

IN THE SUPREME COURT OF PAKISTAN

(Original Jurisdiction)

Present:

Mr. Justice Iftikhar Muhammad Chaudhry, CJ

Mr. Justice Jawwad S. Khawaja

Mr. Justice Amir Hani Muslim

HUMAN RIGHTS CASE No.14392/2013

(Action taken on a news clipping published in Daily Pakistan dated 17.04.2013 regarding Unprecedented load-shedding in the Country)

AND

HUMAN RIGHTS CASE NO.790-G/2009

(Action taken on a News clipping published in Daily Jinnah, Islamabad dated 14.04.2009 Regarding increase in the electricity prices)

AND

SUO MOTU CASE No.1/2013

(Action against grant of 450 & 200 illegal CNG stations licenses during the tenure of two Ex-Prime Ministers, namely, Syed Yousaf Raza Gillani and Raja Pervez Ashraf)

AND

CIVIL PETITION No.455/2013

OGRA through its Secretary

Vs.

M/s Midway II, CNG Station and others

(On appeal from the order dated 28.03.2013 of the Lahore High Court, Rawalpindi Bench passed in ICA No.189/ 2012)

For the Applicant(s)

: Mr. Aamir Malik, ASC (for Hajveri CNG)
Mr. Zulfiqar Khalid Maluka, ASC
(for Shahwani CNG and Renala Petroleum CNG)
Mr. Hassan Raza Pasha, ASC (for Raees & Chinnar CNG)
Syed Nayab Hassan Gardezi, ASC (for TMG,CNG)
Miangul Hassan Aurangzeb, ASC (for Bukhari,CNG)
Mr. Shahid Kamal Khan, ASC (for Midway & Liaquat CNG)
Raja Amir Abbas, ASC (for M/s Energy Comforts)
Mr. M. Munir Paracha, Sr. ASC (for Bugti CNG)
Mr. Salman Akram Raja, ASC with
Mr. Mehmood A. Sh. AOR (in CMA.3399/13)
Mr. Kowkab Iqbal, ASC (in CMA.5527/13)
Raja Abdul Ghafoor, ASC/AOR(in CMA No.6459/13)
Mr. Muhammad Azhar Siddique, ASC with
Mr. Arsahd Ali Chaudhry, AOR (in CMA.6738/2013)
Mr. Tariq Javed, ASC (In CMA-6699/13)
Nemo.(in CMA No.3671/13)

On Court's Notice	: Mr. Muneer A. Malik, Attorney General for Pakistan.
For Govt. of Balochistan	: Mr. Muhammad Farid Dogar, AAG
For Govt. of KPK	: Mr. Zahid Yousaf Qureshi, Addl.A.G.
For Govt. of Punjab	: Mr. M. Hanif Khatana, Addl.A.G. Ms. Afifa Jabeen, Asstt. Manager, Energy Dept.
For Govt. of Sindh	: Mr. Qasim Mirjat, Addl.A.G. Mr. Karim Bakhsh Sheikh, Addl. Secy. (Energy)
For PEPCO, NTDC & OGRA	: Syed Iftikhar Hussain Gillani, Sr. ASC Syed Safdar Hussain, AOR Mr. Zargham Eshaq, Acting MD, PEPCO. Mr. Saeed Ahmed Khan, Chairman, OGRA Mr. Abdul Basit Qureshi, PLO Mr. Rizwan-ul-Haq, ED (Legal) Ms. Misbah Yaqoob, JED Mr. Noor-ul-Haq, JED.
For WAPDA	: Mr. Moazam Ali Rizvi, ASC Mr. Manzoor Hussain, CE (Hydel)
For SNGPL	: Mr. Asim Hafeez, ASC Mr. Faisal Iqbal GM(F) Mr. Amjad Latif, SGM(D)
For SSGC	: Mr. Asim Iqbal, ASC Mr. Shoaib Warsi, Sr. G.M. Mr. Ejaz Ahmed, Sr. G.M. Syed Shehyar Kazmi, D.G.M
For KESC	: Mr. Abid Zubairi, ASC
For NEPRA	: Mr. Rashideen Nawaz Qasuri, ASC Ch. Akhtar Ali, AOR Kh. Muhammad Naeem, Acting Chairman
For PPIB	: Barrister Asghar Khan, Sr. Law Officer.
For IRSA	: Mr. Waqar Rana, ASC Mr. M.S. Khattak, AOR
For AEDB	: Nemo.

For PHYDO	: Mr. Saqib Mushtaq, Assistant Director
For DISCO's	: Mr. Muhammad Ilyas Khan, Sr. ASC Mr. Mehr Khan Malik, AOR
For M/o Petroleum	: Mr. Nazir Malik, Dir (L).
For Mari Petroleum Co.	: Mr. Javaid Iqbal Jadoon, G.M (Operations)
For Pak Arab & Fatima Fertilizer	: Mr. Khalid Anwar, Sr. ASC Raja Abdul Ghafoor, AOR
For Fauji Fertilizer Co.	: Mr. Muhammad Munir Peracha, Sr. ASC Mr. Sheraz Ahmed, Manager (Legal)
For Fauji Fertilizer Bin Qasim	: Mr. Imtiaz Rashid Siddiqui, ASC Mr. Iqbal Hashmi, Legal Advisor
For DH Fertilizer & Engro	: Mr. Feisal Naqvi, ASC Mr. Andaleeb Alvi, Legal Advisor.
For KW & SB	: Mr. Abrar Hassan, Sr. ASC Mr. Masood Ahmad Alvi, ASC
For FIA	: Nemo.
For FBR	: Nemo.

Constitution Petition No.33 & 34 of 2005

Engineer Iqbal Zafar Jhagra
Senator Rukhsana Zuberi

...Petitioners

Versus

Federation of Pakistan and others

...Respondents

CMA's 5962 of 2013 in C.R.P NIL of 2013
in CMA 3821 of 2013 in Const.P.33/2005 etc.
(for permission to file C.R.P.)

For the petitioners:	Mr. M. Ikram Ch. ASC (in Constitution Petition No.33/05) Nemo (in Cons.P.34/05)
For the applicant:	Dr. Rana M. Shamim, ASC (in CMA 5962 of 2013)
For the Federation:	Mr. Muneer A Malik, Attorney General for Pakistan

Raja Abdul Ghafoor, AOR
Assisted by: Mr. Faisal Siddiqui, Adv.

For FBR: Mr. Shakeel ur Rehman, ASC
Mr. Arshad Ali Chaudhry, AOR

For OGRA: Mr. Salman Akram Raja, ASC
Mr. Saeed Ahmad Khan, Chairman
Mr. Abdul Basit, Law Officer
Ms. Misbah Yaqoob, JED(F)

For M/o Petroleum: Ch. Akhtar Ali, AOR

For M/o Finance: Nemo

For M/o Climate Change: Mr. Dilawar Khan, Dy. Director

For OCAC: Nemo

Dates of hearing: 6, 7, 11, 12, 13, 19 & 20 November
and 2 & 3 December, 2013

J U D G M E N T

IFTIKHAR MUHAMMAD CHAUDHRY, CJ.— Energy has acquired great importance in our daily life. It is part of our life more than ever before. From aircrafts to cars, televisions to cell phones, air conditioning to water heating, pharmaceuticals to plastics and fertilizers to cement, energy makes it all possible. Beyond the requirement of peoples' domestic use, energy is essential for wide range of essential activities, namely, agriculture, construction, manufacturing, health and social services. Without availability of energy, familiar elements of modern life would not exist. There are more than 7 billion people on Earth who use energy to make their lives safer, healthier and more productive. Every single product we buy, bread or cloth, requires energy. The desire of human being to improve its living standard is the biggest driver of energy demand.

2. It is a well-known fact that in future, in developing countries, the energy demand will grow around 60%. The most significant fact in increase in energy demand is the growing electricity requirement. For electricity generation, natural gas, which emits up to 60% less carbon-dioxide emissions than coal, will be the fastest-growing major fuel. The energy demand growth requires unprecedented levels of investment and the pursuit of all energy sources.

3. In order to emerge from global recession and financial crisis, countries are looking for solutions to improve domestic economic performance. The energy sector constitutes a relatively modest share of GDP in most countries. However, its impact on the economy is much greater, as goods and services could be provided without it. Thus, availability of energy at reasonable price is required to reignite, sustain and expand economic growth.

4. In the world of the 21st century, it seems unfathomable for life to carry on without the provision of an uninterrupted supply of energy in the form of electricity. Electricity pervades every part of human life; so much so that the economy, particularly industry, is heavily dependent on electricity. Fossil fuels, which are used in producing electricity, are fast depleting the world over. We as a nation need to do whatever we can to conserve energy so that we can continue to progress. The availability of energy and the progress of a nation-state are inextricably linked. Article 38 of the Constitution commands, "The State shall.....secure the well-being of the people... by raising their standard of living..." Without energy, there can be no

progress, no development which will raise the standard of living of the people as commanded by Article 38 *ibid*. A country without energy is a country paralysed. Unfortunately, this is the case with Pakistan. We are constantly faced with massive loadshedding, particularly of electricity in the summer season and of gas in the winter season. Our once thriving industries are now reduced to a state of non-functionality. The everyday life of the common man is hampered by this massive loadshedding. No economic sector can be expected to run without the provision of energy.

5. In the month of April, 2013 it was reported in the print and electronic media that there was severe shortfall of electricity in the country. The news clippings published in the Daily "Dawn" and " " wherein it was mentioned that the Chairman of Pakistan Industrial and Traders Associations Front (PIAF) appealed to the Chief Justice of Pakistan to take notice of unprecedented loadshedding due to which industrial production had nosedived. The news items were placed before one of us (Chief Justice) and the office was directed to put up the matter. The matter was registered as Human Rights Case No.14392/2013 and put up in Chambers, having seen the acute shortage of electricity, as was evident from the contents of news clipping, the matter was dealt with under Article 184(3) of the Constitution because it involved fundamental rights of general public under Articles 9, 18 and 25 of the Constitution and was directed to be put in Court.

6. It is to be noted that in the matter of: Alleged Corruption in Rental Power Plants (2012 SCMR 773) this Court has held the

provision of electricity comes under the guarantee of the right to life enshrined in Article 9 of the Constitution as interpreted in the celebrated judgment of Shehla Zia v. Federation of Pakistan (PLD 1994 Supreme Court 694). Thus the matter is undoubtedly one of public importance concerning the fundamental rights of the people of Pakistan. In the Rental Power Plants case (*ibid*) we have dilated upon such matters at great length, so there it is beyond doubt that the Supreme Court has jurisdiction to adjudicate on the provision of energy to the people of Pakistan. The relevant portions of the said judgment are reproduced as under: -

5. It may be stated that in Pakistan, electricity is produced from hydel, oil, gas, coal and nuclear sources. Hydel and thermal power generation was previously under the control of WAPDA. To augment the generation capacity to meet demand and eliminate inefficiencies due to WAPDA's growth, demand suppression and high tariff policy and proliferated theft, WAPDA's Power Wing was restructured/segregated into twelve (12) distinct autonomous entities under the Companies Ordinance 1984, viz., three generation, one transmission and eight distribution corporate entities. Thus, electricity generation from thermal sources is under the control of Generation Companies (GENCOs) carved out of WAPDA, which are exclusively owned by the Government of Pakistan. These companies have long term projects called IPPs, spreading over a period of 25 to 30 years. The electric power generated by GENCOs is delivered to NTDC, which in turn, delivers the same to DISCOs. The DISCOs then sell it to the consumers under the contracts of electric powers on specified terms.

At the same time, in view of the non-availability of the

information regarding generation of electricity by PEPCO on its website (www.pepco.gov.pk), on 16-3-2012 the Registrar was directed to procure the following information: -

- (i) Total generation capacity (Hydel, IPP, RPP, etc.);
- (ii) Total electricity generated for the last one year (Hydel, IPP, RPP, etc.), if shortage, assigned reasons;
- (iii) Detail of IPPs, which are generating and not generating electricity and the reasons for the same;
- (iv) Monthly/weekly average of production of each RPP;
- (v) Net demand of electricity for each month during the last one year; and
- (vi) As to why PEPCO website is not being updated?

In response to above query, following details about the total installed generation capacity and dependable capacity have been received: --

MONTH	1	2				
	Total Generation Capacity /Installed Capacity (MW)	DEPENDABLE CAPACITY (MW)				
		HYDEL	IPP'S	GENCO'S	RENTAL	TOTAL
SCP Require-ment # (i)	(i)					
Mar-11	20686	3850	8305	3580	323	16058
Apr-11	21021	4068	8295	3580	594	16537
May-11	21030	5519	8297	3580	594	17990
Jun-11	21030	5142	8300	3580	594	17616
Jul-11	21030	5649	8300	3580	594	18123
Aug-11	21030	6437	8300	3580	594	18911
Sep-11	21030	6673	8300	3580	594	19147
Oct-11	21030	6437	8300	3580	594	18911
Nov-11	21030	4240	8300	3580	594	16714
Dec-11	21030	4926	8300	3580	594	17400
Jan-12	21030	4255	8300	3580	594	16729
Feb-12	21030	5030	8300	3580	594	17504

Similarly, the detail of total electricity generated, viz., the net demand and shortfall/load management was provided as under:--

	3					4	5
Month	Total Electricity Generated (MW) SCP Requiriement # (ii)					Net Demand of Electiri-city/Peak System Demand (MW)	Shortfall/ Load Manageme nt (MW)
	Hyde l	IPP'S	GENC O 'S	Monthly Av. Producti ion of RPPS	TOTA L		
SCP Require -ment # (i)				(iv)		(v)	
Mar-11	3454	4741	1789	61	10045	14981	4936
Apr-11	4216	5923	1377	88	11604	15796	4192
May-11	5228	6931	1462	103	13724	17302	3578
Jun-11	5145	6790	2000	112	14047	18511	4464
Jul-11	5224	5636	1793	143	12796	18860	6063
Aug-11	5657	6632	1859	67	14215	18677	4462
Sep-11	5995	5197	1256	119	12567	18544	5977
Oct-11	4359	4109	1268	153	9889	17554	7665
Nov-11	3993	6647	1547	215	12402	14156	1754
Dec-11	3784	3760	1701	135	9380	14475	5095
Jan-12	2472	5498	1708	134	9812	13685	3873
Feb-12	4923	4830	1587	83	11423	14691	3268

.....

- The reasons assigned for power shortages are as under: -
- Requirements as per Serial Nos (ii) and (iii) of the Directions of Hon'able Supreme Court of Pakistan
- (ii) Total electricity generated for the last one year (Hydel, IPP,RPP, etc.) if shortage, assigned reasons.
- (iii) Detail of IPPs, which are generating and not

generating electricity and the reasons for the same

Operational Constraints of the Power Generation and Distribution System

1. Diversion of gas, reduced power generation and increased cost of generation whereas no tariff increase allowed from FY 2003 to FY 2007, despite steep increase in generation cost due to surge in oil prices.

1(sic). Overdue rehabilitation of distribution network and Public Sector Generation Companies (most of the plants have been outlived) due to time and financial constraints causing increase in distribution and generation losses.

2. Increased non-payment of bills (collection issues, including extra ordinary stay by the courts) and Kunda Culture

3. Mismatch between cost of supply and tariff triggered birth of circular debt and adversely affected fuel supplies to IPPs and GENCOs plants.

4. IRSA releases water from dams exclusively as per cultivation requirement and not for power requirement.

Other Reasons:

5. Public Sector was not allowed to add new capacity in thermal since long time resulting in no capacity additions during 2003-2008

6. Quantum jump in power demand (7% to 14%) due to:

- Consumption led growth strategy of 2002-2008 - influx of millions of household appliances.
- Continuous increase in rural electrification since 2002 onwards.
- Increased demand for agri-tubewell loads - over 80,000 new connections.

7. Extra high Load growth in urban areas (20%)

8. Air-conditioning load exceeds 5000 MW and is

being added each year.

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21. It has been admitted on behalf of PEPCO and GENCOs that phenomenon of rental power projects to overcome the shortage of electric power was introduced by the Government for the first time in the year 2006, considering it to be a short term measure. Two unsolicited rental contracts were executed with Messrs Alstom for 136 MW at Bhikki and Messrs General Electric Power for 150 MW at Saharanpur respectively.

67. The necessity in introducing the concept of RPPs is apparent from the facts that in the year 2006 when the then Government decided to adopt the phenomenon of rental power projects, no feasibility study was carried out which is crucial because study is based on the input of the experts on the subject to determine whether or not the implementation of the project is advisable. It is well known that feasibility study is based on the extensive research to ascertain that what would be the impact of such a project in terms of costs of the project, its results, future prospects, operational implications, advantages and disadvantages, keeping in view the situation like alleged shortage of electricity. The Government had formulated energy policies in the years 1994-2002 on the basis whereof IPPs were installed, therefore, had the Government allowed the experts on the subject of electric energy/power to examine merits and demerits of introducing the RPP regime, it would have helped in implementing the Rental Power Projects in a highly transparent manner. It is a fact that during the previous regime, Rental Power Projects were installed at Sharaqpur and Bhikki on the recommendation of WAPDA. Though it is stated that tender notices were issued in the newspapers, but no response was received, however, copies of such notices have not been made available on record. Further, it is alleged that decision to install RPPs was based on the recommendations of ECC dated 16-8-2006 in the case No.ECC-135/9/06, contents whereof have been reproduced hereinabove, but it pertained to 150 MW at Piranghaib, Multan, and subsequent thereto another project on the same site for 192 MW was approved contrary to the PPRA Rules (detailed discussion has been made hereinabove) and the same was signed off, which caused considerable loss to the public exchequer.

7. It is an undisputed fact that existing resources, i.e. Hydel and Thermal, etc., as is evident from the above paras, are not sufficient to cater for the basic electricity requirements. Inasmuch as, the IPPs were installed but IPPs and other re-sources which have been used for generation of electricity had not proved sufficient.

8. At this stage, it would be appropriate to note that this Country has been facing electricity crises since long. Previously, in the year 1990, the scheme of Independent Power Projects (IPPs) was launched. Under the said scheme many power projects were established. With regard to one of the IPPs, namely, HUBCO Power Purchase Agreement was executed on 03.08.1992 along with an Implementation Agreement guaranteeing due performance of the aforesaid Agreement. A Sovereign Guarantee was also executed on behalf of the President of Pakistan undertaking to pay the amount falling due under the aforesaid agreement. The agreement was supplemented and amended by the Supplemental Deed dated 16.11.1993. Thereafter, the agreement was amended on 24.02.1994 and 17.10.1994. There was allegation of corruption and corrupt practices in the award of said agreement, which culminated into litigation. On 08.05.1998 a Writ Petition No.8755 of 1998 was filed in Lahore High Court under "public interest litigation", inter alia, asserting that amendment No.2 to the Power Purchase Agreement being without consideration, unauthorised, illegal and fraudulent was ineffective in law. The High Court directed WAPDA to pay Rs.761million per month more to HUBCO than the amount which was paid to other concerned using similar technology. Civil Petition for leave to appeal filed in this

Court by HUBCO was disposed of with consent of the parties. The dispute remained pending adjudication before various forums including International Chamber of Commerce, Civil Court, High Court and this Court, when ultimately this Court vide order dated 14.06.2000 passed in the HUB Power Company Limited v. Pakistan WAPDA(PLD 2000 SC 841) HUBCO was restrained from invoking the arbitration clause of the agreement for the following reasons: -

“The allegations of corruption in support of which the above mentioned circumstances do provide prima facie basis for further probe into matter judicially and, if proved, would render these documents as void, therefore, we are of the considered view that according to the public policy such matters, which require finding about alleged criminality, are not referable to Arbitration.

The disputes between the parties are not commercial dispute arising from an undisputed legally valid contract, or relatable to such a contract, for, according to the case of WAPDA on account of these criminal acts disputed documents did not bring into existence any legally binding contract between the parties, therefore, the dispute primarily relates to very existence of a valid contract and not a dispute under such a contract.”

9. In the meantime, on 16.12.1997, to provide for the regulation of generation, transmission and distribution of electric power and matters connected therewith and incidental thereto, the Regulation of Generation, Transmission and Distribution of Power Act, 1997 was promulgated. In 1998, Pakistan Electric Power Company (PEPCO) was incorporated under the Companies Ordinance, 1984 with a view to improve the efficiency of the power sector, to meet customers' electric energy requirements on a sustainable and environmental friendly basis, to stop loadshedding, to construct new grid stations, to reduce line losses, to minimize tripping and theft control, to revamp generation units and to improve customer services,

and develop an integrated automated power planning system for generation, transmission and distribution to ensure system stability, fault isolation and upgrade relaying, metering and tripping system at the level of National Transmission and Distribution Company (NTDC) as well as Distribution Companies (DISCOs).

10. In the military regime, phenomenon of Rental Power Projects (RPPs) to overcome the shortage of electric power was introduced by the Government in the year 2006, considering it to be a short term measure. Two unsolicited rental contracts were executed with Messrs Alstom for 136 MW at Bhikki and Messrs General Electric Power for 150 MW at Saharanpur respectively. However, both the projects failed to generate electricity up to their maximum capacity. Despite failure of the phenomenon, in the year 2008 again the government adopted mode of generating electricity through RPPs as is evident from the paras from RPPs case, reproduced hereinabove.

11. It is to be noted that as the natural gas was to be used for both these RPPs as the fuel and availability factors of both the plants were 92% and both the projects generated (MKWH) 1515 and 816 respectively on account of plant factor average 39% and 26% comparing to availability factor 92%. The financial impact was on account of CPP tariff determined by NEPRA (Rs./kW/Month) and CPP-FOM charge (Rs./kW/Month). Thus, due to tariff determination by the NEPRA according to the available formula, considerable losses occurred to NPGCL. Despite failure of the phenomenon, in the year 2008 again the Government adopted mode of generating electricity through RPPs as is evident from the portion of judgment from RPPs' case (supra),

reproduced hereinabove.

12. It may also be observed here that this Court has already observed in RPPs' case (supra) that the NEPRA being an independent regulatory body had to perform its functions according to law. As per section 7(3)(a) of the Act, 1997, NEPRA is exclusively responsible for determining tariff, rates, charges and other terms and conditions for supply of electric power services by the generation, transmission and distribution companies and recommend to the Federal Government for notification. Under section 7(6) of the Act, 1997, the NEPRA is mandated to protect the interests of consumers and companies providing electric power services in accordance with the guidelines, not inconsistent with the provisions of the Act, laid down by the Federal Government. Therefore, the NEPRA cannot close its eyes and determine tariff contrary to the provisions of the Act, 1997. Further, under section 31 of the Act, 1997 and Rule 17(2) of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998, the NEPRA is required to lay down procedures and standards for the purpose of determination of tariff. However, it might not be possible for the NEPRA to discharge its functions because of the instructions and interference by the Ministry of Water and Power, which had been issuing instructions from time to time, but in any case, instead of following mandatory provisions of the Act, 1997, the NEPRA ought not to have compromised its position.

13. The Court has been informed that there are number of factors of energy crises, especially the shortfall of electricity, including increase in demand of electricity due to increase in population, new

electric connections, electric supply to new villages; decrease in generation of electricity due to shortage in river waters, non-availability of CNG/Natural Gas, non-construction of new dams; inefficient power plants; theft and non-payment of electricity bills; and line losses, etc. Besides, corruption, inefficiency, mismanagement and defective planning in WAPDA are also contributory factors for increase in loadshedding. In this regard, countrywise load management schedule was placed before Court, which reads as under: -

COMPANY WISE SUMMARY FOR PRESENT LOAD MANAGEMENT												
S#	CATEGORY OF CONSUMERS		LESCO	GEPCO	FESCO	IESCO	MEPCO	PESCO	HESCO	SEPCO	QESCO	TOTAL
1	DOMESTIC	NO OF CONSUMERS	2,931,053	2,335,039	2,802,867	1,946,045	4,101,073	2,442,486	744,606	560,270	403,012	18,266,451
		AVG. LOAD (MV) %AGE	1,790	608	561	1,345	1,827	1,544	647	843	180	9,345
		OF LOAD SHEDDING DURATION (HOURSE)	39%	33%	53%	69%	58%	68%	65%	84%	11%	51%
			10	12	12.5	10		06 to 12	8	10	4	
2	COMMERCIAL	NO OF CONSUMERS	509,823	294,057	323,721	328,343	432,563	278,847	140,127	112,282	98,023	2,517,786
		AVG. LOAD (MV) %AGE	320	210	16	166	252	169	73	15	30	1,251
		OF LOAD SHEDDING DURATION (HOURSE)	7%	12%	2%	9%	8%	7%	7%	1%	2%	7%
			10	12	12.5	10		06 to 12	8	10	10 to 12	
3	Agri t. Wells	NO OF CONSUMERS	56,100	40,342	37,933	7,918	73,810	23,220	15,674	12,287	24,031	291,315
		AVG. LOAD (MV) %AGE	721	306	147	-	410	117	116	73	1,215	3,105
		OF LOAD SHEDDING DURATION (HOURSE)	16	17%	14%	0%	13%	5%	12%	7%	75%	17%
			10	12	12	10		06 to 12	8	10	16 to 18	
4	INDUSTRIAL	NO OF CONSUMERS	72,544	56,680	43,657	13,919	48,064	28,906	13,381	11,455	3m418	292,024
		AVG. LOAD (MV) %AGE	1,733	657	337	202	662	406	166	76	10	4,249
		OF LOAD SHEDDING DURATION (HOURSE)	38%	36%	32%	10%	21%	18%	17%	8%	1%	23%
			10	12	11	10		04 to 08	8	10	12	
5	AJK	NO OF CONSUMERS	-	11	-	104	-	29	-	-	-	144
		AVG. LOAD (MV) %AGE	-	44	-	230	-	33	-	-	185	492
		OF LOAD SHEDDING DURATION (HOURSE)	0%	1%	0%	12%		1%	0%	0%	11%	3%
			10	12	0	10		8	0	0	0	
	TOTAL	NO OF CONSUMERS	3,569,520	2,726,129	3,208,178	2,296,329	4,655,510	2,773,488	913,788	696,294	528,484	21,367,720
		AVG. LOAD (MV) %AGE OF LOAD SHEDDING DURATION (HOURSE)	4,564	1,825	1,061	1,943	3,151	2,269	1,002	1,007	1,620	18,442

14. One of the core problems lies in electricity theft. Large sections of population, especially rural farms with hundreds of tube wells, government departments, residents of FATA, Karachi, Sindh, Seraiki belt, KPK and Baluchistan, and many industrial and production units, etc., are not paying electricity bill at all or according to cost of electricity they are consuming. In this regard, during the last year a loss of around Rs.750 billion was caused. The consumers in Pakistan are facing electricity shortages of the worst order whereas nothing is being done about the parasite which is heavily responsible for this conundrum: the electricity thief. The consumer is made to pay exorbitant bills to cover up the losses that are made because the electricity thief gets his electricity for free. He steals this valuable natural resource from the people of Pakistan with impunity; and nothing is done to stop him. The government must take strict action against such thieves to end the loadshedding crisis.

15. In the hearing of the present case, the Court directed Mr. Zargham Eshaq, MD PEPCO vide order dated 01.07.2013 to provide "details of all the IPPs operating on Gas or RFO in the country along with the details of their electricity generating capacity and if there is a shortfall reasons for the same along with the procedure required to be followed by PEPCO, NTDC, NEPRA or any other regulatory authority to pursue them to achieve maximum target of generation of electricity as payments of their bills are causing extra load on the public exchequer and despite of it they are not getting electricity."

16. In response to the Court order of 01.07.2013, Mr. Zargham Eshaq placed on record the following tables which indicate

the capacity of the IPPs operating on RFO and gas: -

R.F.O OPERATED PLANTS

Sr. No.	PLANT	CAPACITY (MW)
R.F.O OPERATED PLANTS		
1.	KAPCO	1092
2.	AGL	156
3.	NISHAT POWER	195
4.	NISHAT CHUNIAN	196
5.	HUBCO NAROWAL	214
6.	ATLAS	214
7.	LIBERTY TECH	196
8.	KEL	124
9.	JAPAN	107
10.	SEPCOL	110
11.	HUBCO	1205
12.	AES LALPIR	350
13.	AES PAKGEN	350
14.	SABA POWER	126
TOTAL		4635

GAS OPERATED PLANTS

GAS OPERATED PLANTS		
Sr. No.	PLANT	CAPACITY (MW)
1.	HCPC	131
2.	UCH	551
3.	ROUSCH	395
4.	FKPCL	151
5.	LIBERTY POWER	212
6.	AEL	29
7.	ENGRO POWER	214
8.	FOUNDATION	124
9.	SAIF POWER	205
10.	ORIENT POWER	213
11.	SAPPHIRE	212
12.	HALMORE	350
13.	AES PAKGEN	207
14.	KAPCO – III	253
TOTAL		2945

17. On the same date i.e. 01.07.2013, the following table was also placed on record, which indicated how much power was actually being produced by the various hydel, thermal, gas and wind plants

across the country.

STATION	MW	STATION	MW	STATION		MW
TARBELA	3331	KAPCO	774	ATTOCK GEN		139
G BAROTHA	1384	HUBCO	898	ATLAS		175
MANGLA	348	KEL	124	NISHAT POWER		131
WARSAK	190	LALPIR	350	NISHAT CHNIAN		50
CHASHMA HYD	143	PAKGEN	300	LIBERTY TECH		195
JINNAH HYD	32	SEPCOL	0	HUBCO NROWAL		0
KHAN KHWAR	62	SABA	-1	ORIENT		196
ALLAI KHWAR	121	JAPAN	0	SAIF		199
SMALL HYDEL	46	LIBERTY	0	SAPHIRE		96
WAPDA HYDEL	5657	UCH	509	HALMORE		196
JAMSHORO	398	ROUSCH	398	ENGRO		208
KOTRI POWER	0	F. KABIRWALA	145	FOUND'N DARKI		165
LAKHRA POWER	0	HCPC	111	MALAKAND-III		76
GENCO-I	398	ALTERN	26	PEHUR HYDEL		4
GUDDU	543	CHASHNUP-I	302	NEW BONG		23
QUETTA P/H	25	CHASHNUP-II	303	FFC WIND		28
GENCO-II	568	JAGRAN	30	SYS. FREQUENCY	49.96 Hz	
MUZAFARGARH	702	TOTAL GENCOs	1668		49.94 Hz	
NGPS MULTAN	0	TOTAL IPPs	6074	KESC EXPORT		650
GTPS FSBD	0	IPPs + GENCOs	7741			
SPS FSBD	0	WAPDA HYDEL	5657			
GENCO-III	702					
BAROTHA FOREBAY LEVEL		333.23 metres	TOTAL GENERATION		13392	
Sunday June 30 2013						

18. The Court was of the opinion that all stakeholders were entitled to consume electricity as per the formula of "equitable distribution" of available electricity. The above charts paint the stark picture of the difference between the capacity of the plants and the amount of electricity that they are actually generating. The total generation has been shown to be 13392 MW up until 30.06.2013. It is equally important to note that electricity generation of all of the captive power plants, IPPs and KESC has not been shown, but it has been shown that KESC exports 600 MW to NTDC. Thus, the upshot of the above three charts is that the existing resources at the system's disposal are sufficient to overcome the electricity shortfall faced by this

country. It seems that the loadshedding problem is a result of mismanagement or want of administrative control by relevant functionaries. It has been admitted that the average minimum amount of loadshedding is ten hours per day. If this figure were to be taken at face value, that means for nearly half of a day, there is no provision of electricity to all sectors, most important of all industry and agriculture. It is difficult to envision how the commercial sector can grow and develop when there is such a great gap between supply and demand of a basic commodity like electricity. As mentioned hereinabove, the world of today is increasingly dependent on electricity. Scientific discovery and innovation has taken human potential to new heights in the past decade; whereas in this country the state of affairs is so derelict that people have to time their activities on the basis of when electricity is available.

19. It is true that one of the reasons for the loadshedding crisis is the non-availability of RFO or gas. As shown by the tables reproduced hereinabove, RFO and gas-operated plants are not producing electricity in consonance with their full potential. MD PEPCO provided further figures to the effect that on 09.07.2013, generation from IPPs on RFO is about 3790 MW and on gas is about 2500 MW, which only further proves that these plants are operating under capacity. MD PEPCO averred that the procedure required to be followed to achieve maximum targets of generation of electricity is as under: -

- a. The procedure for operation of the IPPs implemented under the GoP's 1994 Energy Policy is specified in the Power Purchase

Agreements (PPAs). Under this procedure the Generating plants (IPPs) are supposed to make their plants available for 85% of the time in an agreement year. They are allowed allowance of 15% for "Forced" and "Scheduled" Outage in a year. If the IPPs exceed their outage allowances, they are required to pay Liquidated Damages (LDs). The oil (RFO) based plants are also required to maintain 30 days storage of oil, while the gas plants are supplied gas of the required quantity and pressure through "Gas Supply Agreement" with gas supply Companies.

b. When the IPPs do not operate as per their required availability, they have to pay Liquidated Damages (LDs) to the Power Purchase for non-performance. However, when payments are delayed to them (due to shortage of funds), the IPPs dispute the LDs raised on the pre-text of "Consequence of Default" and their oil and gas supplies get disrupted resulting in non-availability of their capacity which is not accepted by the Buyer (NTDCL) and LDs are imposed. For 2002 Policy IPPs, deduction on account of less capacity available or stoppage of capacity payment at the time invoice is received by the buyer.

c. Plants at HUBCO, KAPCO and Kohinoor Power Limited (KEL) are currently not operating on full load due to some of their units being on schedule and forced outage and expected back online in couple of days. Some of the RFO based plants are running at lower than their name plate ratings due to higher ambient temperatures. About 350 MW is not online due to non-availability of gas. Three (3) IPPs (340 MW) have dispute with the Buyer on the cash payments that had already been made to these plants. The issue is being sorted out. Two plants HUBCO Narowal (214 MW) and liberty (212 MW) are back online after settlement of their disputes/liabilities.

20. After having gone through the above facts, it is quite clear that the IPPs are not abiding by the terms of the agreements that they are bound by. The picture that is painted by the above submissions of MD PEPCO is that IPPs are taking undue and deleterious advantage of the weak financial position of PEPCO. The IPPs slow down their

production and assign various reasons for non-payment of electricity. One reason that could be countenanced as valid in this regard is the non-availability of RFO and gas. However, it is also the duty of IPPs to take steps to generate electricity to help boost the commercial, industrial and agricultural sectors rather than continuously pass the buck to PEPCO. It is for these reasons that on 01.07.2013 we ordered a forensic audit of the performance of the IPPs so as to ascertain the financial liability on the public exchequer. So far, however, the orders of the Court have not been complied with and no audit has been conducted.

21. It is to be noted that it is the responsibility of WAPDA to generate hydroelectricity, which is to account for 33% of the total electricity produced. WAPDA is, however, only performing at 60% of its own capacity in this regard. The reasons for this are *inter alia*, the decentralisation of WAPDA into different GENCOs providing for a possible gap in administrative efficiency, the increased reliance on RFO and gas powered IPPs, and the seasonal constraints on hydroelectric power. To elaborate on the last reason, hydroelectric power is generally produced from dams and barrages when the water level in the reservoir exceeds a specified level known as "Dead Storage Level". The water level is dependent on seasonal rains. However, rather than increasing the number of facilities available to harness hydroelectric power such as dams, barrages etc. the Government seems to be engaged in a policy of promoting RFO as a basis for producing electricity. RFO is imported whereas hydel power is purely indigenous. At the same time, it is imperative to be cognizant of the fact that the

33% share of hydroelectric power amounts to only 6,595 MW. The average cost of hydel energy generation in Pakistan is Rs.1 to 1.5 per kilowatt hour. On the other hand the cost of thermal power is around Rs.5/- on CNG and around Rs.15/- on RFO. Therefore, the increased reliance on RFO is unwarranted. Thus, the reason for non-production of electricity to the maximum installed capacity is, to a large extent, financial.

22. Furthermore, 70% of Pakistan's oil needs are met through imports. Further, the projected lifetime of the existing natural gas and oil resources in Pakistan is just over fifteen and nine years respectively; therefore, simple increase in production by new expensive Thermal Units will not solve this issue. However, the identified hydropower potential in the country is approximately 41,722 MW, but a cheap, renewable and environment-friendly source of energy has remained untapped. In view of these facts, the best solution to Pakistan's energy/electricity crisis is hydropower.

23. It may further be noted that there are two other resources of electricity generation, namely wind power and solar power, which are currently producing only 49.5 MW, mainly by the Fauji Wind Power Project. There are thirty other projects out of which, statedly, the construction of Zorlu energy (wind power) having capacity of 56.4 MW has been completed and has commenced. Other than Zorlu, there are three other such wind power projects in the pipeline which have capacity of 50 MW each and are likely to achieve COD in 2014. LOS has been issued to nine other companies to engage in similar projects. As far as solar power is concerned, there are fifteen solar power

projects which are at the initial stage of completing feasibility. Moreover, there are also six biomass/bagasse power projects, none of which are producing an energy output as of yet.

24. It is important to note that DISCOs are purchasing electricity at expensive rates from Captive Power Projects (CPPs). During the course of the proceedings much reference was made to Captive Power Plants; which are basically run either on furnace oil (RFO) or natural gas to produce electricity. From the record placed before us, it became clear that captive power plants were being supplied gas at subsidized rates; whereas they sell electricity at marked-up prices to the National Transmission and Despatch Company (NTDC). This electricity is thus more expensive than normal rates and is often used to give an uninterrupted supply of electricity to affluent cooperative societies. It may also be noted that concessions and subsidies should not ordinarily be withdrawn as Pakistan is a welfare State as envisioned in Article 38 of the Constitution, noted hereinabove. However, concessions and subsidies must be focused on what is most important to the downtrodden classes. The concessions and subsidies in case of Captive Power Plants are not being made with the interest of the common man as the goal. Such subsidies also fly in the face of the gas allocation policy detailed by Mr. Khalid Anwar, Sr. ASC, which shall be discussed below.

25. On the hearing dated 22.07.2013, Mr. Arif Hameed, Managing Director, SNGPL, stated that a major reason for lack of availability of gas was because bulk of the gas is being supplied to fertilizer companies at subsidized rates. In light of this contention, we

issued notice to the fertilizer companies mentioned by Mr. Arif Hameed, namely M/s. Dawood Hercules Chemicals, Pak Arab Fertilizers, AGRITECH, ENGRO, Fauji Fertilizer Bin Qasim, Fauji Fertilizer Sadiqabad and Fatima Fertilizer.

26. Mr. Khalid Anwar, learned Sr. ASC, appeared on behalf of Pak Arab Fertilizers and Fatima Fertilizers. His contentions were very helpful in elucidating the situation. Mr. Khalid Anwar explained that up until 03.07.2012, the fertilizer sector received gas at No. 2 on the supply priority list. Thereafter, it was downgraded to No. 3 with general industry and the power sector moved up to No. 2 in accordance with the fresh load management policy approved by the Economic Coordination Council (ECC) of the Cabinet. The CNG sector, on the other hand, is much lower on the priority list, yet the factual situation is that they are getting more gas than the fertilizer sector. He provided the following tables to illustrate this point:

Up to 03 July 2012

Category of Customer	Priority
Domestic & Commercial Sectors	First
Fertilizer and Industrial to the extent process gas	Second
Power Sector (with committed GSAs)	Third
General Industry, CNG, and Captive Power of export oriented textile	Fourth
Power sector other than above & Captive Power	Fifth
Cement	Sixth

Since 03 July 2012

Category of Customer	Priority
Domestic & Commercial Sectors	First
Power	Second
General Industry, Fertilizer and Captive Power	Third
Cement & its Captive Power	Fourth
CNG Sector	Fifth

27. Mr. Khalid Anwar also explained at length that there is no subsidy given to the fertilizer sector. The government, in fact, uses a policy of differential pricing with respect to the sale of gas to the fertilizer sector. This means, in effect, that the fertilizer sector has to pay less for gas because this in the wisdom of the government furthers the socio-economic policy and progress of the country. This policy was explained by Mr. Feisal Naqvi, ASC on behalf of ENGRO and DH Fertilisers. Mr. Feisal Naqvi averred that by providing cheaper gas to the fertilizer companies, such companies were able to price their products independently of international market forces so as to make the fertilizer available at cheaper rates to local farmers. This is particularly true of ENGRO, DH, Fatima and Pak Agro Fertilisers, all of which manufacture urea and provide it to local farmers at rates cheaper than the international market. Moreover, gas is scientifically utilised with greater efficiency in the production of urea. In this regard, Mr. Feisal Naqvi placed on record the Final Report of the International Resources Group for the Asian Development Bank on the "Pakistan Integrated Energy Model (Pak-IEM)" dated August 2011. The relevant portion of the report reads as under: -

Gas has a higher economic value for fertilizer production compared to power sector.

The System Level Economic Valuation indicates that reducing gas to the fertilizer sector costs the economy Rs. 196 million per MMCFD, while increasing gas to the power sector costs the economy Rs 98 million per MMCFD.

28. The Court exercises judicial restraint in matters of government policy except where fundamental rights are violated. In this instance, we are of the opinion that the Government should follow the priority list for allocation of gas and provide the fertilizer sector with gas at the No. 3 priority instead of supplying more gas to the CNG sector, which is clearly against the policy that the Government itself has set out. It may be noted that there is no check on the sale of urea. Much of the urea is smuggled to Afghanistan and Central Asia; and until very recently, the price of packs of urea was not printed on the packs, making their sale and pricing arbitrary, thus there is little benefit to the farmers. Moreover, it is necessary to provide gas to the power sector at the number 2 priority as indicated by the government itself due to the acute loadshedding problem currently faced by the country.

29. It is clear that the government is not following the policy it has set out itself, and it has come to our attention that CNG prices are rising much higher than as warranted. The reason we have decided to look into the CNG pricing issue is found in the judgement in this very case reported as Iqbal Zafar Jhagra v. Federation of Pakistan (2013 SCMR 1337). Therein, we held as under: -

46... We, thus, declare that the Federal Government has no lawful authority to impose or recover GST on CNG @ 26% and @ 17% on the value of taxable supplies made in the course or furtherance of any taxable activities with effect from 13-6-2013

until passing of the Finance Bill. The excess amount equal to 1%, i.e., 17% - 16%, of GST recovered on the petroleum products/CNG or any other taxable supplies w.e.f. 13-6-2013 onward is thus refundable to the consumers and the concerned authorities are directed to deposit it with the Registrar of this Court subject to passing of the Bill by or under the authority of Majlis-e-Shoora (Parliament). The observations following the procedure of its refund have already been made hereinabove. Similarly, the Government has also been directed to deposit 9% out of 26% of GST charged on CNG as per notification dated 13-6-2013 in the same manner. In respect of recovery of additional 9%, statement shall also be filed on behalf of the Government showing the amount of GST so recovered from the consumers under proviso to rule 20(2)(c) of the aforesaid Rules of 2007 on the value of CNG in addition to 16% GST imposed under section 3 of the Act, 1990 as this amount is also to be refunded to the consumers, for which appropriate order shall be passed subsequently...

48... (ii) Under proviso to rule 20(2)(c) of the Sales Tax Special Procedures Rules, 2007, 9% in addition to the Sales Tax prescribed under section 3 of the Sales Tax Act, 1990 imposed or recovered from the consumers on CNG is unconstitutional and contrary to Articles 3, 9, 24 and 77 of the Constitution as well as section 3 of the Sales Tax Act...

(vi) The excess amount equal to 1% (17%-16%) of the Sales Tax recovered on the petroleum products/CNG or any other taxable supplies w.e.f. 13-6-2013 onwards, thus is refundable to consumers and concerned authorities accordingly are directed to deposit it with the Registrar of this Court subject to passing of the Finance Bill (Money Bill) 2013-14 by or under the authority of the Majlis-e-Shoora;

If the Sales Tax is imposed by the Majlis-e-Shoora to be recovered with retrospective effect, same shall be paid to the Government, otherwise appropriate orders will be passed for its disbursement;

(vii) The Government is also directed to deposit 9% out of 26% of the Sale Tax on CNG as per notification dated 13-6-2013 in the same manner as it has been noted above;

(viii) A statement shall also be filed by the Government showing the amount of Sales Tax recovered @ 9% under proviso to rule 20(2)(c) of the aforesaid Rules 2007 on value of the CNG from the consumers in addition to declared Sales Tax of 16% imposed under section 3 of the Act, 1990 as this amount is also to be refunded to the consumers, for which appropriate order shall be passed subsequently;

30. Office had reported that compliance of the above directions had not been made. On 05.07.2013, we heard the learned Attorney-General for Pakistan, to whom we inquired how the additional sales tax of 9%, which is not prescribed under section 3 of the Sales Tax, 1990, is being recovered on CNG. His contention was that levy of additional tax is permissible under the Finance Act, 2013 w.e.f 01.07.2007. We considered it appropriate to put the following queries to the learned Attorney-General:-

- (i) Whether under Article 77 of the Constitution, GST is recoverable on petroleum products, etc., as well as on CNG w.e.f. 13.06.2013 and 01.07.2007 retrospectively?
- (ii) Whether in addition to GST, prescribed under section 3 of the act, 1990, 9% added tax can be levied on CNG; if it is so, levy of additional tax of 9% is not discriminatory?
- (iii) Whether GST on Gas Infrastructure Development Cess (GIDC) at 17%+9% is not recoverable because the payment of the cess is not recovered on taxable activities or taxable supplies; if so, to what effect?

The learned Attorney-General was also asked to place on record a comparative study of the taxes duly levied by the Finance Act, 2013 to ascertain as to whether the end consumers of the petroleum products and CNG have been treated equally with other taxpayers.

31. The learned Attorney-General placed on record a chart showing the break-up of notified maximum CNG consumer price in rupees per kilogram. The same is reproduced hereinbelow: -

		Existing Prices with GIDC & Sales Tax @ 26%	
Sr.#	Components	Region-I @ 1040BTU	Region-II @ 950 BTU
A	Cost of Gas	33.00	30.14
B	Gas Infrastructure Development Cess (GIDC)	13.05	9.18
C	TOTAL (A+B)	46.25	39.32
D	GST (17% of C)	7.86	6.68
E	Additional GST (9% of C) *	4.16	3.54
F	TOTAL (C+D+E)	58.27	49.54
G	Value Addition (Electricity cost)	7.14	7.14
H	Operating Expenses (i-iv)	5.06	5.06
i.	Human Resource Cost	2.59	2.59
ii.	Fee & Subscription	0.16	0.16
iii.	Repair & Maintenance (Machinery)	1.50	1.50
iv.	Oil & Lubrication	0.81	0.81
I	Margin	5.01	5.01
J	Cost Added by CNG Station (G+H+I)	17.21	17.21
K	Maximum CNG Sale Price (F+J)	75.48	66.75
Region-I: Khyber Pakhtunkhwa, Baluchistan & Potohar Region (Rawalpindi, Islamabad & Gujarkhan)			
Region-II: Sindh & Punjab excluding Pothohar Region			
GIDC is currently notified @ 263.57 per MMBtu for Region I and Rs.200 per MMBtu for Region II			
* In accordance with Section 3 of Sales Tax Act 1990			

He also furnished replies of the Federal Board of Revenue (FBR) to the foregoing queries. The queries were replied to as under: -

- (i) The proviso to Rule 20(2)(c) of the Sales Tax (Special Procedure) Rules, 2007 did not charge an additional levy, rather it only changed the mode of collection of tax to improve compliance. However, in accordance with the orders of the Court in Iqbal Zafar Jhagra's case (*supra*), Parliament inserted a new sub-section (8) in section 3 of the Sales Tax Act, 1990 through the Finance Act, 2013 w.e.f. 01.07.2013, which has protected and validated the sales tax already collected under the Sales Tax (Special Procedure) Rules, 2007 w.e.f. 01.07.2007.
- (ii) Sales tax is a value-added tax where every person in the supply chain has to charge sales tax on the taxable supplies made by him. In short, every person in the supply chain only pays sales tax on value-addition made by him. In the case of CNG stations also, sales tax was chargeable at the standard rate. However, most of the CNG stations did not get themselves registered and pay sales tax in accordance with law. To address this situation, the Federal Government changed the mode of collection of sales tax from CNG stations to ensure proper collection and payment of the same tax. Therefore, there is no discrimination. The levy was not increased; only the mode of collection was changed for valid administrative reasons.
- (iii) GIDC has been levied under the Gas Infrastructure Development Cess Act, 2011 and can be charged only by companies specified in the First Schedule to the Act, from their consumers (other than domestic consumers). These consumers (which include CNG stations), cannot charge/further pass on the cess as such. Thus, GIDC becomes part of the cost of the CNG stations, and should not be considered as an indirect tax to be passed on to end consumers. Thus, like all other costs (such as cost of gas, labour, electricity, overheads, advertising etc.), in case of CNG stations, GIDC is a component of the cost of

the business to be included in the sale price of the product.

32. The learned Attorney-General also placed on record a table which attempted to show that the tax was not discriminatory, in compliance with the Court order of 05.07.2013. According to the FBR, the table shows that the tax collected under the Special Procedure actually benefits the end consumer because it is less than the tax collected under the normal regime. We are of the considered opinion that the contentions of the learned Attorney-General and the FBR cannot be accepted. It is admitted that the sale price of CNG is increased by virtue of the added 9% tax. Therefore, it is erroneous and contradictory to state that the 9% is not passing on to the consumer. Moreover, section 3(1) of the 1990 Act is a charging section; and under section 2(46) no other section of the Sales Tax Act, 1990 can be utilised to charge tax other than a charging section. Therefore, the new sub-section 8 added by the Finance Act, 2013 is contradictory with respect to section 3(1). In this behalf, reference may be made to Collector of Sales Tax and Central Excise, Lahore v. WAPDA (2007 SCMR 1736) and Sheikhoo Sugar Mills v. Government of Pakistan (2001 SCMR 1376) to the effect that it is trite law that only a charging section can be used to impute taxes. Therefore, section 3(8) is *ultra vires* section 3(1) of the Sales Tax Act and is struck down as such.

33. It must be noted that throughout these proceedings it was highlighted that NEPRA is playing a highly inactive role in fixing power tariff. As elaborated hereinabove, it is the mandate of NEPRA to make

an independent determination of power tariff under section 31 of the 1997 Act. However, it was found that the Ministry of Water and Power was, in fact, fixing the said tariff instead of NEPRA as highlighted by Mr. Azhar Siddique, ASC on behalf of the Applicant in H.R.C. 14392 of 2013. The Notifications in this regard were S.R.O. 698(I)/2013 dated 08.05.2013 and S.R.O. 834(I)/2013 dated 30.09.2013 which the Court struck down vide order dated 04.10.2013. However, the exorbitant tariff was reinstated by NEPRA and the subsidy that is afforded to consumers was taken away under s 31 of the 1997 Act vide notification dated 10.10.2013 as noted in 22.10.2013. It is not disputed that Government has the power to take away subsidies. This is a power which the Executive undoubtedly enjoys. However, this power must be exercised in consonance with the command of Article 38 of the Constitution as stated hereinabove. Article 38 commands the State to act for the welfare of its citizens. With a large number of the population living below the poverty line, it is difficult to comprehend how a raised electricity tariff which does not afford any subsidy is in the benefit of the people. It has already been stated above that the provision of electricity is a substantive part of the right to life. In the wake of loadshedding and high electricity tariffs, it is clear that the government policy in this regard is violative of Article 9 of the Constitution.

34. It would not be out of place to mention that petrol prices in the country are skyrocketing, even though petrol prices in the international market are steadily decreasing. There seems to be no policy justification for such increase. It is beyond doubt that the petrol

prices should be set in consonance with the international market. Petrol and Diesel are of imperative need to the economy and to the populace. As stated above, Article 38 of the Constitution directs the State to act for the welfare of the people. Fixing high petrol/diesel rates without justification is clearly not in the welfare of the people.

35. From the aforementioned, it is abundantly clear that we have the resources and capability to overcome loadshedding. The total requirement of electricity ranges from 13000 – 18000 MW as is evident from the table reproduced hereinabove provided in the Rental Power Plants' case (*supra*). It seems that the government is interested in installing new projects which are costly and do not fulfil our requirements. If we use the existing resources, while giving priority to capacity building of hydroelectric power, we can overcome the scourge of loadshedding.

36. As a consequence of the above discussion, it is declared and held as under: -

- (i) Loadshedding of electricity in the country is manageable subject to dedicated and committed efforts to ensure the maximum possible generation of electricity which is sufficient to cater to the requirement of all the categories of the stakeholders/consumers. The competent authority must concentrate its efforts to minimise the sufferings of the consumers by endeavouring to provide uninterrupted supply of electricity. If, however, loadshedding is the only way out, it must be administered without having

distinction between rural and the urban areas as well as domestic, commercial and industrial sectors. Moreover, a formula must be put in place to ensure the distribution of electricity on equitable basis.

- (ii) The competent authority shall take steps to control all kinds of losses after supply of the generation like line losses, theft, etc., by using modern devices like introducing smart meters and supplying electricity only to the consumers, who are ready and willing to make payment, if need be, in advance or without any default after submission of the bills. As far as all kinds of unauthorized consumers are concerned, efforts should be made to persuade them to make payments of the bills, failing which action as envisaged under the Electricity Act, 1910, the Electricity Rules, 1937 and NEPRA Act, 1997 as well as other enabling laws/rules, should be taken. A policy has to be announced by the NTDC/DISCOS under which the supply of electricity to the consumers who believe in law and make the payment in time is encouraged and supply of unauthorized consumers is discouraged.
- (iii) It is responsibility of the NEPRA and PEPCO to reduce the prices while ensuring that electricity is generated through less-costing value of production from hydel power. And as far as thermal power is concerned, preference must be given to generate electricity by using coal and gas, and unless there is no compulsion, the electricity should not be

generated from RFO as it is casting higher prices, which ultimately has to be borne by the consumers. Furthermore, the renewable sources for generating electricity including wind and solar power must be utilized.

- (iv) Prices of petrol, diesel, petroleum products, etc. are invariably being fixed by OGRA arbitrarily without taking into consideration the rate in the international market. Therefore, in future, all necessary steps shall be taken in this behalf to fix the prices strictly in accordance with the prevailing rates in the international market.
- (v) As far as supply of gas at subsidized rates to the fertilizer companies are concerned, it may continue but at the same time there must be a policy to ensure that the production of the fertilizers like urea etc. is sold in the market to the farmers at a subsidized rate. However, as far as captive power plants are concerned, the policy must be revised and without any justification they cannot be allowed supply of gas to produce electricity because they supply electricity at much higher than the NEPRA rate instead of subsidized rate to NTDC. Therefore, the supply of gas to captive power plants should be revised to a lower priority and not at a subsidized rate.
- (vi) NEPRA has failed to perform its duties strictly in accordance with the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997.

As it has been discussed hereinabove, without any unnecessary interference, the NEPRA must watch interest of stakeholders/consumers while determining the tariff of the electricity and opportunity of hearing must be ensured to all concerned.

- (vii) The Federation of Pakistan under Article 38 of the Constitution as a policy is bound to secure the well-being of the people by raising their standard of living. Therefore, the subsidy already being given to them should have not been withdrawn. Though subsidy is not the right of the consumers, the Government being responsible for their welfare may consider in near future to increase the rate of subsidy by extending its benefits to the consumers, who are not in a position to pay high charges of the electricity.
- (viii) As far as subsection (8) of section 3 of the Sales Tax Act, 1990 inserted by means of Finance Act, 2013 is concerned, it is contrary to law and the Constitution. Therefore, levy of extra tax at the rate of 9% cannot be charged except the rate which has been fixed under section 3(1) of the Sales Tax Act, 1990. Moreover, the same directions and the ratio of the judgment dated 21.06.2013 reported as Iqbal Zafar Jhagra v. Federation of Pakistan (2013 SCMR 1337), wherein rule 7 of the Provisional Collection of Taxes Act, 1931 was declared ultra vires, shall be applicable in this case. OGRA is directed to issue revised notification to recover only 16% or 17% sales tax as early as possible but

not beyond the period of seven days and the extra sales tax shall be deposited by FBR within three months in the manner as was directed in the judgment (ibid) and the matter shall be fixed before the Court for issuing guidelines for its disbursement.

- (ix) As far as recovery of the gas development charges GDIC is concerned, it falls within the definition of section 2(46) of the Sales Tax Act, 1990 and no order is required to be passed in this behalf.
- (x) An exercise has also been undertaken to inquire into the grant of licenses to the various CNG stations. These were *prima facie* unauthorizedly issued from time to time is delinked and this aspect of the case is to be heard along with the case of implementation in the case of appointment of Tauqir Sadiq reported as Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132) and the Court shall decide it on the basis of evidence recorded by the FIA independently. The FIA is directed to handover it to NAB where already proceedings of Tauqir Sadiq are pending.
- (xi) Similarly, Suo Motu Case No.1 of 2013, Civil Petition No.455 of 2013 are delinked and ordered to be fixed along with implementation case noted hereinabove within two weeks.
- (xii) Likewise, CMA No.5962 of 2013 for permission to file Civil Review Petition against the judgement of this Court dated 21.06.2013 passed in CMA No.3821 of 2013 in Constitution

Petition 33 and 34 of 2013 shall be heard separately.

37. Cases stand disposed of.

Chief Justice

Judge

Judge

Announced in open Court on 10.12.2013
At Islamabad

Chief Justice

Approved for Reporting