

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : W.P. NO.2771/2016
Lahore Electric Supply Company Limited (LESCO)
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.2727/2016
Multan Electric Power Company Limited (MEPCO) through its Chief
Executive Officer
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.3037/2016
Gujranwala Electric Power Company Limited (GEPCO) through its CEO
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.2854/2016
Islamabad Electric Supply Company Limited (IESCO) through its CEO
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.3148/2016
Faisalabad Electric Supply Company Limited (FESCO) through its CEO
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.3063/2016
Peshawar Electric Supply Company Limited (PESCO)
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.3023/2016
Sukkhur Electric Power Company Limited (SEPCO) through its
Finance Director
Vs.

National Electric Power Regulatory Authority & Another

CASE NO. : W.P. NO.4013/2016
Acro Textile Mills Limited
Vs.
The Federation of Pakistan through Secretary, Ministry of Water &
Power, Islamabad etc.

CASE NO. : W.P. NO.3752/2016
Ejaz Textile Mills Limited through its Director etc.
Vs.

The Federation of Pakistan through Secretary, Ministry of Water & Power, Islamabad etc.

CASE NO. : W.P. NO.3024/2016
Hyderabad Electric Supply Company Limited (HESCO)
Vs.

National Electric Power Regulatory Authority & Another

Petitioners by : Syed Ahmad Hassan Shah, Advocate
Mr. Munawar-us-Salam, Advocate & Mr. Adil Bandyal
Barrister Malik Kashif Rafique Rajwana, Advocate
Barrister Muhammad Hassan Alam, Advocate
Rao Qasim, Advocate
Respondents by : Hafiz Naeem, Advocate
Mr. Muhammad Arshad Majeed Malik, Advocate
Raja Khalid Mahmood Khan, DAG
Date of hearing : 30.05.2017

AAMER FAROOQ J. This judgment shall decide the instant writ petition as well as the petitions noted hereinabove, as common questions of law and facts are involved.

2. The petitioners are the distribution companies (DISCOs) and are aggrieved of tariff determination by respondent No.1; refusal to entertain Review Petition as well dismissal of the Reconsideration Petition by Federal Government.

3. The petitioners filed a multiyear Tariff Petition(s) for securing a tariff for the years 2015, 2016 till 2019-20 before respondent No.1. The referred Petition(s) was decided on 08.03.2016 and in the same, respondent No.1, denied petitioners the right to recovery of amounts, which they claimed to be entitled in accordance with various guidelines of the Federal Government as well as National Power Policy, 2013. On 18.03.2016, feeling aggrieved, the petitioners filed a Review Petition before respondent No.1 however the leave to consider the Leave Petition was dismissed by respondent No.1 on 19.05.2016. The Federal Government, pursuant to Section 31(4) of the Regulation of Generation,

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Transmission and Distribution of Electric Power Act, 1997 (the NEPRA Act), filed a Reconsideration Petition seeking the determination of the tariff anew on 08.06.2016. Respondent No.1, pursuant to Reconsideration Petition, called the petitioners/DISCOs for participation in the hearing of the Petition. In this behalf, notices were issued on 27.07.2016. On 28.06.2016, a request was made for rescheduling of the hearing, which was allowed and the matter was listed on 01.07.2016. On the referred date, against a request was made, which was not acceded to and Reconsideration Petition was dismissed.

3. Mr. Munawar-us-Salam, Advocate Supreme Court, appearing on behalf of petitioners in the instant writ petition as well as in W.P. Nos.3063/2016 & 3148/2016, *inter alia*, contended that respondent No.1 erred in law by failing to provide a hearing to the petitioners as well as respondent No.2. In this behalf, it was contended that the petitioners and respondent No.2 enjoyed constitutional right to be heard in Reconsideration proceedings, especially so, when the decision has a direct effect on their rights and interests; that respondent No.1's refusal to reschedule request was patently illegal; that respondent No.1, in failing to provide an opportunity of hearing to the petitioners, failed to exercise its statutory power to grant reschedule request as empowered vide Rule 26 of the NEPRA (Tariff Standard and Procedure) Rules, 1998 (the Tariff Rules). In this behalf, reliance was placed on a case reported as 'Sajid Naseer Ch and 04-Others Vs. Member, Board of Revenue (Consolidation), Punjab, Lahore and 04-Others' (2004 YLR 510) as well as Mst. Noor Bibi and Another Vs. Chairman, Evacuee Trust Property Board, Government of Pakistan, Lahore and Another' (2003 YLR 1794). It was further contended that respondent No.1's reliance on order dated 01.07.2016 passed in CMA No.4998-2016 by the Hon'ble

Lahore High Court, Multan Bench, Multan, in a writ petition filed by one consumer, cannot be made a ground for compromising the right of a petitioner to be heard. It was further contended that respondent No.1 failed to comply with the mandate of Section 31(4) of NEPRA Act. In this behalf, it was submitted that under the referred provision, the Federal Government is empowered to require NEPRA to reconsider its determination and tariff and when such request is made, the tariff is to be determined anew; that the Reconsideration decision by NEPRA failed to consider the tariff determination and the review determination and determine the same anew, the term 'anew' has been interpreted in the case reported as 'Subedar (Retired) Muhammad Khan Vs. Adalat Khan and Another (2002 CLC 971) & 'Imam Buksh & Others Vs. Ghulam Nabi & Others (1999 SCMR 34); that the Concise Oxford Dictionary defines 'anew' as 'in a new and different and typically more positive way' and 'once more'; 'again'; that the determination tariff 'anew' would require at a bare minimum; that necessary and proper parties are heard in terms of meaningful hearing. Learned counsel further contended that respondent No.1 erred at law by imposing limitations and the requirement of securing leave as a precondition to the reconsideration petition, which is not tenable. In this behalf, it was contended that right and process of reviewing an order passed by respondent No.1 was regulated, *inter alia*, by Rule 16 of the Tariff Rules, which was notified on 23.12.1998; that regulation 3(2) of National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009 further elucidated the provision of review, which was duly notified on 30th December, 2009; that the amendment was made in the NEPRA Act by insertion of Section 7(2)(g), which empowers respondent No.1 to review its orders, decision or determination. In the referred backdrop, it was

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contended that since now, respondent No.1 has specific power to review its orders. The limitations prescribed in 1988 Rules and 2001 Regulations do not find mention in the Amendment or the Amendment Act. Reliance was placed on cases reported as 'NEPRA Vs. Faisalabad Electric Supply Company Limited' (2016 SCMR 550). It was next contended that respondent No.1 erred at law by refusing to follow the constitutional and legal mandate as well as the policy guidelines issued by the Council of Common Interests and respondent No.2. In this behalf, it was contended that tariff determination, review determination and reconsideration decision are required to comply with Article 153, read with 154 of the Constitution and policies framed there-under; that Article 153 read with Article 154 of the Constitution empowers the Council of Common Interests to formulate and regulate policies with respect to matters listed in Part-II of the Federal Legislative List and exercise supervision and control over related institutions; that Entry No.4 of Part-II of Federal Legislative List, Electricity and Entry No.6 of Part-II of Federal Legislative List, all regulatory authorities are established under federal law, meaning thereby that the Council of Common Interests enjoys constitutional sanction to formulate and regulate policies with respect to matters of electricity and exercise supervision and control over institutions operating as 'regulatory authority'; that the tariff determination, review determination and reconsideration decision are required to comply with Article 97 of the Constitution and the law/guidelines/policies framed pursuant thereto. In this behalf, it was stated that Article 93 of the Constitution empowers respondent No.2 to exercise executive authority with respect to matters falling within the legislative powers of the Parliament/Majlis-e-Shoora and as per Entries Nos.4 & 6 in Part-II of the

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Federal Legislative List, the power to regulate provision for 'electricity and 'regulatory authorities' can only be legislated by Majlis-e-Shoora therefore as per mandate of the Constitution, respondent No.1 has to comply with and adhere to all such guidelines as prescribed by respondent No.2; that with context to respondent No.1, Section 7(6) read with Section 31(4) and 31(2) of the NEPRA Act, respondent No.2 is empowered to exercise supervisory control and issue guidelines to respondent No.1. It was also contended that tariff determination, review determination and reconsideration decision are repugnant to the applicable constitutional and legal framework as provided under Articles 153 & 154 of the Constitution in as much as that National Power Policy, 2013 prescribed a policy methodology to alleviate market inefficiencies and financial burdens from the national power sector, which is binding on all the parties including respondent No.1. It was further contended that the efficiency prescribed in 2013 policy is binding upon respondent No.1, which has not been taken into consideration while making the tariff determination and dismissing the reconsideration petition. Reliance was placed on the decision by the Division Bench of Hon'ble Lahore High Court in ICA No.1766 of 2016 in case titled 'Punjab Higher Education Commission Vs. Dr. Aurangzeb Alamgir etc.', 'Water and Power Development Authority through Director Services and Estates Vs. Excise & Taxation Department, Government of the Punjab through Director General & 04-Others (2017 PTD 517), 'Syed Feroze Shah Gillani and Others Vs. Federation of Pakistan & Others' (PLD 2013 Lahore 659), 'Master Textile Mills and 275 Others Vs. Federation of Pakistan and Others' (PLD 2014 Islamabad 83), 'Wattan Party through President Vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and Others' (PLD 2006

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Supreme Court 696) & 'M/s Gadoon Textile Mills and 814 Others Vs. WAPDA and others' (1997 SCMR 641).

4. Mr. Ahmad Hassan Shah, Advocate Supreme Court, appearing for petitioners in W.P. No.2727-2016, 2854/2016, 3023/2016, 3024/2016 & 3037-2016, *inter alia*, contended that under the scheme as provided in NEPRA Act, when a redetermination petition is filed by the Federal Government, the same has to be decided anew. In this behalf it is contended that phrase 'anew' means that it is a fresh determination. In this behalf, learned counsel took the Court through the provisions of NEPRA Act for understanding the scheme of law, which is to be followed while deciding a redetermination petition. Learned Counsel contended that the petitioners in the writ petitions, filed by him have not challenged the decision in the redetermination petition by the Federal Government as the petition were filed prior to the said decision.

5. Hafiz Naeem, & Barrister Arshad Majeed Malik, Advocates High Court, appearing on behalf of respondent No.1/NEPRA, *inter alia*, contended that right of hearing was provided to the petitioners inasmuch as the hearing was scheduled for 14.06.2016, however, the Federal Government sought an adjournment and the hearing was accordingly adjourned. In the meanwhile, the Hon'ble Lahore High Court, Multan Bench, Multan directed NEPRA vide order dated 23.06.2016 that NEPRA has to decide the reconsideration request within 7-days therefore hearing was scheduled for 30.06.2016 and the Federal Government as well as the petitioners were informed accordingly, but request for adjournment was made by the petitioners and the Federal Government, which was not accepted. It was further contended that opportunity of hearing was duly provided to the petitioners, but not availed by them; that petitioners and Federal Government abused the

right of hearing and were interested to linger on the matter. Reliance was placed on case reported as 'Justice Khursheed Anwar Bhinder and Others Vs. FOP and another' (PLD 2000 SC 483), 'Warid Telecom and Others' Vs. PTA' (2015 SCMR 338), 'Rasheed Ahmad Vs. FOP and Others' (PLD 2017 SC 121). It was further contended that that proviso to section 31(4) of NEPRA Act requires NEPRA to determine the tariff 'anew' after receiving reconsideration request from the Federal Government. In this behalf, it was contended that NEPRA is a Regulator of the electric power sector; the proviso to section 31(4) is to be read and understood by reading the entire NEPRA Act and the powers and functions of NEPRA have to be kept in mind; that reading of the NEPRA Act shows that when reconsideration request is received from the Federal Government, it is either to be accepted or rejected, if same is rejected then there is no redetermination of tariff, however, if same is accepted then there may be a new tariff; that filing of the reconsideration petition does not nullify earlier tariff determination; that since the entire exercise regarding redetermination is to be completed within 15-days therefore the wisdom of the legislature is that the entire process is not to be started from scratch. It was further contended that policy guidelines of the Federal Government are not binding upon NEPRA in light of Section 7(6) of NEPRA Act. It was further contended that Hon'ble Supreme Court of Pakistan has held that policy guidelines of Federal Government are not binding upon the regulator and at the best are 'guidelines', which the regulator may take into consideration however the ultimate responsibility for tariff determination is of the regulator. Reference was placed on cases reported as 'Engineer Iqbal Zafar Jaghra and Others Vs. FOP and others (PLD 2013 SC 224) & 'Pak Telecom Mobile Limited Vs. PTA' (2014 SC 478). It was further contended that respondent No.1 did

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not violate National Power Policy, 2013 or National Power Tariff and Subsidy Policy Guidelines, 2014; that through the reconsideration request the Federal Government is seeking to pass on the inefficiencies of DISCOs to the end consumers whereas the afore-stated guidelines which state that inefficiencies of DISCOs will not be passed on to the consumers. It was further submitted that NEPRA has to determine tariff in accordance with law and its rules and guidelines. Finally, it was contended that petitioners have argued their case beyond their pleadings. Reference was placed on a case reported as 'Sardar Muhammad Naseem Khan Vs. Returning Officer' (2015 SCMR 1698).

6. Learned DAG adopted the arguments advanced by learned counsels for the petitioners and submitted that redetermination petition filed by the Federal Government, respondent No.1 failed to adhere to the principles of procedural propriety and committed illegality.

7. Learned counsel for the petitioner Malik Kashif Rafique Rijwana & Rao Qasim in W.P. No.3752/2016 & 4013/2016 and for the applicants in W.P. Nos.2771-2016 & 2727-2016 supported the learned counsel for NEPRA and submitted that the orders passed by respondent No.1 comply with the provisions of NEPRA Act and rules and regulations framed in this behalf and the Federal Government is required to notify the tariff as duly determined by NEPRA.

8. The petitioners are aggrieved of the initial determination made by NEPRA/respondent No.1; its refusal to grant leave, for review motions, to petitioners and the decision made by it while deciding redetermination petition filed by Federal Government of Pakistan. Respondent No.1, while exercising powers for tariff determination, review application or redetermination petition acts in a quasi judicial

capacity. The petitioners seek judicial review of the referred decision(s) by NEPRA for exercise of such authority. The principles, on the basis of which, this Court under Article 199 of the Constitution, has to examine such like orders, are enshrined in various pronouncements of the Hon'ble Supreme Court of Pakistan as well as the High Courts of the country. Some of the following judgments lay down the basic principles of judicial review in such like cases;

a) In case reported as 'Habibullah Energy Limited & Another Vs. WAPDA through Chairman and Others' (PLD 2014 Supreme Court 47); it was observed as under: -

"3. In order to ascertain the proper role of State agencies in the management of public sector enterprises, it is of critical importance to understand the nature of government as defined by our constitutional system. Constitutional democracy is premised on a contractual theory of government, whereby power is delegated by the people to the government in accordance with the terms of the Constitution. The preamble to the Constitution stipulates, inter alia, "that it is the will of the people of Pakistan to establish an order." State agencies responsible for the management of publicly owned companies are part of the order established by the will of the people, and thereby possess merely delegated authority.

4. Rather than being owners of public sector enterprises, State agencies stand in a fiduciary relationship to the people who are the beneficial owners of the publicly owned assets. The idea that rulers owe a fiduciary obligation to the ruled is at least two millennia old. The Roman philosopher and politician Cicero defined the nature of government as follows in De Officiis, "The guardianship of the state is a kind of trusteeship which should always be managed to the advantage of the person [or body which has entrusted rather than of those to whom it is entrusted. " We have on numerous occasions emphasized the fiduciary nature of the interaction between the State and the citizen. In Muhammad Yasin v. Federation of Pakistan (PLD 2012 SC 132), we held that "holders of public office are first and foremost fiduciaries and trustees for the people of Pakista And when performing the functions of their Office, they can have no interest other than the interests of the honourable People of Pakistan." The basis of fiduciary relations is the exclusive benefit principle, according to which the fiduciary has a duty to act solely in the interests of the beneficiary. Fiduciary obligations depend on the complete commitment of the fiduciary to act in the best interest of the principal.

5. *It is important to note that a fiduciary obligation is not merely an ethical precept. As a legal imperative, fiduciaries must act in the best interests of the -principal, performing their functions with care and complete fidelity. In the private law context, where fiduciary duties are routinely enforced by the courts, elections alone are not considered sufficient to hold company directors responsible to shareholders and align their interests. Instead, in the area of corporate law, there is a recognition that the interests of elected directors and shareholders may diverge. Given that shareholders are numerous and diffuse, it may be difficult for them to effectively monitor the decisions taken by the board. Further, because of collective action problems, the shareholders may find it difficult to coordinate and respond to abuse .of discretionary authority by the directors. Hence, corporate law employs a judicial mechanism, the enforcement of fiduciary duties, to align the interests of the shareholders and their agent, the board of directors. The structure of the principal agent problem is the same in the case of state agencies, such that public officials may have an incentive to advance their own interests at the expense of the citizens' interests. In fact, the need for a judicial mechanism is even more acute in the case of state agencies, since the principal, the people, is even more numerous and diffuse than the shareholders of a company.*

6. *At this point, it is important to note that not all decisions by state functionaries are to be subjected to an exacting judicial oversight. This is because the principal, (the people), has in fact vested state agencies with discretionary power of an administrative nature. Such delegation of authority by the principal is essential to the efficient functioning of the government. However, given the possibility of the agent's deliberate or negligent deviation from the best interests of the beneficiary, the court will enforce fiduciary obligations under certain circumstances. A breach of the duty of loyalty, such as in the case of a self-dealing transaction or one involving conflict of interest, will trigger heightened scrutiny by the court. Further, if public officials fail to exercise the duty of care that is expected of a prudent manager, the court will assess the underlying action or transaction to ascertain whether the state functionaries have breached their fiduciary obligations to the people of Pakistan.*

b) Similarly, the Hon'ble Supreme Court of Pakistan in case reported as 'Dr. Akhtar Hassan Khan and others Vs. Federation of Pakistan and others' (2012 SCMR 455) observed as follows:-

22. *Though its policies sometimes may be open to criticism but that is for the concerned economists in the government or academics to examine and opine but once the Competent Authority in the government has taken a decision backed by law, it would not be in consonance with the well established norms of judicial review to interfere in policy making domain of the*

executive authority. In Asia Foundation and Construction Ltd. v. Trafalgar House Construction (I) Ltd. ((1997) 1 Supreme Court Cases 738), the Indian Supreme Court annulled the judgment of the High Court whereby the said Court had quashed the award of contract to a Company on the ground that the contract was awarded at the behest of Asian Development Bank who had partly funded the project. The Court observed as follows:--

"It is well known that it is difficult for the country to go ahead with such high cost projects unless the financial institutions like World Bank or the Asian Development Banks grant loan or subsidy, as the case may be. When such financial institutions grant such huge loan they always insist that any project for which loan has been sanctioned must be carried out in accordance with the specification and within the scheduled time and the procedure for granting the award must be duly adhered to. In the aforesaid premises on getting the valuation bids of the appellant and respondent No.1 together with the consultant's opinion after the so-called corrections made the conclusion of the bank to the effect "the lowest evaluated substantially responsive bidder is consequently AFCONS" cannot be said to be either arbitrary or capricious or illegal requiring court's interference in the matter of an award of contract. There was some dispute between the Bank on one hand and the consultant who was called upon to evaluate on the other on the question whether there is any power of making any correction to the bid documents after a specified period. The High Court in construing certain clauses of the bid documents has come to the conclusion that such a correction was permissible and, therefore, the Bank could not have insisted upon granting the contract in favour of the appellant. We are of the considered opinion that it was not within the permissible limits of interference for a court of law, particularly when there has been no allegation of malice or ulterior motive and particularly when the court has not found any mala fides or favouritism in the grant of contract in favour of the appellant.

23. *In Tata Cellular v. Union of India (36(1994) 6 SCC 651), the Court while dilating on the parameters of judicial review in matters of awarding of contract by the Government candidly laid down as follows:--*

"77. The duty of the court is to confine itself to the question of legality. Its concern should be:

- (1) whether a decision-making authority exceeded its powers?*
- (2) committed an error of law,*
- (3) committed a breach of the rules of natural justice,*
- (4) reached a decision which no reasonable tribunal would have reached or,*

(5) *abused its powers.*

Therefore, it is not for the court to determine whether a particular policy of particular decision taken in the fulfillment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under:--

(i) *Illegality: This means the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it.*

(ii) *Irrationality, namely, Wednesbury unreasonableness.*

(iii) *Procedural impropriety.*

The above are only the broad grounds but it does not rule out addition of further grounds in course of time."

24. *In R v. Deptt. of Constitutional Affairs [2006 All ER (D) 201] even some deviation from the best practice was found to be no justification for judicial review. The Court held that, "It is not every wandering from the precise paths of best practice that lends fuel to a claim for judicial review." In Reliance Airport Developers (P) Ltd. v. Airports Authority of Indian and others [(2006) 10 SCC], the ratio of the afore-referred judgment was reiterated and it was observed that the power of judicial review would be available "only if public law element is apparent which would arise only in a case of "bribery, corruption, implementation of unlawful policy and the like." In the cases of commercial contracts, the Courts' lack of expertise was taken note of in Paras 50 and 51, in terms as follows:--*

"It does not have the material or expertise in this context to 'second guess' the judgment of the panel. Furthermore, this process is even more clearly in the realm of commercial judgment for the defendant, which judgment cannot properly be the subject of public law challenge on the grounds advanced in the evidence before me."

34. *The Courts while dealing with cases relatable to financial management by the government or awarding of contract by it must appreciate that these are either policy issues or commercial transactions requiring knowledge in the specialized fields. The Courts lack the expertise to express any opinion on the soundness or otherwise of such acts/transactions. The question whether a contractual transaction or decision taken in the exercise of executive authority by the Government can be subjected to judicial review has engaged the attention of constitutional courts in several countries and the judicial consensus generally has been that the Courts should ordinarily refrain from interfering in policy making domain of executive authority or in the award of contracts unless those acts smack of arbitrariness, favoritism and*

a total disregard of the mandate of law. In Watan Party v. Federation of Pakistan (PLD 2006 SC 697), the Court annulled the privatization of Karachi Steel Mill not merely because of violation of a single rule or regulation but there were several factors that weighed with the Court which included the abdication of the authority by the Cabinet Committee on Privatization to the Privatization Commission to issue letter of acceptance to whoever may be the highest bidder, the net assets of the Steel Mill which was privatized had not been included in the valuation report, the decision that the Government of Pakistan shall bear a huge financial liability of the VSS Scheme for the employees of the Steels Mill which was not part of the initial public offering to the bidders through the advertisement, the credentials of the highest bidder seriously impinged on its integrity as also the fact that the major share holding in the highest bid was that of a company which had off shore offices. At page 763 of the Watan Party supra case, this Court commented in detail on the corporate credentials of a member of the consortium that had purchased it which reflected that the Privatization Commission had not kept in view the mandatory requirements of the process of pre-qualifying a bidder. There were 9 instances of financial irregularities in the corporate profile of the said member of the consortium, which were specifically noted in the para 87 of the said judgment.

36. In the case of Watan Party supra (Pakistan Steel Mills Case), the well established principles governing the power of judicial review were reiterated by holding that:--

"in exercise of the power of judicial review, the courts normally will not interfere in pure policy matters (unless the policy itself is shown to be against Constitution and the law) nor impose its own opinion in the matter."

The Court quoted with approval the law laid down in Messrs Elahi Cotton Mills Ltd. v. Federation of Pakistan (PLD 1997 SC 582) and BALCO Employees Union (Regd.) v. Union of India (AIR 2002 SC 350). In the latter judgment, the Indian Supreme Court held as follows:--

"Process of disinvestments is a policy decision involving complex economic factors. The Courts have consistently refrained from interfering with economic decisions as it has been recognized that economic expediencies lack adjudicative disposition and unless the economic decision, based on economic expediencies, is demonstrated to be so violative of constitutional or legal limits on power or so abhorrent to reason, that the Courts would decline to interfere. In matters relating to economic issues, the Government has while taking a decision, right to "trial and error" as long as both trial and error are bona fide and within limits of authority."

39. In Air India Ltd. v. Cochin International Airport Ltd. ((2000) 2 Supreme Court Cases 617), the Court held that the award of a

contract, whether by a private party or by a State, is essentially a commercial transaction. It can choose its own method to arrive at a decision and it is free to grant any relaxation. Nevertheless it was observed, the State, its corporations, instrumentalities and agencies have the public duty to be fair in their transactions. In the event of some irregularity in the decision making process, it was further observed, the Court must exercise its discretionary powers of judicial review with circumspection and only in furtherance of public interest and not merely making out of a legal point. It should always keep the larger public interest in mind to interfere or not to interfere. Only when the public interest overwhelms any other consideration, the Court should interfere. In Master Marine Services (P) Ltd. v. Metcalfe & Hodgkinson (P) Ltd. ((2005) 6 Supreme Court Cases 138), the Indian Supreme Court set aside the judgment of the High Court whereby the contract awarded to a party was quashed”.

c) In case reported as ‘Government of NWFP through Secretary and 3-Others Vs. Mejee Flour and General Mills Pvt. Ltd. Mardan and Others’ (1997 SCMR 1804), it was held as follows:

9. Mr. A.K. Brohi, in his treatise *Fundamental Law of Pakistan* while elaborating his notion of inequality aptly remarked:--

"There are, let us note, various kinds of inequalities; inequality emanating, for example, from economic disequilibrium observable in our society, and this inequality in its turn leads up to the denial of equal opportunity for all. Then there is what might be called, political inequality, which leads up to disenfranchisement of a vast section of the people of a given country and thus inevitably involves the deprivation of the right of the people to participate in the political life of the State. The ideal of political equality can only be realized by universal suffrage and free participation in the representative institutions by recourse to which modern democratic States are functioning. Similarly, there is such a thing as social inequality: the growth of humanism has brought about the liberation of people from the world of slavery and the evil of un-touchability and such other social abominable practices which deprive people of an honourable place as free citizens in a democratic society. To this list of inequalities might be added the inequality which results from racial pride; this, again, finds its culmination in the dogma that only those who have blue blood in their veins are capable of taking part in the political, civic and economic activities of the State.

Historically considered, the notion of human equality has arisen as a protest against the practice of magnifying artificial distinctions between man and man based on considerations like wealth, purity of blood and religious superstition and making these as criteria for determining

the status of each individual in the total legal order. If the judicial administrative organs of the State while applying the law were to discriminate between man and man and exercise what may be characterized as arbitrary authority in singling out some persons for discriminatory treatment they would be acting counter to the ideal of equality before law which has been proclaimed by the framers of the Constitution in the first part of the clause of Article 5--an Article which declares that all citizens are equal before law."

It would thus be noticed that notion of human equality had emerged as a reaction to abhorring artificial distinctions between man and man or between one class of men and another class based on consideration, inter alia, of personal likes and dislikes under the garb of discretion.

10. In his Treatise 'Discretionary Powers' which is Legal Study of Official Discretion D.J. Galligan has acknowledged that "the general principles that discretionary decisions should be made according to rational reasons means: (a) that there be findings of primary facts based on good evidence, and (b) that decisions about the facts be made for reasons which serve the purposes of the statute in an intelligible and reasonable manner". According to the celebrated author, the actions which do not meet these threshold requirements are arbitrary, and may be considered a misuse of powers. In *Amnaullah Khan and others v. The Federal Government of Pakistan through Secretary, Ministry of Finance, Islamabad and others* (PLD 1990 SC 1092) Shafiur Rahman, J. who was sitting in the Full Bench has very ably propounded by 'now well-known doctrine of 'Structuring the discretion' in the following paragraph of the report at page 1147:--

"Wherever wide-worded powers conferring discretion exist, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Clup Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will achieve the, high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure. Somehow, in our context, the wide-worded conferment of discretionary powers or reservation of discretion, without framing rules to regulate its exercise, has been taken to be an enhancement of the power and it gives that impression in the first instance but where the authorities fail to rationalise it and regulate it by Rules, or policy statements or precedents, the Courts have to intervene more often than is necessary, apart from the exercise of such power appearing arbitrary and capricious at times."

11. The impugned action of the petitioners when placed on the touchstone of structuring the discretion we come to the irresistible conclusion that the cases like the one before us provides ample justification for interference in the illegality and procedural impropriety bordering on the irrationality in an official action through the judicial review of the impugned action.

d) In case of 'Badshah Gul Wazir Vs. Government of Khyber Pakhtunkhwa and Others' (PLD 2014 Peshawar 210), the Division Bench observed as follows:-

10. As regards the mala fides alleged against the Law Minister by the petitioner that the amendments are based upon political considerations, the same cannot be sustained as no 'mala fides' can be attributed to the legislature. No enactment can be struck down just by saying that it is arbitrary and illegal or that the Court thinks that it is unjustified. The scope of interference as regards legislative action and the administrative action is quite different and the parameters to deal with them are distinct. Administrative action can be interfered with while exercising judicial review on the ground of it being unreasonable or irrational or there being an illegality or procedural impropriety but the same cannot be utilized and applied to strike down an enactment on any of these grounds. The motive of the Legislature in passing a statute is beyond the scrutiny of Courts coupled with any irregularity of procedure under Article-69 of the Constitution. Nor can the Courts examine whether the Legislature had applied its mind to the provisions of a statute before passing it. The propriety, expediency and necessity of a legislative act are for the determination of the legislative authority and are not for determination by the Courts. An Act passed by the Provincial Legislature stands on the same footing as an Act passed by the Federal Legislature, as provided in Article 127 of the Constitution. It needs no highlighting the aspect that there is always a presumption in favour of the constitutionality and a law will not be declared unconstitutional, unless the case is so clear as to be free from doubt and that too on the basis of the two fundamental principles with regard to the powers of the Court to strike down a legislation, where the validity of the statute is questioned and there are two interpretations, the one which would make the law valid has to be preferred over the other which would render it void. In our view, no mala fides can be attributed to any act of legislature and when the competent legislature has enacted a statute, prescribing a particular age, the same cannot be struck down on the grounds of mala fides of respondent No.2, as has been alleged. Although, the petitioner has annexed certain correspondence in between the office of Ombudsman and Law Ministry but the same will have no relevance with regard to the validity or otherwise of the prescription of the age under the amending Act"

e) In a case reported as 'Bank of Punjab through Group Head of its Special Projects Vs. Accountability Court No.1, Lahore & 02-Others' (PLD 2014 Lahore 92), it was observed as follows:-

35. Section 25(b) of The NAB Ordinance which is relevant to resolve the controversy does not use the expression "prerogative" but word "Discretion" has been used. In the opinion of learned counsel for the respondent, keeping in view the language of section, it amounts to prerogative as exclusive discretion has been vested in the Chairman NAB.

The word "prerogative" has been defined in BLACK'S LAW DICTIONARY (Sixth Edition) as follow:--

"An exclusive or peculiar right or privilege. The special power, privilege, immunity, right or advantage vested in an official person, either personally, or in respect of the things to his office or in an official body, as a court or legislature".

The same word has been defined in the Concise Oxford Dictionary as follow:--

"Right of Sovereign, theoretical subject to no restriction. Peculiar right or privilege natural or divine giving advantage, privilege or faculty".

The argument keeping in view the definition of expression referred to and use of expression "Discretion" in section 25(b) of The NAB Ordinance would not advance the plea of respondent No.3.

36. Even if it is presumed for the sake of arguments that power conferred upon Chairman NAB is "prerogative" and "privilege", it would not advance the plea of respondent No.3, claiming complete immunity in view of dictum laid down by Honourable Supreme Court of Pakistan in "CONTROLLER OF PATENTS AND DESIGNS, KARACHI and others v. MUHAMMAD QUADIR HUSSAIN" (1995 SCMR 529), whereby while deciding appeal from the judgment of learned High Court of Sindh dated 23-8-1989 passed in Constitutional Petition No.D-128 of 1985, provisions of Section 79 of The Patent and Designs Act (II of 1911) were examined containing the expression "Prerogative of the Federal Government".

Referring to the judgment in "Laker Airways Ltd. v. Department of Trade" (1977) 2 ALL E R. 182, it was held at page 533 as follow:--

"There can be no cavil with the proposition that the Government of Pakistan or for that matter any of holder of its offices, or any Government functionary do not enjoy any conventional prerogative as was or is available to Crown in England except those discretionary powers which are either specifically conferred by the

Constitution or under any law passed by the Parliament. We are also of the view that any discretionary power available to the Government or its functionaries in the nature of prerogative either under the Constitution or under any of Act of the Parliament is subject to the process of judicial review by the superior courts, in accordance with their jurisdiction under the constitution. However, any exercise of discretionary power in the nature of prerogative claimed by the Government or holding of any of its offices, or its functionaries has to be justified either under some statute law or under the provisions of the Constitution, before it is pressed into service before a court-----".

Lord Denning while speaking in Report "LAKER AIRWAYS" (1977 (2) All ER 182 opined as follow:--

"Seeing that the prerogative is a discretionary power to be exercised for the public good, it follows that its exercise can be examined by the court just as any other discretionary power which is vested in the executive".

37. Viewed from the angle, claim of absolute immunity to the decision of the Chairman NAB cannot be endorsed.

38. It is further to be noted that power of "Judicial Review" as compared to "Jurisdiction" is available to the superior courts enshrined by the Constitution which by no stretch of imagination either can be curtailed or abridged.

Concept of Judicial Review was dealt with honourable Supreme Court in the case of "(1) Saiyyid ABUL A'LA MAUDOODI" (PLD 1964 SC 673) and it was held that courts following British common law not barred from subjecting executive or judicial action to judicial review even where there is no express requirement of "reasonable grounds" for taking administrative action.

39. Scope of exercise of power of Judicial review was also examined by apex Court in "SUO MOTU CASE No.18 of 2010" (PLD 2011 SC 927) and while making reference to the case-law from Pakistani and Indian jurisdiction it was held at pages 956-957 as follow:--

"The exercise of constitutional powers by the High Court and the Supreme Court, under the relevant Articles, have been categorized as power of "Judicial review". Every executive or administrative action of the state or other statutory or public bodies is open to judicial scrutiny and High Court or the Supreme Court can, in exercise of the powers of Judicial review under the constitution, quash the executive action or decision which is contrary to law or is violative of fundamental rights guaranteed by the constitution. With the expanding horizon of articles dealing with fundamental rights, every executive action of the Government or other public bodies, including instrumentalities of the

government, or those which can be legally treated as "Authority", if arbitrary, unreasonable or contrary to law is amenable to the writ jurisdiction of the Supreme Court or the High Courts and can be validly scrutinized on the touch stone of the constitutional mandate. Common cause, A. Regd. Society v. Union of India (AIR 1999 SC 2979)".

40. Dealing with the scope of judicial review of executive authority, the honourable apex Court, while referring to the case of "Asia Foundation and Construction Ltd. v. Trafalgar House Construction Ltd." (1997) 1 Supreme Court Cases 738) has held in "Dr. AKHTAR HASSAN KHAN and others v. FEDERATION OF PAKISTAN and others" (2012 SCMR 455), that once the competent authority in the government has taken a decision backed by law, it would not be in consonance with the well-established norms of judicial review to interfere in policy making domain of executive authority. In "COUNCIL OF CIVIL SERVICE UNIONS AND OTHERS v. MINISTER FOR THE CIVIL SERVICES" (1985) 1 Appeal Cases 374), it was enunciated that executive action was not immune from judicial review merely because it was carried out in pursuance of a power derived from a common law, or prerogative, rather than a statutory source and a minister acting under a prerogative power might, depending on its subject matter, be under the same duty to act fairly as in the case of action under a statutory power.

In brief three conditions were laid down to interfere in the action falling within the executive domain which are as follow:--

- "(1) "Illegality" which means that the decision maker must understand correctly the law that regulates his decision-making power and must give effect to it.
- (2) "Irrationality" was referred to as "Wednesbury unreasonableness" (Associated provincial picture Houses Ltd. v. Wednesbury Corporation (1948) 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be settled could have arrived at it.
- (3) "Procedural Impropriety" is another ground which means and includes failure of authority to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision".

Question of "Illegality", "Irrationality" and "Procedural Impropriety" was also dealt with by a learned Division Bench of this Court in "Ch. IFTIKHAR AHMED v. CHIEF SECRETARY, PUNJAB and others" (2012 PLC (C.S.) 1470).

41. Dealing with question of exercise of powers of Judicial review, it was opined by House of Lord in "INLAND REVENUE COMMISSIONERS AND NATIONAL FEDERATION OF SELF-EMPLOYED AND SMALL BUSINESSES LTD." (1982 Law Reports (Appeal Cases)

617) that in order to exercise power of Judicial review there must be sufficiency of interest of the party.

Examining the moot point, in "PRESTON v. INLAND REVENUE COMMISSIONERS (1985) 2 ALL ENGLAND LAW REPORTS 327), it was held that Judicial review is available only as a remedy for conduct of a public officer or authority which is ultra vires or unlawful but not for acts done lawfully in the exercise of an administrative discretion which are complained of only as being unfair or unwise.

42. In view of above state of law, action of any authority, officer or Government is subject to Judicial review of this court but keeping in view the conditions referred to in the judgments.

f) In a case reported as 'Muhammad Nadeem Vs. Executive District Officer' (2017 PLC (CS) 430), the Hon'ble Lahore High Court recommended procedural impropriety as ground for judicial review.

9. The thrust of the arguments by the learned counsel for the petitioners was that under proviso (2) of Section 31(4) of the Act, the Federal Government if not satisfied with the determination, can file a petition for reconsideration of the determination of the tariff and when such petition is made, the authority shall determine the same anew. For the ease of convenience, subsection (4) of Section 31 of the Act and its proviso are reproduced below and are as follows:-

“(4) Notification of the Authority’s approved tariff, rates, charges, and other terms and conditions for the supply of electric power services by generation, transmission and distribution companies shall be made, in the official Gazette, by the Federal Government upon intimation by the Authority.

Provided that the Federal Government may, as soon as may be, but not later than fifteen days of receipt of the Authority’s intimation, require the Authority to reconsider its determination of such tariff, rates, charges and other terms and conditions. Whereupon the Authority shall, within fifteen days, determine these anew after reconsideration and intimate the same to the Federal Government”

The scheme of law, as enshrined in Section 31, is that the respondent Authority has the power to determine the tariff rates and other charges and while exercising the referred power, it has to keep in view the

interests of consumer and companies providing electric power services in accordance with guidelines not inconsistent with the provisions of the Act, *ibid*. Since while hearing the redetermination, the tariff has to be decided anew hence the distribution companies, being the stakeholder in the matter, viz-a-viz the determination of their tariff, are entitled to a right of hearing in the same. NEPRA, being mindful of the said fact, did issue the notice to the petitioners on petition for redetermination of the tariff however they were not actually heard by NEPRA. In this behalf, the term 'anew' has been interpreted by the Hon'ble Lahore High Court in a case reported as 'Subedar (Retired) Muhammad Khan Vs. Adalat Khan and Another (2002 CLC 971) as 'new' and 'recent' in all respects. Similarly, in case reported as 'Imam Buksh & Others Vs. Ghulam Nabi & Others (1999 SCMR 34), it was observed that where *denovo* trial is ordered, the trial takes place afresh and the matter has to be decided anew as if had not been heard before and as if no position has previously rendered. Similarly, the word 'anew' has been defined in Concise Oxford English Dictionary, 11th Edition, to mean 'in a new or different way', 'once more' and 'again'. The referred meaning to the word 'anew' shows that when the petition for redetermination of tariff is made, the matter has to be decided afresh, as if no previous position on the same has been rendered and as observed above a balance has to be maintained between the interests of the consumer and the power services companies, hence the petitioners, being the Distribution Companies, have an interest in the matter and are entitled to be heard.

10. It is the stance of NEPRA that an opportunity of hearing was granted to the petitioners but they did not avail the same and requests for adjournment/postponement were made time and again. Reliance

was placed in this case on a case reported as Justice Khursheed Anwar Bhinder and Others Vs. FOP and another' (PLD 2000 SC 483), wherein the Hon'ble Supreme Court of Pakistan observed that a prima facie right of opportunity to be heard may be excluded by implication in the following cases: -

- i) When an authority is vested with wide discretion;
- ii) When the maxim '*expressio unius est exclusio alterius*' is involved;
- iii) Where absence of expectation of hearing exists;
- iv) When compulsive necessity so demands;
- v) When nothing unfair can be inferred;
- vi) When advantage by protracting a proceeding is tried to be reaped;
- vii) When an order does not deprive a person of his right or liberty;
- viii) In case of arrest, search and seizure in criminal case;
- ix) In case of maintaining academic discipline.

The implications cited by the August Apex Court wherein the right of hearing is to be excluded are not attracted in the facts and circumstances of the instant case. In fact, since the petitioners set the ball rolling by filing the tariff determination petitions, it was their legitimate expectation that they shall be heard in the petition(s) for reconsideration of the tariff. The denial of petitioner's request for rescheduling is contrary to law, as even in proceedings which are of *quasi judicial* nature the dictates of natural justice demand that any motion for postponement should be allowed. Reliance is placed on case reported as 'Sajid Naseer Ch and 04-Others Vs. Member, Board of Revenue (Consolidation), Punjab, Lahore and 04-Others' (2004 YLR 510). In the referred case, the Hon'ble Lahore High Court observed that reasonable opportunity of hearing is to be given to all those persons who are likely to be affected by the order, by denying adjournment and opportunity of hearing to the petitioners, the principle of natural justice was disregarded. Similarly, in case reported as Mst. Noor Bibi and Another Vs. Chairman, Evacuee Trust Property Board, Government

of Pakistan, Lahore and Another’ (2003 YLR 1794), the Hon’ble Lahore High Court observed that where the scheme of law i.e. the Act and the Rules clearly indicate the intention of the legislature that the authority, could on account of sufficient cause, grant adjournments and even restore the matter dismissed in default, the same means that an object oriented opportunity of hearing should be allowed to the parties consistent with the principles of natural justice. Even otherwise, Under Rule 26 of National Electric Power Regulatory Authority (Tariff Standard & Procedure) Rules, 1998, the Presiding Officer/Authority may for good cause shown extend time as prescribed under the rules. The stance taken by NEPRA that, Redetermination Petition is to be decided within 15-days and also there was a direction by the Hon’ble Lahore High Court in this behalf, hence the adjournment/postponement request could not be allowed, is without substance. Generally, in cases where time is prescribed to conclude the proceedings and no consequence is provided for failure to do so, said time period is taken as directory and not mandatory. Even in the instant case, under proviso to subsection (4) of Section 31 of the Act, no consequence is provided for failing of the authority to decide redetermination proceedings within 15-days hence referred period of 15-days is directory. This court in case reported as High Flying Solar Development Pakistan Limited versus NEPRA (2016 CLC 1805) clinched the law on the subject and observed as follows:-

“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 be mandatory in every 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 matter 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 be made to the celebrated treatise 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 and others V. District Officer (R) & Others' reported as [PLD 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 been given due weightage to the submission 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

necessities that alternatives or options are to be deliberated upon in the public interest”

11. The petitioners are also aggrieved of dismissal of their application for review of the tariff determination. In this regard it was contended that now after amendment in section 7 of the Act of NEPRA has power of review its order decision or determination, therefore, procedure for filing an application for promotion/ permission of review motion is not tenable. The petitioners have not challenged the vires/legality of the Electric Power Regulatory Authority (Review Procedure Regulations, 2009) which primarily provide the procedure to be adopted by the NEPRA for review of its order; under Regulation 3 (2) of the referred regulations, any party aggrieved from any order of the authority and who upon discovery of new important piece evidence or on account of some mistake or error apparent on the face of the record or for any other sufficient reason may file motion seeking review of the said order. Under Regulation 3(3), the motion for review shall not be entertained unless it is made within time prescribed. Under section 31(4) of the Act and Rule 16(6) of the Rules, however, authority may for the reasons to be recorded in writing condone the delay considering the peculiar facts and circumstances of the matter in questions. Similarly, Regulation 16(6), prescribes that a party within 10-days of service of final order for determination or decision may file motion for leave to review before the authority to be considered by the full strength of the authority. Under Rule 16(9), the authority may refuse leave to appeal if it considers that review would not result in withdrawal and modification of final order, determination or decision. Likewise, under Rule 6(12), the authority shall within 15-days on request by the Federal Government for reconsideration by the authority of its final order/ determination or decision anew shall do so within 15-days and intimate

the same to the Federal Government for the notification in the official gazette under sub-section 4 of section 31 of the Act. As mentioned above, the power of review is conferred on authority by amendment made in sub-section 2 of section 7 of the Act and through Regulation of Generation, Transmission and Distribution of Electric Power Amendment Act, 2011, whereby the authority has the power to review its order, decision or determination. The Hon'ble Supreme Court of Pakistan while determining the effect of 1998 Rules qua the review in case reported as "National Electric Power Regulatory Authority V. Faisalabad Electric Supply Company Limited" (2016 SCMR 550), observed as follows:-

"The authority that has been conferred power under clause (g) of subsection (2) of section 7 to review its order, decision or determination. Power to review was conferred by the authority as notified above under the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2011 and the Rules were framed on 23.12.1998. Therefore, rules providing any other strength of members for exercising its authority may it be executive, administrative and or quasi judicial, different than what is set down in the parent Statute itself, unless of course, such is permissible and provided for under the Act itself, must yield to the present Statute."

In light of the observations made by the Hon'ble Supreme Court of Pakistan, the Rules and Regulations framed by the NEPRA are subservient to the parent Statute, hence, any restriction imposed on the right of any party to seek review of any decision, order or determination would be in violation of the parent Statute i.e. Act. Respondent No.1 needs to amend the Rules and Regulations to bring it in harmony with the Statute.

12. Under Article 153 of the Constitution of Islamic Republic of Pakistan, 1973, the Council of Common Interests has been created to take decisions and perform functions with respect to matters provided in

Article 154. In this behalf, the Council is to formulate and regulate the policies in relation to matters in Part-II of the Federal Legislative List and shall exercise supervision and control over related institutions. Part-II of the Federal Legislative List contains electricity (Item No.4) and to regulate the authorities established under a federal law (Item No.6) on the subjects over which the Council of Common Interests is to formulate and regulate the policies.

13. Learned counsel for the petitioners argued that policies framed by the Council of Common Interests viz-a-viz the electricity are binding upon NEPRA, whereas contrary stance has been advanced by learned counsel for NEPRA. In this behalf, the nature of control exercised by Council of Common Interests and the effect of its policies has been interpreted by the Hon'ble Supreme Court of Pakistan as well as High Courts. Some of the cases in this regard as 'Watan Party V. Federation of Pakistan' (PLD 2006 SC 697). In the referred case, the Hon'ble Supreme Court of Pakistan, observed as follows: -

"It is important to note that a perusal of both these rules abundantly makes it clear that the policy decisions of the CCI are required to be implemented by the Cabinet Secretary as well as the Secretary of the concerned Ministry. Therefore, it is not correct to assert that the powers of the C.C.I. have been transferred/delegated to the Commission for the purpose of making its policies independent of C.C.I. while discharging the functions in terms of section 5 as well as section 22 of the Ordinance, 2000. It would not be out of place to mention that as far as the procedural rules are concerned they have got Constitutional support/backing, therefore, whatever decision will be pronounced by the CCI the Executive Government in discharge of its functions in terms of Article 97 of the Constitution is bound to implement the same unless it is varied by the Parliament. It may be recorded that validity of these Rules has not been challenged before us"

Similarly, in a recent judgment, the Division Bench of Hon'ble Lahore High Court in case titled 'Punjab Higher Education Commission Vs. Dr. Aurangzeb Alamgir etc.' (ICA No.1766-2016) observed as follows:-

“CCI is to formulate and regulate policies in relation to matters in Part-II of the Federal Legislative List and to exercise supervision and control over related institutions. HEC being a related institution, falls under the supervision and control of the CCI. Any standards, guidelines or recommendation regarding standards in institutions must obtain approval of CCI. This constitution obligation takes precedence over the powers and functions of the HEC under the HEC Ordinance. CCI also acts as an intergovernmental forum to avoid conflict and dysfunctionality between the policies of the provinces and the federation under vertical sharing of power.

CCI can also formulate and regulate policies in respect of matters in Part-II of the Federal Legislative List. The constitutional wisdom behind this is to embed and mainstream participatory and cooperative federalism is our national governance. Such policies, with constitutional fiat behind them, may be considered by the legislative while legislating on subjects falling under Part-II of the Federal Legislative List so that the footprint of provincial autonomy and federalism is visible in the proposed legislation. This is also a constitutional requirement as article 142 has been made “subject to the Constitution.”

The words ‘formulate/regulate policies and control’, as provided in Article 154 of the Constitution, were elaborated by the Hon’ble Supreme Court of Pakistan in a case titled ‘M/s Gadoon Textile Mills and 814 Others Vs. WAPDA and others’ (1997 SCMR 641). In this behalf, the august Apex Court observed as follows: -

“It may be observed that the words “formulate”, “regulate”, “policy” “control” and “supervise” employed in clause (1) of Article 154 of the Constitution carry wide connotations. The word “formulate” inter alia carries the meaning, set forth, reduce to a formula; whereas the word “regulate” inter alia connotes control, subject to guidance. The word “policy” inter alia carries meaning, as the general principles by which a Government is guided in its management of public affairs. The word “control” inter alia connotes, to regulate or guiding or restraining power over; whereas the word “supervise” inter alia carries the meaning, to look over and to inspect. The above words cannot be construed in isolation, but the same are to be construed in the context in which they are employed.

It is supposed to formulate and regulate general policy matters as to their working, which may include general policy for the working of WAPDA. It may even include a guideline for fixation of tariff by WAPDA but such guideline cannot be inconsistent with subsection (2) of section 25 of the Act, which lays down statutory parameters for fixation of tariff.

Likewise, the Hon'ble Lahore High Court, in case reported as 'Water and Power Development Authority through Director Services and Estates Vs. Excise & Taxation Department, Government of the Punjab through Director General & 04-Others (2017 PTD 517) observed as follows:

“30. Thus, in the holding of the Supreme Court of Pakistan, WAPDA as a legislative matter was in the Federal Legislative List and, therefore, the executive authority of the Federation must extend to the Authority. It was concluded that a binding effect of Article 154 and WAPDA being in the Federal Legislative List was that the generality of the executive authority as regards the Authority, vested in the Federation but that was subject to the power vested in the CCI under Article 154. Also that the Authority was an important statutory instrumentality and it was a public utility organ of the State with monopoly in generation, distribution and supply of electricity throughout Pakistan. Its importance had been recognized by the Constitution by expressly treated it as a distinct legislative matter and by mentioning it in Article 154 of the Constitution as also in Part II of the Federal Legislative List. Thus, clearly the Supreme Court of Pakistan was of the view that the executive authority of the Federation would extend to the Authority set up by the Act of 1958. Moreover, an important plank of the judgment was that WAPDA was a public utility authority whose object was to develop energy resources but its primary object was to serve the country. Its motive was not to earn commercial profit and pay dividend, but to charge reasonable rate without suffering any loss. The clear division of work was delineated in the judgment of the Supreme Court of Pakistan. CCI was tasked with formulation of policy and guidelines leaving the operation and machinery part to WAPDA for implementing that policy. Thus, WAPDA functioned under the overarching regulatory framework with its apex as the CCI. Ajmal Mian J. held in the majority judgment that the Federal Government had administrative control over WAPDA which included financial discipline inasmuch as by virtue of section 21 of the Act, 1958, WAPDA was obliged to submit after the end of every year a report of conduct of its affairs for the year along with a copy of the audit report for placing before the National Assembly which, in turn, is required to refer the same to its Committee of Public Accounts for its scrutiny.

The principles, which can be derived from the above interpretation of the Constitution is that the Constitution of Pakistan confers the power/authority to the Council of Common Interests to regulate and formulate policies for the Federation in relation to a number of subjects including electricity and regulatory bodies. The decision of the Council of

Common Interests has the binding/obligatory effect unless the same is modified by the Parliament as provided in Article 154(7) of the Constitution, hence any policy viz-a-viz the electricity and NEPRA formulated by the Council of Common Interests, has a binding effect on the respondent Authority.

14. Under section 7(6) of the Act, NEPRA while performing its functions under the Act, shall as far as practicable, has to protect the interests of consumers and companies providing electric power services in accordance with the guidelines as laid down by the Federal Government not inconsistent with 1997 Act. On behalf of NEPRA, it was vehemently argued that the guidelines, so framed by the Government, are not binding on it and in support, reliance was placed on case reported as 'SNGPL Vs. OGRA' (PLD 2013 Lah. 289). In this behalf, the Hon'ble Lahore High Court observed as follows:-

"32. The role and the functions of the respondent No.1 rests in its ability to make decisions that affect the petitioner's performance when providing a public utility, in this case its sui gas. It was established, as per its preamble, to protect public interest while respecting individual rights and to provide effective and efficient regulation. Section 6(2) of the OGRA Ordinance provides that it shall safeguard public interest, that it shall protect the interest of all stakeholders including consumers and the licensees. An important function of the respondent No.1 is the fixation of tariff and prices for natural gas. A critical element in fixing tariff is the exercise of discretion. The Hon'ble Supreme Court of Pakistan in case "Tariq Aziz-ud-Din and others (2010 SCMR 1301)" has laid down seven points for structuring discretion. In the words of the Hon'ble Supreme Court:--

"Wherever wide-worded powers conferring discretion exists, there remains always the need to structure the discretion and it has been pointed out in the Administrative Law Text by Kenneth Culp Davis (page 94) that the structuring of discretion only means regularizing it, organizing it, producing order in it so that decision will, achieve the high quality of justice. The seven instruments that are most useful in the structuring of discretionary power are open plans, open policy statements, open rules, open findings, open reasons, open precedents and fair informal procedure"

The discretion exercised by the respondent No.1 satisfied the test laid down by the Hon'ble Supreme Court of Pakistan. The discretion is not open ended but guided by the OGRA Ordinance, the Tariff Rules and the License Rules. Stakeholders have been consulted including the petitioner and opinions have been reviewed by the respondent No.1. Furthermore, the discretion exercised by the respondent No.1 was after giving due consideration to all the issues raised by the petitioner. Detailed reasons have been given in the decision for the determinations made. There is nothing on the record to show that the respondent No.1 has acted unfairly, unreasonably or contrary to the law and principles of natural justice. The respondent No.1 has applied its mind and reasoned its Decision. Therefore no case for a direction under section 12(2) of the OGRA Ordinance is made out. Consequently, this petition is dismissed”

The perusal of the above judgment shows that the Hon'ble Lahore High Court was interpreting a similar provision as contained in the Act and observed that the discretion to maintain balance between the interests of the consumer and the supplier is to be regulated under the principles of the relevant law. Similarly, under section 7(6) *ibid*, NEPRA has to keep in view the guidelines issued by the Federal Government from time to time and keep the balance as much practicable while making decisions or passing orders otherwise. The guidelines are not *per se* binding, but also cannot be ignored by NEPRA. If the same are inconsistent with the Act, they shall not be followed at all, however, if they are not, the same are to be applied and followed in order to balance the interests of the consumer and the electric supplier companies.

15. In view of above, it is held as follows: -

- a) the respondent Authority did not provide adequate opportunity to the Federal Government as well as the petitioners, which it should have, as they are the stakeholders in fixation/redetermination of the tariff.
- b) Under the Act, NEPRA has the power to review its orders, decisions, determinations therefore to follow procedure whereby permission is to be obtained to file a review, negates the referred power/right of the affected person and

is contrary to the afore noted decision of the Hon'ble Supreme Court of Pakistan reported as 'NEPRA Vs. Faisalabad Electric Supply Company Limited' (2016 SCMR 550);

- c) the policies framed and regulated by the Council of Common Interests have a binding effect under the scheme of the Constitution and should be kept in regard by the concerned functionaries.

16. For the aforementioned reasons, all the titled writ petitions are allowed, except Writ Petition 3752/2016 & W.P. No.4013-2016, which are dismissed; consequently the redetermination order passed by the respondent Authority is set aside. The respondent Authority shall provide an opportunity of hearing to the Federal Government as well as DISCOs while adjudicating/deciding redetermination petition filed by Federal Government. The petitioners/Federal Government shall not obtain adjournments/postponements and shall facilitate NEPRA to decide the matter within the time frame provided in proviso to subsection (4) of Section 31 of the Act. Furthermore, NEPRA, while deciding the redetermination petition, shall keep in view the observations made hereinabove. All pending applications are accordingly disposed off.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 22.06.2017

JUDGE

Approved for reporting

Zawar

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