to which, they claim that they are unable to give effect to SRO 810 as it does not have an SOT. Learned counsel for K-Electric argued that when a subsidy is

issued by the Federal Government, it is to be given effect through the electricity bills. In this case, when SRO 810 was issued by the Federal Government they failed to provide the SOT to the uniform tariff notified vide SRO 575, on the basis of which SRO 810 could be implemented for the benefit of K-Electric. Hence, the time lag between the issuance of SRO 810 on 12.07.2019 and the issuance of the Corrigendum on 22.01.2020 created an anomaly for K-Electric as to how to give effect to SRO 810. In this context, K-Electric issued several letters to the Ministry of Energy (Power Division) wherein they requested for amendments in SRO 575 which notified the uniform tariff for K-Electric consumers so as to give effect to SRO 810. It is their case that the Ministry of Energy (Power Division) was required to get the SOT given in SRO 575 amended so that K-Electric could apply the updated tariff to industrial consumers. On 01.07.2020, K-Electric also informed the Ministry of Energy (Power Division) that they will be giving retrospective application to SRO 810 as per the SOT to be issued in order to cover the gap from 12.07.2019. Hence, the learned counsel argued that there was no illegality with the issuance of the Corrigendum, which does not change the tariff but was necessary to give effect to the subsidy in SRO 810. Learned counsel further argued that the Consumers have been unjustly enriched at the expense of K-Electric, who is unable to give effect to SRO 810 for want of an SOT. Learned counsel explained that during the period from July 2019 to December 2019, K-Electric was charging the Consumers on the basis of

SRO 575 which meant that the Consumers were enjoying the benefit of the total subsidy *on peak hours* and *off-peak hours* whereas SRO 810 issued on 12.07.2019 required the subsidy to be applied only to the extent of *peak hours*. K-Electric, therefore, was entitled to adjust amounts that the consumers had not paid for the *off-peak hours*. This adjustment was reflected in the electricity bills issued in March 2020 as arrears which were challenged by the Consumers. Learned counsel also pointed out that the impugned judgment has set a new tariff requiring the industrial consumers of K-Electric to be charged tariff as per left hand column of SRO 575, being the tariff determined by NEPRA for *off-peak hours* and as per the right hand column for *peak hours*, being the uniform tariff determined by the Federal Government. The learned counsel argued that the direction given by the High Court does not allow K-Electric to recover amounts due to it and has also failed to appreciate the impact of tariff determination and of a uniform tariff.

6. We have heard the learned counsel and found that the issues raised by the Consumers, as well as, K-Electric are in fact with reference to the power of Federal Government to provide electricity-based subsidies and to incorporate the same into the tariff without any determination from NEPRA. Related to this issue is the question as to whether the Federal Government can determine a uniform tariff and notify it without any determination from NEPRA. Finally, the more concise dispute as brought by the Consumers is the effect

of SRO 810 and the Corrigendum in relation to SRO 575 and SRO 12.

The law related to tariff determination:

7. The Act provides for the regulation of generation, transmission and distribution of electric power and matters connected to it. Section 3 of the Act establishes NEPRA as the Authority for this purpose. Section 7 of the Act provides for the powers and functions of the Authority, the gist of which is that the Authority is exclusively responsible for regulating the provisions of electric power services and that the Authority is to determine the tariff, rates, charges and other terms and conditions for supply of electric power services by generation, transmission and distribution companies. As per this section, the Authority is required to recommend to the Federal Government the determined tariff for notification of tariff. Section 31 of the Act sets out the requirements for the determination, modification or revision of the tariff. This section mandates NEPRA to consider the Federal Government's National Electricity Policy and National Electricity Plan with reference to tariff determination and also to consider the factors enumerated in Sub-Section (2), which includes the Federal Government's social and economic policies for the purposes of tariff determination. Section 31(3) of the Act sets out the guidelines to be followed by NEPRA with reference to the determination of the tariff, whereby the basic guideline is that the tariff should allow the licensee to recover all costs, prudently incurred, to meet the needs of the consumer. Section

31(4) provides that for the benefit of the consumers, NEPRA is to determine a uniform tariff in the public interest. Section 31 of the Act also sets out timelines for NEPRA's tariff determination, being four months from the date of admission of the tariff petition and also requires the tariff to be notified within fifteen days by the Federal Government. The tariff is subject to adjustments on a monthly basis, on account of variations in fuel charges and policy guidelines.

8. The Authority issued the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 (**1998 Rules**), which prescribes the procedure for tariff determination. In terms of Rule 16, a timeframe is provided whereby all orders, determinations and decisions of the Authority are to be in writing and the Authority must decide a petition within four months from the date of its admission. A motion for *leave for review* can be filed against the determination issued by the Authority within 10 days of service of the final order, determination or decision of the Authority. The Authority is required to decide upon a motion for review within 10 days either by way of granting leave or refusing leave, as the case may be. The 1998 Rules also provide for the standards and guidelines on the basis of which tariff is to be determined, modified or revised which essentially requires that the tariff be determined to allow the licensee the recovery of any and all costs prudently incurred to meet the needs of the consumers. In terms of Rule 19, the format of the tariff is such that it should show all requisite details necessary or appropriate

to explain the basis of all charges made. The schedule of the tariff must show the price or unit upon which it is based, meter rental along with service charges and any other details necessary for a complete understanding of the charges which make up the tariff.

9. The Federal Government introduced the National Power Policy, 2013 (**2013 Policy**), which sets out the targets and principles on the basis of which the Federal Government aims to achieve efficiency and sustainability and improve access to electricity at affordable prices. The 2013 Policy calls for tariff rationalization, low energy costs and protection for the poorer consumers of electricity. This Policy essentially supplements the earlier National Power Policy of 2002, which continues to be operational.

10. The Federal Government also issued the National Power Tariff and Subsidy Policy Guidelines, 2014 (**2014 Guidelines**), which describes the policy of the Government with respect to electricity pricing and cost of allocation so as to achieve a sustainable power sector. The Government has provided its guidelines with respect to the requirements of the annual tariff as well as the multi-year tariff and has also prescribed its subsidy policy. As per the stated policy, a Uniform National Tariff along with subsidies can ensure a more stable and affordable price for the consumption of electricity by its customers. The Government seeks to provide electricity-based subsidies to make electricity affordable for the poorer class of consumers by targeting low-income consumers and also

requires NEPRA to develop a process to address cost overruns in subsidy adjustments applicable to all DISCOs during the determination of their electricity tariff regardless of the fact that the tariff determinations are under an annual or multi-year regime. The 2014 Guidelines also require NEPRA to take into account any subsidy provided by the Government through the National Budget. Hence, the 2014 Guidelines seek to provide subsidies to promote efficiency, control pricing, rationalize electricity costs and protect consumer interest with respect to the affordability of electricity.

11. In exercise of powers under Section 7 of the Act read with Rule 3 of the 1998 Rules, the Authority formulated NEPRA Guidelines for the Determination of Consumer-end-Tariff, 2015 (**2015 Guidelines**), which provide for the methodology and process for determining the consumer-end-tariff of each distribution licensee by assessing the different components of the revenue required. The 2015 Guidelines provide for an annual tariff and multi-year tariff and in this context, the 2015 Guidelines provide for the minimum filing requirements by the licensee and formulae and principles for determining their revenue requirements. The 2015 Guidelines also prescribe the tariff determination process, the timelines and the requirement of an SOT. In terms of Guideline No.25 of the 2015 Guidelines, the SOT will assure full recovery of the revenue requirements based on regulatory targets and distribution licensees. Guideline No.28 provides that the SOT shall indicate the cross-subsidy and/or inter-region subsidy, if any, for the respective

class of consumers. Guideline No.30 requires the SOT to be notified by the Government in terms of Section 31(4) of the Act and once the SOT is notified, it shall remain effective until superseded by a new SOT notified by the Federal Government. As per the 2015 Guidelines, a tariff is subject to quarterly and annual adjustments based on capacity and transmission charges, the impact of transmission and distribution losses and adjustment of O & M variables.

12. The Federal Government issued the National Electricity Policy, 2021 (**2021 Policy**), which again identifies the goals sought to be achieved by the power sector with the vision to ensure access to electricity at affordable prices and environment-friendly outcomes. This Policy is to prevail over the 2015 Policy to the extent of any conflict or inconsistency. The Policy also stresses that NEPRA shall consider the socio-economic objectives, budgetary targets and any uniform tariff in line with Government Policy. The uniform tariff essentially ensures affordable electricity at the same price throughout the country. The 2021 Policy also specifically mentions that the Government will maintain a uniform consumer-end-tariff for K-Electric and other state-owned distribution companies even after privatization.

13. The scheme of the tariff determination legal regime is such that in terms of the Act, Section 7 read with Section 31, tariff determination can only be made by the Authority. This is one of the core functions of NEPRA and cannot be delegated to anyone. The Federal Government is required to notify the tariff

determined by NEPRA but cannot exercise this function itself. NEPRA determines the tariff as per the guidelines provided in Section 31(3) of the Act and is also to be guided by the National Electricity Policy, the National Electricity Plan and any Guidelines issued by the Federal Government from time to time with respect to the tariff. In this context, the Federal Government can make policies to protect consumer interest, encourage economic efficiency and to eliminate exploitation and economic distortions with respect to the consumption of electricity, which means it can offer subsidies to the consumers of electricity in furtherance of its policies. Consequently, Section 31(2) of the Act binds the Authority to consider all directions given by the Federal Government under the 2014 Guidelines, which sets out the government's subsidy policy. The mandate of the Act as given in Section 31 read with the 1998 Rules, being that NEPRA as the tariff determining authority, shall consider and build into the tariff any electricity subsidy offered by the Federal Government as per the 2014 Guidelines and issue the required SOT. In the context of the dispute before the Court, the process for determining the uniform tariff for K-Electric is an issue because K-Electric is a privatized public utility, being the only vertically integrated power utility in Pakistan, which means that it generates and distributes electricity for its consumers. The uniform tariff for K-Electric by way of practice was determined and notified by the Federal Government and not NEPRA due to K-Electric's unique feature of having a multi-year tariff and being vertically integrated. As a consequence, the

Federal Government would also adjust any subsidy in the tariff to give effect to its policies as it was issuing the SOT for the uniform tariff. This has become the basis of the dispute before the Court.

14. As per the Act, Rules, Guidelines and Policies, a tariff petition is filed by the licensee, considered by NEPRA by following due process and ultimately, a decision is given on the recommended tariff. This tariff is sent to the Federal Government for notification, upon which, it becomes the final and applicable tariff for the licensee. The tariff is subject to monthly, quarterly and bi-annual adjustments based on costs and charges, which fluctuate and need to be adjusted. Importantly, the Act envisions a timeline for tariff determination and its notification, so as to ensure that this is achieved within the financial year under discussion. However, as per practice, delays are caused in the notification process essentially on account of the challenges made to the determined tariff by NEPRA. The delay itself becomes a cause of dispute on account of the time lag created as the notified tariff has not been charged within the given timeframe. This issue has, to some extent, been dealt with by amendments to Section 31 of the Act in 2021 vide Notification dated 10.08.2021 of Act No.XIV (**2021 Amendments**). As per the amendment, if there is a delay in the issuance of a notification by the Federal Government then the tariff determined by NEPRA should be notified until the final tariff is decided and notified by the Federal Government. The

dispute before us, however, pertains to the period prior to the 2021 Amendments.

15. The issue which has been highlighted before us with reference to the tariff determination process and its delay also includes reference to the determination of the uniform tariff. This is a specific K-Electric problem because of its unique nature of being vertically integrated and having a multi-year tariff, which means it has a different tariff structure when compared with DISCOs. As per the information given by Mr. Sajid Awan, Additional Director General (Tariff), NEPRA the annual tariff of each DISCO is decided by NEPRA. The Federal Government then requests for a uniform tariff for all DISCOs which determination is made by NEPRA. So far as K-Electric is concerned, their multi-year tariff is determined by NEPRA and the Federal Government then provides the SOT for the uniform tariff based on the uniform tariff of the DISCOs. With reference to the facts of this case, SRO 576 is the multi-year tariff for K-Electric as determined by NEPRA and SRO 575 is the uniform tariff issued by the Federal Government. The left hand column of SRO 575 is the tariff contained in SRO 576 and the right hand column is the uniform tariff notified by the Federal Government. Interestingly, the uniform tariff is the one determined by NEPRA vide decision dated 19.12.2018 for all DISCOs, which was then applied to K-Electric. NEPRA has disputed the practice of the Federal Government with reference to determining the uniform tariff to K-Electric as well as with reference to making adjustments in the uniform tariff without

recourse to NEPRA on the ground that they are the sole tariff determining authority and that the Federal Government has no power to determine the tariff including the uniform tariff. While Mr. Sajid Awan, Additional Director General (Tariff) explained the procedure followed by NEPRA for tariff determination, he reiterated the fact that NEPRA has repeatedly been contesting its position with the Federal Government on the issue of tariff determination for K-Electric such that even for K-Electric the determination of the uniform tariff and adjustment of subsidies both fall within the domain of NEPRA. Syed Asif Hyder Shah, Secretary, Ministry of Energy (Power Division) explained the position of the Federal Government with reference to subsidies and concessions given by the Federal Government for relief to electricity consumers. In the case of K-Electric, he stated that they are slightly different from the DISCOs as their tariff structure is different and is generally higher than other DISCOs. Hence, the uniform tariff is also necessary in K-Electric's case. He also explained that K-Electric being the only vertically integrated company, generating and distributing electricity with a multi-year tariff has been one of the reasons for the delay in the tariff determination process as the DISCOs are all given an annual tariff and not a multi-year tariff, so being a new experience, it took time to settle some of the issues as a multi-year tariff is structured in a manner altogether different from the annual tariff. As per the Secretary, Ministry of Energy's understanding, the Federal Government as a supervisory body monitors activities in the field of power generation, transmission

and distribution with the objective to smooth out the workings of the power sector and to safeguard the interest of the power consumers. As per his understanding, NEPRA determines the tariff essentially to ensure that the licensee recovers its costs after following due process, whereas the Federal Government on the basis of the 2014 Guidelines seeks to rationalize the tariff to provide relief and concession to relevant categories of consumers after approval from the Economic Coordination Committee (**ECC**). He states, with reference to the 2021 Amendments, that the issues regarding the process of the determination of the uniform tariff for the K-Electric have been settled. The determination of the uniform tariff will be made by NEPRA and all adjustments which include adjustments to subsidies will also be made by NEPRA, as per Government policies from time to time.

16. What emerges from the discussion is that the Federal Government as per its policy seeks to provide subsidies with reference to electricity pricing, essentially to make electricity affordable for all income groups. At a macroeconomic level, energy subsidies are used by governments in developing countries to attain economic and social targets with reference to poverty alleviation and development, as electricity is directly linked with economic activity. Under the prevailing legal regime for tariff determination, the term subsidy has not been defined anywhere. The 2014 Guidelines provide for the policy of the government with respect to electricity pricing and cost allocation as well as subsidies so that electricity is affordable for those

segments of consumers to which the Federal Government intends to provide relief, being low-income consumers. In this context, the 2014 Guidelines require a uniform national tariff to balance the different cost profiles of different distribution companies. However, the term subsidy is not defined even in the 2014 Guidelines. The International Energy Agency (**IEA**) and Organization for Economic Co-operation and Development (**OECD**) have attempted to define subsidies¹ for the benefit of their reports and research as any government action that raises the price received by energy producers, lowers the cost of energy production or lowers the price paid by energy consumers, which means that subsidies are a tool used to make electricity affordable, especially with rising fuel prices. In this context, the concept of rationalization of the tariff through a uniform tariff is another tool as prescribed under the 2014 Guidelines to reduce the price of electricity. The concept of uniform tariff and its determination process is important. Essentially, NEPRA determines the tariff of each DISCO after ascertaining the prudence of costs based on the requirements of the DISCO. So each DISCO will have its tariff determined by NEPRA. The Federal Government then, as per its policy, seeks to rationalize the tariff to create one uniform tariff in the country so that everyone pays the same price for electricity effectively. Accordingly, the Federal Government applies to NEPRA to devise a uniform tariff, once the tariff for each of the DISCOs is determined. The Federal Government then takes the uniform

¹ World Energy Outlook 1999 Insights, Looking at Energy Subsidies: Getting the Prices Right

tariff and applies the same to K-Electric whilst issuing the SOT. Although the 2013 Policy and 2014 Guidelines speak of a uniform tariff, the methodology for arriving at a uniform tariff and its adjustment was not issued until 2018 and implemented vide decision dated 19.12.2018 by the Authority for all DISCOs. Based on the uniform tariff notified by NEPRA for the DISCOs, the Federal Government issued SRO 575 being the uniform tariff for K-Electric. This fact is evident from the decision by NEPRA dated 19.12.2018 where K-Electric was informed that its notification for the uniform tariff will be issued after the DISCOs notification for the uniform tariff is issued. Consequently, it notified SRO 576 and SRO 575 on the same date i.e., 22.05.2019. The essential fact being that the uniform tariff for K-Electric as notified by the Federal Government is the uniform tariff determined by NEPRA for the DISCOs.

17. The question before us is the procedure adopted by the Federal Government to effectuate SRO 810. This issue has arisen because Section 31 of the Act categorically requires NEPRA to determine the tariff which includes a uniform tariff, keeping in view, Government subsidies. However, in this case, the Federal Government itself determined the SOT for SRO 810, by adjusting the uniform tariff for K-Electric. In dispute before us, SRO 12 was notified by the Government of Pakistan, Ministry of Energy (Power Division) under Section 31(7) of the Act, which introduced the Rs.3/kWh subsidy for industrial consumers on 01.01.2019. On 22.05.2019, SRO 576 notified the multi-year tariff for K-Electric as determined by NEPRA.

Essentially, on the same day, the Federal Government notified its uniform tariff vide SRO 575 by showing NEPRAs tariff in the left hand column and the uniform tariff in the right hand column. After the issuance of SRO 810, the Federal Government issued the Corrigendum with the SOT which made the necessary adjustment to the SOT in SRO 575 on account of SRO 810.

18. The case of the Appellant (K-Electric) is basic, that after the issuance of SRO 575 being the uniform tariff they were bound to follow the SOT of the uniform tariff determined by the Federal Government. When SRO 810 was notified, they found themselves unable to implement the same because there was no SOT with the SRO. In this context, a period of six months was consumed before the SOT was issued by way of the Corrigendum. During these six months, the consumers were getting the benefit of SRO 12 vide SRO 575 despite the issuance of SRO 810. This means that the consumers were enjoying a subsidized rate on *off-peak hours* even though SRO 810 had withdrawn this subsidy and limited the subsidy to Rs.3/kWh on *peak hours*. Consequently, K-Electric claims that in order to give effect to SRO 810 and adjust the benefit availed by the consumers to the extent of *off-peak hours* the same had to be done in the subsequent bills after the Corrigendum was issued. The consumers challenged the same on various different grounds and ultimately, the impugned judgment declared the Corrigendum illegal which means K-Electric is unable to recover arrears exceeding Rs.6 billion from the consumers.

19. The impugned judgment has tried to rectify this problem by requiring K-Electric to charge electricity for *off-peak hours* on the basis of the left hand column of SRO 575 being the NEPRA-determined tariff and for *peak hours* on the basis of the right hand column of SRO 575 being the uniform tariff notified by the Federal Government. However, we find that this direction does not resolve the matter. The entire dispute was with reference to the issuance of the Corrigendum, the effect of which was to effectuate SRO 810. As K-Electric required an SOT to give effect to SRO 810, its recourse was to NEPRA, who has to make the adjustments. The Act and the Policy Guidelines, all make clear that NEPRA determines the tariff, be it annual, multi-year or uniform and the Federal Government notifies the tariff. So far as any adjustments to the tariff are concerned, they are also to be made by NEPRA, whether it is under Section 31 of the Act, being a monthly adjustment or under the 2014 Guidelines, being quarterly or bi-annual adjustment. The SOT is also to be issued by NEPRA, detailing the tariff and the charges it contains. Hence, the impugned judgment could not have declared the manner in which K-Electric should charge consumers for *peak hours* and *off-peak hours* based on the Federal Government subsidy. This squarely falls within the domain of NEPRA. Furthermore, tariff determination is a complex and technical process, for which, NEPRA has been established. A detailed regime exists with procedures, process and guidelines on tariff determination which in no manner empowers the Federal Government to determine or adjust the

tariff. This is the clear mandate of the Act yet for some reason confusion persisted with reference to K-Electric and its uniform tariff, possibly due to its unique nature. However, the 2021 Policy have made clear to the Federal Government that they cannot determine the uniform tariff nor make adjustments to the tariff nor issue any SOT even for K-Electric as this must be done by NEPRA. So far as the finding in the impugned judgment that it is just mathematical adjustments, we find that the Court has oversimplified a complex process for computing and adjusting tariffs, which fell within the domain of NEPRA. The effect of SRO 810 and the required adjustments to the SOT need to be computed by NEPRA, so as to ensure the implementation of the government subsidy SRO 810.

20. Now coming to the Appellants, the Consumers' grievance, they challenged the issuance of the Corrigendum, as it was not routed through NEPRA. This part of their grievance is correct that the Corrigendum providing the SOT was issued by the Federal Government. They also challenged SRO 810, claiming that it could not be given effect to as the ISP given in SRO 12 had become an integral part of the tariff in SRO 575, therefore, SRO 810 could not amend SRO 12. Their argument is that the subsidy in SRO 12 has become part and parcel of the tariff, hence, cannot be withdrawn or modified. This argument is flawed and the High Court did not appreciate the matter in its entirety. The impugned judgment has called the withdrawal of part of the ISP vide SRO 810 a *mathematical exercise*, which led to the issuance of the Corrigendum. The Court then proceeded

to correct the mathematical error by directing which SOT to charge for *peak hours* and *off-peak hours*, however, the issue of adjustments remains for the period when SRO 810 was issued until the Corrigendum and even after that. The Federal Government is well within its right to introduce, modify or withdraw subsidies. This is an integral part of its socio-economic policies, which NEPRA must give effect to as per Section 31 of the Act. So a consumer of electricity is entitled to a subsidy as long as it is offered by the Federal Government and is bound by any modifications or withdrawals made by the Government. To give effect to a subsidy it is built into the tariff, as its obvious outcome is to reduce the price of electricity. So a subsidy is given effect through the tariff. There is no vested right in favour of the consumer with reference to a subsidy, simply because the subsidy is built into the tariff. Effectively, a subsidy is a relief package offered to consumers and remains operative for as long as it is required as per Government policy. In order to take the benefit of the subsidy, it has to be calculated in terms of the tariff, therefore, even if, it is reflected as a part of the tariff or separately it remains a subsidy and does not merge into the tariff. Essentially, it is based on a policy decision of the Federal Government and is not the outcome of a NEPRA determination. As per Section 31 of the Act, NEPRA is guided by government policies and must consider them, which means that it must reflect the subsidy through the tariff. Hence, the petitions filed by the Consumers seeking the continuation of SRO 575 and the declaration that SRO 810 is illegal were

without basis as the ISP was modified vide SRO 810, which was a policy decision and had to be given effect to. In this context, we find that the High Court had no jurisdiction to calculate the tariff as a dispute pertaining to the tariff should be decided by NEPRA.

21. The SOT issued by the Corrigendum is in issue. The impugned judgment failed to appreciate the significance of the SOT, which was necessary for K-Electric to give effect to SRO 810, because SRO 575, which provided the SOT for the uniform tariff for K-Electric, included the benefit of SRO 12. In order for K-Electric to remove part of the benefit from *off-peak hours*, they required an adjustment in the SOT of the uniform tariff, meaning that, they required an amendment to the SOT. It took the Federal Government six months to figure this out before they issued the Corrigendum that too without recourse to NEPRA. Resultantly, the Consumers before the Court all enjoyed the benefit of SRO 12, which they were not entitled to after its modification vide SRO 810. The solution to this issue is simply that the Federal Government and K-Electric place this matter before NEPRA for adjustments, so as to ensure that the Consumers adjust all amounts which they have received by way of the subsidy (SRO 12) for *off-peak hours* (SRO 810). As this adjustment means adjustment to the uniform tariff it must be done by NEPRA after following due process. Interestingly, the Consumers accept the uniform tariff in SRO 575 for K-Electric, which is without recourse to NEPRA, as the SOT for the uniform tariff was issued by the Federal Government. Yet they do not

accept the subsequent Corrigendum and its SOT whereby the Federal Government was giving effect to its own policy of modifying the ISP. This is a contradictory position taken by the Consumers, as the entire issue is with respect to NEPRA's authority to determine the tariff and make any subsequent adjustment to the tariff. Accordingly, they never questioned SRO 575, issued by the Federal Government, yet challenged the Corrigendum, simply to prevent the modification of the ISP from SRO 12 to SRO 810. Consequently, we find that the petitions before the High Court were without merit, the Consumers have no vested right to claim the benefit of a subsidy, which is based on Government policies. Hence, their petitions were liable to be dismissed.

22. So far as K-Electric is concerned, the adjustments they seek have to be determined by NEPRA, hence, they should have approached NEPRA in the first instance. However, as there was confusion over the procedure with respect to the determination of K-Electric's uniform tariff and its SOT and any subsequent adjustments, even NEPRA appears to be in doubt especially given the Federal Government's position that it was authorized to notify K-Electric's uniform tariff without recourse to NEPRA. Effectively, the issue now stands to rest as per the 2021 Amendments and as per the Federal Government's own understanding, it will apply to NEPRA for the K-Electric uniform tariff in the future and for any adjustments.

23. Finally, on the issue of retrospective application, we find that even this contention has no merit as Section 31 of the

Act requires NEPRA to determine the tariff, the Federal Government notifies the tariff and allows NEPRA to make adjustments on a monthly basis on account of fuel charges or policy guidelines. The 2014 Guidelines allow quarterly and bi-annual adjustment to ensure that all costs and variables are properly reflected in the tariff. Hence, the law provides for regular adjustments to the tariff, which are given effect to by NEPRA. In this case, the adjustment to the tariff with respect to a government subsidy is based on a policy guideline. This means that once a subsidy is offered, modified or withdrawn, it must be given effect to by way of an adjustment. In the proper course of the procedure with the issuance of SRO 810, K-Electric should have moved an application to NEPRA for an SOT incorporating the adjustment required consequent to SRO 810. This is because K-Electric has to charge electricity as per its SOT and cannot go beyond the SOT. NEPRA would have issued the SOT reflecting the modification in the ISP to the extent of *peak hours*. Hence, the adjustment is of the ISP by way of an SOT, which reflects the change. Without this change, K-Electric cannot give effect to SRO 810. Similarly, the 2014 Guidelines also require bi-annual and quarterly adjustments to the tariff which are required to update the tariff with reference to costs, charges, losses and expected charges to given components. As the concept of adjusting the tariff is provided for under the Act and 2014 Guidelines, it is a necessary and integral part of the tariff determination regime, which must be followed. The adjustments *per se* are made to the tariff,

subsequent to its determination and are built into the tariff determination regime. In this case, the adjustment from SRO 12 to SRO 810 must be made as the Consumers have no right to claim a subsidy beyond what is offered. This adjustment has to be given effect to from the date of SRO 810. The manner in which it is done is for NEPRA to decide, but its application is protected under the scheme for adjustments. Hence, the entire argument based on the retrospective application of the tariff is misconceived and misleading, as it is the subsidy, which is being adjusted and not the tariff.

24. Consequent to the aforementioned, the appeals as well as the petitions filed by the Consumers are dismissed. The Appeals of K-Electric are allowed to the extent that the working given by the High Court in Para 42(b) of the impugned judgment is set aside and the matter of adjustment consequent to SRO 810 may be referred to NEPRA for its determination and issuance of an SOT amending the uniform tariff for K-Electric.

CHIEF JUSTICE

JUDGE

Islamabad
19th January, 2023
'APPROVED FOR REPORTING'
*Azmat/Alizeh**

JUDGE