HCJD/C-121

JUDGMENT SHEET

ISLAMABAD HIGH COURT
ISLAMABAD

W.P. No. 4178 of 2015.

High Flying Solar Development Pakistan Ltd. etc.

VERSUS

National Electric Power Regulatory Authority, etc.

Petitioners by	:	Mr Feisal Hussain Naqvi and Mr Hassan Murtaza Mann, advocates.
Respondents by	:	Barrister Asghar and Mr Faisal Atta and Mr Ajmal Ghaffar Toor, advocates for the respondent no.1. Syed Ahmed Hassan Shah, advocate for the respondent no.2. Sheikh Muhammad Ali and Mr Munawar us Salam, advocates for the respondent no.3. Raja Mehmood, advocates for the respondents no.6 & 7. Mr Rashid Hafeez, A.A.G. Punjab. Mr Afnan Karim Kundi, AAG. Malik Zahoor Awan, Standing Counsel. Mr Ahmed Hussain Soomro, S.O. (Law), M/O Water and Power. Ms Afifa Jabeen, Dir. Legal, respondents no.6 & 7.
Date of Hearing	:	22-06-2016.

ATHAR MINALLAH, J:-

Through this single order I shall dispose of the instant petition along with W.P. No. 4179 of 2015, titled "Elbel Green Energy Pakistan Ltd. etc versus NEPRA etc",

since common questions of law and facts are involved in both these petitions.

2. The facts, in brief, are that the Government of Punjab issued and publicized a 'Power Generation Policy' in 2006 (hereinafter referred to as the ***"Policy of 2006"***) in order to encourage and invite investment in the energy sector. The Policy of 2006 was updated and revised in 2009. In furtherance of the Policy of 2006, the Government of Punjab established the 'Punjab Power Development Board' (hereinafter referred to as the ***"Board"***). In order to give effect to the Policy of 2006, the Government of Punjab set up a 1000 MW Solar Power Park in Bahawalpur called the 'Quaid-e-Azam Solar Park'. Before the establishment of the 1000 MW 'Quaid-e-Azam Solar Park', a detailed plan was prepared in September 2013 by the National Transmission and Dispatch Company Limited (hereinafter referred to as ***"NTDC"***). The plan was prepared in order to confirm the feasibility of evacuating 1000 MW from the Park. The plan of evacuation, prepared by the National Transmission and Dispatch Company, and a subsequent study titled 'Advanced Technical Studies Report' also prepared by the latter in January 2014, recommended the proposed interconnection scheme for adoption. In response to the representations made by the Government of Punjab in its Policy of 2006, various international entities responded, including Zonergy Company Limited, a juridical person incorporated in the

Republic of China, which claims to be leading in the field of solar energy. The petitioners in both the petitions are the subsidiaries of the said juridical person. The Punjab Power Development Board had issued a letter of intent for 900 MW for a solar power project. The project is being developed as 9x100 MW modules to be set up in the 'Quaid-e-Azam Solar Park', while the Government of Punjab itself is setting up a 100 MW project. It is asserted by the petitioners that after fulfilling all the pre-conditions, respective applications were submitted before the National Electric Power Regulatory Authority (hereinafter referred to as ***"NEPRA"***) for acceptance of upfront tariff and respective generation licenses. On 21.01.2014, NEPRA issued an upfront tariff determination for the solar power plants (hereinafter referred to as the ***"2014 tariff"***). It is the case of the petitioners that following the decision of the Government of Punjab to dedicate 6,500 acres of land near Bahawalpur for the generation of solar power, NEPRA decided to initiate a suo moto review of the 2014 tariff. Accordingly, after seeking comments from all the stakeholders, a fresh upfront tariff determination for the solar power plants was announced on 22.01.2015 (hereinafter referred to as the ***"2015 tariff"***). The validity period for opting for the 2015 tariff was six months from the date of Notification. Different stakeholders filed review petitions and pursuant thereto certain modifications were made by NEPRA and the revised determination was then notified on 01.07.2015, which was

to remain valid till 31.12.2015. Nine entities, including the petitioners, applied to NEPRA for approval of the 2015 tariff vide applications dated 28.03.2015. They also applied for generation licenses. NEPRA, vide determinations dated 30.06.2015, approved the issuance of generation licenses to three of the applicants, while approval of the 2015 tariff was issued in the case of each of the three companies vide letters dated 26.05.2015. However, in the case of the petitioners, vide letter dated 01.07.2015, NEPRA informed them that the grant of a generation license was subject to the submission of an interconnection study duly approved by the NTDC. The petitioners were, therefore, advised to expedite the approval of the interconnection study by the NTDC. The petitioners submitted applications to the NTDC for interconnection approvals. However, vide letters dated 14.07.2015, NEPRA informed the petitioners that since they had failed to submit the approval by the NTDC of the Grid Connectivity and Simulation Studies, therefore, their applications to opt for the 2015 tariff stood rejected. The petitioners informed NEPRA that since they had timely applied to the NTDC for seeking interconnection approval, therefore, the time may be extended. In case of the petitioners in W.P. No. 4178 of 2015, NTDC issued letters dated 24.07.2015, 29.07.2015 and 05.08.2015, conveying its approval of the interconnection studies. The petitioners, therefore, once again filed applications for acceptance of the

2015 tariff. It would be relevant to refer to clause 12.3 of the 2015 tariff and the same is as follows;-

> *"In order to establish the upper limit as to how much solar-based power can be connected to the national grid, detailed simulation studies have been initiated by NTDC for proposing a modification in the Grid Code. Till the completion of studies and approval of modified Grid Code by NEPRA, NTDC will carry out such studies for every proposed solar-based project and make its recommendations to NEPRA for suitability or otherwise to the national grid. As a condition precedent for opting the upfront solar tariff, approval of NTDC for power evacuation and interconnection will be mandatory. NEPRA will consider only those projects for approval of upfront tariff, which submit NTDC's explicit approval in this respect."*

3. It is pertinent to mention that pursuant to the above, a study was initiated by the NTDC through international consultants i.e. M/S GOPA International Energy

Consultants GmbH, Moeller & Poeller Engineering GmbH and Reee Pvt. Ltd. (hereinafter referred to as the ***"GOPA Study"***). NEPRA, therefore, had explicitly mentioned in the 2015 tariff that till the completion of the GOPA Study, the NTDC will carry out the studies for each proposed solar based project and accordingly make its recommendations. NEPRA, vide letter dated 05.10.2015 addressed to the NTDC, referred to the approvals granted to the petitioners in W.P. No. 4179 of 2015 relating to suitability to the national grid and observed that the said approvals, in the absence of the final integrated study, i.e. the GOPA Study, were not adequate or useful. The NTDC, vide letter dated 12.10.2015, justified the issuance of approvals granted in the case of the petitioners and, therefore, reiterated its approvals. In response NEPRA, vide letter dated 28.10.2015, informed the NTDC as follows;-

> *"In this regard, the Authority has desired a complete detail of all the solar projects awaiting approval of Interconnection Study pending with NTDC on the prescribed format. The required detail may be provided to this office at earliest enabling the Authority to proceed further in the matter. The said information must reach this office*

not later than seven (07) days of the receipt of this letter."

4. The NTDC, vide letter dated 04.11.2015, informed NEPRA that the approvals granted in the case of the petitioners be treated as withdrawn. Consequently, on the basis of the letter dated 04.11.2015, addressed by the NTDC to NEPRA, the latter rejected the applications of the petitioners vide respective letters dated 21.12.2015 on the sole ground mentioned therein, and the same is reproduced as follows;-

"The Authority, after detailed deliberations, observed that since NTDC has withdrawn its earlier approval as well as certificate of power evacuation in respect of Elbel Green Energy Pakistan Ltd. (EGEPL) therefore decided to return the application being deficient in providing the necessary documents and information i.e. approved interconnection study and certificate for power evacuation."

5. The learned counsels for the respondents were asked whether the GOPA Study had been completed or not. The learned counsels have informed the court that the GOPA

Study has already been forwarded to NEPRA. They were further asked whether before rejecting the applications, the petitioners were given an opportunity of hearing. The answer of the learned counsel for the respondents was in the negative.

6. Barrister Asghar Khan, representing NEPRA, stated at the Bar that opportunity of hearing was not required since the petitioners had failed to fulfill the requirements as contemplated under the National Electric Power Regulatory Authority Upfront Tariff (Approval and Procedure) Regulations, 2011 (hereinafter referred to as the ***"Regulations of 2011"***). This stance, taken on behalf of NEPRA, is not only in violation of the fundamental rights guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 but at the same time raises questions regarding the transparency of proceedings before one of the most important statutory regulatory authorities while dealing with matters involving rights accrued in favour of the applicants, pursuant to representations made by competent Governments through acknowledged policies. Moreover, the role and status of NEPRA as an independent statutory regulatory authority essentially makes it a duty of the latter that its decisions and proceedings are not only transparent, in order to reflect its autonomy in achieving the objects of the statute where

under it has been established and created, but that it is seen as being free from regulatory capture.

7. The august Supreme Court, while emphasizing the status of autonomous / statutory regulatory authorities, has specifically referred to NEPRA in the case titled "Muhammad Yasin versus FOP through Secretary, Establishment Division, Islamabad and others" [PLD 2012 S.C. 132] and has observed as follows;-

> *"In terms of regulatory autonomy, OGRA is just one amongst a number of regulatory authorities which have been created in Pakistan during the past few decades to ensure good governance in important (mainly economic) sectors of the country. These include the National Electric Power Regulatory Authority ("NEPRA"), Pakistan Telecommunication Authority ("PTA"), Pakistan Electric Media Regulatory Authority ("PEMRA"), Securities and Exchange Commission of Pakistan ("SECP") and Competition Commission of Pakistan ("CCP"). These bodies have explicitly been made autonomous to ensure that they remain*

free from political or other interference and thus remain focused on the objectives of their parent statutes."

8. While referring to NEPRA in the case titled "Flying Board and Paper Products Ltd versus Government of Pakistan and others" 2010 SCMR 517, the august Supreme Court has observed, "Towards this reform initiative, an independent statutory body, the National Electric Power Regulatory Authority (NEPRA) was constituted under the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997". There is no doubt whatsoever, therefore, that NEPRA is an independent regulatory authority. NEPRA, which has been established under section 3 of the Regulation of Generation, Transmission and Distribution of Electric Power Act 1997 (hereinafter referred to as the Act of 1997") is vested with such functions and powers as are enumerated in section 7. Section 6 unambiguously provides that all orders, determinations and decisions of NEPRA shall be taken in writing and shall identify the determination of the Chairman and each Member. Sub section (6) of section 7 expressly mandates that in performance of its functions NEPRA shall, as far as possible, protect the interests of the stakeholders specified ibid in accordance with the guidelines of the Federal Government, provided such guidelines are not inconsistent with the provisions of the Act of 1997. A cumulative reading

of the provisions clearly shows that NEPRA, as an independent regulatory authority, is under a statutory duty to protect the interests of each stakeholder and that its decisions, orders and determinations are in writing, reflecting a conscious application of mind by the Chairman and each member involved in the proceedings. Section 6 is unambiguously indicative of the legislative intent and it is implicit in its language that the Chairman and the members involved in the decision making process afford an opportunity of meaningful hearing and record their reasons. It is, therefore, axiomatic that as one of the most important regulatory authorities, NEPRA is under a statutory obligation to show, through its proceedings and orders/decisions, that it has regulated its discretion and has confined the same through principles and rules.

9. In the context of regulatory capture the august Supreme Court in the case titled "Lahore Development Authority through D.G. and others versus Ms Imran Tiwana and others" [2015 SCMR 1739], has emphasized setting up of meaningful standards for the purposes of exercising discretion vested in regulators. The relevant passage is as follows;-

> *"The government does not have an absolute discretion in the matter. For as Douglas J wrote in New York v U.S.*

342 U.S. 882, 884, 'Absolute discretion like corruption marks the beginning of the end of liberty'. Even where legislative bodies confer discretion on regulators without meaningful standards it is the duty of those on whom such discretion has been conferred to structure it. They must develop standards to regulate it. They should confine their discretion through principles and rules. This has been the consistent view of this Court: Chairman RTA v. Pak Mutual Insurance Co. PLD 1991 S.C. 14 at 26.

10. The case of the petitioners stems from refusal of the applications filed under the National Electric Power Regulatory Authority Upfront Tariff (Approval & Procedure) Regulations, 2011 (hereinafter referred to as the ***"Regulations of 2011"***). Sub-Regulation (8) of Regulation 4 expressly requires giving an opportunity of hearing to the applicant and the said provision is reproduced as follows;-

"The Authority may reject the application in case any particulars furnished with the application are deficient or found to be false or

materially inaccurate, provided that, before declining the application, the Authority shall given an opportunity of hearing to the applicant."

11. Besides the statutory duty of NEPRA to ensure transparency in its proceedings, the Regulations of 2011 manifestly and in express terms makes it mandatory that before taking a decision relating to an application seeking approval of upfront tariff an opportunity of hearing be given to the applicant. The statement made on behalf of NEPRA before this Court and the conduct of the latter in the instant case is definitely in disregard and violation of the express mandatory requirement provided under the Regulations of 2011.

12. During the proceedings before this Court apprehensions were raised regarding decisions of NEPRA being influenced by the Federal Government. In other words, concerns were raised suggesting that there has been regulatory capture. It, therefore, becomes even more important that the proceedings, decisions or orders passed by NEPRA clearly reflect its autonomy, more particularly that it is not influenced by those whose actions are to be regulated in the public interest. Since it is an express statutory duty of NEPRA to protect the interests of all the stakeholders, therefore, observance of principles of due

process and procedural fairness become essential or rather a pre condition for the validity of its actions and orders.

13. In order to further elaborate the significance of *the principles of procedural fairness, or in other words the doctrine of audi alteram partem in relation to the proceedings, decisions and determinations of NEPRA it would be advantageous to examine the precedent law. There is no cavil that the principles of natural justice are embedded in the fundamental right guaranteed under Article 10-A of the Constitution of the Islamic Republic of Pakistan 1973 as an integral part of due process. In this regard, it would be pertinent to refer to two judgments of the august Supreme Court. In the case of "The University of Dacca through its Vice Chancellor and another Vs. Zakir Ahmed", reported as* ***PLD 1965 Supreme Court 90****, the august Supreme Court, after examining the case law, observed and held as follows:-*

> *"What these principles of natural justice are it is not possible to lay down with any exactness, for, they have been variously defined in various cases, as was pointed out by the Judicial Committee in the case of the University of Ceylon v. Fernando Tuker, L. J., said in Russel v. Duke of Norfolk (1) "the requirements of natural justice must*

depend on the circumstances of the case, the nature of the enquiry, the rules under which the Tribunal is acting, the subject-matter that is being dealt with, and so forth." Nevertheless, the general consensus of judicial opinion seems to be that, in order to ensure the "elementary and essential principles of fairness" as a matter of necessary implication, the person sought to be affected must at least be made aware of the nature of the allegations against him, he should be given a fair opportunity to make any relevant statement putting forward his own case and "to correct or controvert any relevant statement brought forward to his prejudice." Of course, the person, body or authority concerned must act in good faith, but it would appear that it is not bound to treat the matter as if it was a trial or to administer oath or examine witnesses in the presence of the person accused or give him facility for cross-examining the witnesses against him or even to serve a formal charge sheet upon him. Such a person

or authority can obtain information in any way it thinks fit, provided it gives a fair opportunity to the person sought to be effected to correct or contradict any relevant statement prejudicial to him. In other words, "in order to act justly and to reach just ends by just means" the Courts insist that the person or authority should have adopted the above "elementary and essential principles" unless the same had been expressly excluded by the enactment empowering him to so act."

14. A Bench consisting of thirteen Hon'ble Judges of the august Supreme Court, in the case of "Justice Khurshid Anwar Bhinder vs. Federation of Pakistan" reported as **PLD 2010 SC 483,** examined various precedent law relating to the doctrine of audi alteram partem. In paragraph 41 of the judgment the august Supreme Court has referred to circumstances wherein, prima-facie, the right of the opportunity to be heard may be excluded by implication. In paragraph 42, it has been held as follows:-

"It must not be lost sight of that in the above mentioned "exclusionary cases, the 'audi alteram partem' rule is

held inapplicable not by way of an exception to fair play in action but because nothing unfair can be inferred by not affording an opportunity to present or meet a case." (Maneka Gandhi v Union of India AIR 1978 SC 597, (1978) 1 SCC 248. Vide also Mohinder Singh Gill v The Chief Election Commissioner AIR 1978 SC 851, (1978) 1 SCC 405. The doctrine of 'audi alteram partem' is further subject to maxim nemo inauditus condemnari debet contumax.' Therefore, where a person does not appear at appropriate stage before the forum concerned or is found to be otherwise defiant the doctrine would have no application. It is also to be kept in view that "application of said principle has its limitations. Where the person against whom an adverse order is made has acted illegally and in violation of law for obtaining illegal gains and benefits through an order obtained with mala fide intention, influence, pressure and ulterior motive then the authority would be competent to rescind/withdrawn/cancel such order

without affording an opportunity of personal hearing to the affected party. Said principle though was always deemed to be embedded in the statute and even if there was no such specific or express provision, it would be deemed to be one of the parts of the statute because no adverse action can be taken against a person without providing right of hearing to him. Principle of audi alteram partem, at the same time, could not be treated to be of universal nature because before invoking/applying the said principle one had to specify that the person against whom action was contemplated to be taken prima facie had a vested right to defend the action and in those cases where the claimant had no basis or entitlement in his favour he would not be entitled to protection of the principles of natural justice."(Nazir Ahmed Panhwar v. Government of Sindh through Chief Secretary Sindh 2009 PLC (C.S) 161, Abdul Haque Indhar and others v. Province of Sindh through Secretary Forest, Fisheries and Livestock

Department, Karachi and 3 others 2000 SCMR 907 and Abdul Waheed and another v. Secretary, Ministry of Culture, Sports, Tourism and Youth Affairs, Islamabad and another 2002 SCMR 769). It has been elucidated in the detailed reasoning of the judgment of 31-7-2009 how the order passed by a seven Member Bench of this Court has been flagrantly violated. Besides that the applicants had no vested right to be heard and furthermore they have acted illegally and in violation of the order of seven Member Bench for obtaining illegal gains and benefits which cannot be ignored while examining the principle of 'audi alteram partem'."

15. The august Supreme Court quoted with approval from various commentaries, including the Constitutional Development in Britain, authored by Lord Denning, and the relevant portion is reproduced as follows:-

"The concept of natural justice is a combination of certain rules i.e. 'audi alteram partem' (nobody should be condemned unheard) and discussed in

depth in preceding paragraphs and 'nemo judex in re sua' (nobody should be a Judge in his own case or cause) application whereof is to be decided by the Court itself in accordance with the fact, circumstances, nature of the case vis-à-vis the law applicable on the subject. It squarely falls within the jurisdictional domain of the Court concerned whether it would be necessary to embark upon the concept of natural justice and whether it would be inevitable for the just decision of the case. The Court is not bound to follow such rules where there is no apprehension of injustice. It can be said with certainty that the concept of natural justice is flexible and it cannot be rigid because it is the circumstances of each case which determine the question of the applicability of the rules of natural justice." There are a number of cases in India in which the flexibility of the rules of natural justice has been upheld. In New Parkash Transport Co. Ltd v. New Sawarna Transport Co. Ltd., the Supreme Court observed that rules

of natural justice vary with varying constitutions of statutory bodies and the rules prescribed by the legislature under which they have to act, and the question whether in a particular case they have been contravened must be judged not by any preconceived notion of what they may be but in the light of the provision of the relevant Act. While natural justice is universally respected, the standard vary with situations contacting into a brief, even post-decisional opportunity, or expanding into trial-type trappings. As it may always be tailored to the situation, minimal natural justice, the bares notice, 'littlest' opportunity, in the shortest time, may serve. In exceptional cases, the application of the rules may even be excluded."

16. It is, therefore, obvious that the principles of natural justice are flexible and not rigid. The determination of the application of these principles depends on the circumstances of each case, and various factors may be taken into consideration for this purpose, such as the nature of the enquiry, the subject matter being dealt with, whether anything unfair can be inferred if the opportunity is not

afforded, whether there is no apprehension of injustice etc. However, depending on the facts and circumstances of each case, it would be sufficient if the 'elementary and essential principles of fairness' have been fulfilled. Therefore, in a given situation it may be sufficient if the person affected has been made aware of the nature of the allegations, has been afforded a fair and reasonable opportunity to defend the allegations and to controvert any statement made against him or her. It would not it be mandatory in very case to examine witnesses in the presence of the person against whom allegations have been made, or to afford him or her an opportunity for cross examination. If a person who has been afforded a fair opportunity, which satisfies the requirements of the elementary and essential principles of fairness, does not appear or fails to avail the opportunity, or is otherwise defiant, then he or she may not be able to raise a grievance relating to violation of the principles of natural justice, as they would have no application in the given circumstances. In exceptional cases the application of the doctrine of 'audi alteram partem' may even be excluded.

17. In the light of the role, functions and powers of NEPRA vested under the Act of 1997, as earlier discussed, and the principles and law elucidated in the context of observing the principles of procedural fairness noted above, the applications filed under the Regulations of 2011 for seeking acceptance of Upfront tariff cannot be rejected or

otherwise decided without giving an opportunity of meaningful hearing and thereafter recording reasons in the manner contemplated under section 6 of the Act of 1997, the statutory duty of meaningful hearing and recording of reasons. The rights of the applicants involved, particularly when they have taken decisive steps pursuant to representations made by the Government, makes it mandatory that the reasons recorded ought to qualify the test articulated in Re Poyser and Mills Arbitration [1964] 2 Q.B 467 i.e the reasons must be 'intelligible and must adequately meet the substance of the arguments advanced'. Reference in this regard may made to the celebrated treaties titled "Principles of Judicial Review' by De Smith, Woolf & Jowels.

18. The nature of proceedings in cases relating to deciding applications under the Regulations of 2011 must comply with the statutory duty mandated under section 6 of the Act of 1997, and the standard of hearing afforded to an applicant must meet the threshold eloquently elucidated by the Lahore High Court on the touchstone of the principles enumerated in relation to a meaningful hearing laid down by the Lahore High Court in the case titled "*Maqbool Ahmed & others Vs. District Officer (R) & others*" reported as [P.L.D. 2010 (Lahore) 332]. The relevant portion is as follows;-

> *"Hearing is not a mere mechanical and perfunctory ritual or a desultory cosmetic requirement that has to be hurriedly complied with. There is a deeper meaning to a hearing. Hearing first of all requires that the person against whom the action is proposed is made a part of the decision making process and the officer exercising discretion has given due weightage to the submissions made during the hearing. Additionally, in-built in a hearing is the wisdom that there might be alternative choices available to resolve the problem, which can surface once the hearing takes place. As every law is in the public interest and made for the welfare of the people, this inherent and intrinsic welfare embedded in every law necessitates that alternatives or options are to be deliberated upon in the public interest."*

19. It is the case of the petitioners that in response to the Policy of 2006 they have taken decisive steps and have already made substantial investments. It is also their case that after fulfilling all the required formalities they had

submitted applications under the Regulations of 2011 for acceptance of Upfront Tariff. Moreover, they assert that pursuant to the 2015 Tariff, the NTDC had given respective interconnectivity evacuation approvals to the petitioners in WP No. 4179/2015, while the same was awaited in the case of the petitioners in WP No. 4178 of 2015. It is alleged that contrary to the representations made by NEPRA itself in clause 12.3 of the 2015 Tariff, reproduced above, the latter vide letters dated 5-10-2015 and 28-10-2015 influenced the NTDC to withdraw the approvals granted in the case of the petitioners in WP No. 4179/2015. It is the case of the petitioners that such conduct on the part of an independent regulator was in violation of its statutory obligations, transparency of proceedings and smacks of acting on the dictation of others. It is emphatically asserted that after the GOPAY Study was completed and placed before NEPRA it had become inevitable that the applications should have been decided in the light thereof, and that in any case, according to NEPRA's own stance the individual approvals had become infructuous. The petitioners claim that rights had accrued in their favor for acceptance of the 2015 Tariff. They forcefully claim rights, inter alia, on the basis of the principles of promissory estoppel. There is indeed force in the arguments raised by the learned counsel that the said arguments ought to have been considered by NEPRA and, therefore, besides the statutory duty highlighted above and the express command of Sub-Regulation (8) of Regulation 4,

due to the peculiar facts and circumstances relating to the petitions, the applications in the case of the petitioners definitely could not have been rejected without affording a meaningful hearing and recording of reasons. There is sufficient material placed on record which, prima facie, supports the contentions of the petitioners and ought to have been taken into consideration before deciding the applications. However, propriety requires that restraint be exercised in making observations on merits lest it may prejudice the case of the parties in proceedings before NEPRA.

20. It would be pertinent to advert to the apprehensions raised by the learned counsel for the petitioners regarding the conduct of NEPRA and its alleged regulatory capture. As already noted above, the proceedings before NEPRA must reflect its independence and autonomy and this, inter alia, includes ensuring transparent proceedings and affording opportunity of meaningful hearings to the stakeholders before passing an order, determination or decision. Most important is that NEPRA strictly follows and implement the Regulations of 2011, particularly Regulation 4(8) thereof.

21. It was in the above background that it was suggested to the learned counsels appearing on behalf of the parties that it would be appropriate if the matter is

referred to NEPRA for decision afresh after giving the parties an opportunity of hearing. The learned counsels, taking a fair stance, consented to the suggestion. The learned counsel for the petitioners has specifically made a request that NEPRA, while deciding the matter afresh, be directed, inter alia, to take into consideration the GOPA Study since it is now in the field and has been approved. He has further suggested that NEPRA may also consider that the issue of the NTDC approval has, therefore, now become infructuous.

22. Mr Munawar us Salam, ASC, appearing on behalf of the respondent no.3 has likewise requested that it may be incorporated in the order that while deciding the matter NEPRA takes into consideration whether the petitioners are entitled to be granted generation licenses and whether the respondent no.3 or any relevant entity is under an obligation to purchase energy as per the 2015 or 2016 tariff.

23. This Court expects that NEPRA, while deciding the applications of the petitioners afresh, shall take into consideration all the grounds that may be raised before it by the stakeholders, including the questions suggested by the learned counsels referred to above, and after giving an opportunity of hearing i.e. on the touchstone of the principles enumerated in relation to a meaningful hearing laid down by the Lahore High Court Lahore in the case titled

"Maqbool Ahmed & others Vs. District Officer (R) & others" reported as [P.L.D. 2010 (Lahore) 332].

24. This Court further expects that NEPRA shall observe the timeframe prescribed in the Regulations of 2011 in respect of deciding the applications.

25. The petitions are, therefore, ***allowed.*** .It is declared that the rejection of applications without affording an opportunity of hearing or recording of reasons reflecting the substance of the arguments advanced before NEPRA is ultra vires the Act of 1997 read with the Regulations of 2011, in violation of the fundamental right of due process guaranteed under Article 10-A of the Constitution and thus without lawful authority and jurisdiction. The impugned orders in WP No. 4179/2015, whereby the applications of the petitioners had been rejected, are consequently set aside. The applications shall therefore be deemed to be pending. In the case of WP No. 4178/2015 Mr Asghar Khan, the learned counsel for NEPRA has stated that the same are pending and have not been decided since the petition was pending. The applications relating to the petitioners in both the petitions shall be decided in the light of the guidelines and principles discussed above.

(ATHAR MINALLAH)
JUDGE

Approved for reporting.

*Asad K/**