JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. :W.P. NO.3858 OF 2016
Fatima Energy Limited
Vs.
National Electric Power Regulatory Authority & Another

Petitioner by : **Mr. Rashid Anwar, Advocate.**

Respondent by : **M/s Sikandar Bashir Mohmand & Mustafa Sherpao, Advocates.**

Date of hearing: **09.06.2017**

AAMER FAROOQ J. The petitioner is a limited liability company incorporated under the laws of Pakistan and is part of business conglomerate known as Fatima Group. The petitioner in order to set up a Private Power Unit invested money for setting up of a Bagasse-Coal based Cogeneration Power Plant in Sanawan Mehmood Kot, District Muzaffargarh under the Government of Pakistan National Policy for Power cogeneration by Sugar Industry. In this regard the petitioner filed a tariff petition under National Electric Power Regulatory Authority Act, 1997, before the respondent. The referred petition was dismissed by the respondent vide determination order 17.6.2016. The petitioner feeling aggrieved filed Motion for Review of the order dated 17.6.2016 which also was dismissed vide order dated 18.10.2016. The referred orders have been assailed in the instant petition.

2. The learned counsel for the petitioner, *inter-alia,* contended that the petitioner made a tariff petition under the Act of 1997 on the basis of National Policy for Power Co-generation By Sugar Industry (Cogen Policy); that the referred policy provides for Power Determination on the basis of the capacity of the Unit as well as the energy produced

and sold which generally is referred to as Take or Pay (Tariff Determination); that undoubtedly, National Electric Power Regulatory Authority (NEPRA) has the sole authority to fix a tariff which does not apply to other companies, however, on the application of Pakistan Sugar Mills Association (PSMA) National Electric Power Regulatory Authority (NEPRA) announced an indicative tariff vide determination dated 12.6.2008, thereby making a public representation that in case any company involved in Sugar production sets up a Power Unit and makes a tariff petition the same would be governed under the Cogen Policy; that the referred determination tantamount to representation on part of the respondent which led the companies to setup the Power Production Units on the basis of Cogen Policy. It was further contended that in 2009 JDW Power Private Limited made a tariff petition under the Cogen Policy which was decided on 02.04.2010 and tariff was determined according to Take or Pay; that based on these facts the petitioner conceived a 120 Mega Watt Co-generation Plant in light of the Cogen Policy and the petitioner was duly registered with the Private Power and Infrastructure Board (PPIB) as an Independent Power Plant (IPP). The learned counsel further contended that the petitioner on the basis of registration and on the representation in the form of tariff determination by the respondent made initial arrangements as well for establishing Unit and also entered into power producing agreement with its sister concerns; that the tariff petition filed by the petitioner has been decided on the basis of Take and Pay instead of Take or Pay and payment for capacity has been totally disregarded. The decision rendered by the respondent as initial determination and review are discriminatory and illegal; that the decisions fail to take into account

the submissions of the petitioner proposal for Take or Pay structure was rejected. It was further contended that any policy issued by the Federal Government/or guidelines are binding on the respondent which has been disregarded by the respondent and has wrongly interpreted the provisions of NEPRA Act to come to the conclusion that the Cogen Policy is in violation of the NEPRA Act. It was further contended that while rendering decision the respondent has misinterpreted Section 7(6) of the NEPRA, Act, 1997; that the decisions are flawed as the benefits granted to the other similarly placed producers have been denied; that the decisions have not been rendered by the respondent in accordance with timeline provided in NEPRA (Tariff Standard and Procedure Rules, 1998). In this behalf attention was drawn towards Rules 16 (2) of the Rules ibid. The learned counsel for the petitioner in support of his contentions placed reliance on cases reported as Makhdoom Muhammad Mukhtar Vs. Province of Punjab (PLD 2007 Lahore 61), Muhammad Nawas Malik & others Vs. Government of the Punjab & others (PLD 2011, Lahore 160), Union of India Vs. Anglo Afghan Agencies (AIR 1968 SC 718}, Collector of Central Excise & Land Customs and 3 others Vs. Azizuddin Industries Ltd (PLD 1970 S.C 439), Nazir Ahmad Vs. Pakistan and 11 others (PLD 1970 S.C 453), Asian Food Industries Limited & others Vs. Pakistan & others (1985 SCMR 1753), Regina Vs. North & East Devon Health Authority [2001] Q.B. 213, Attorney General of Hong Kong Vs. Ng Yuen Shiu [1983] 2 AC 629, Robertson Vs Minister of Pensions [1949] 1 K.B. 227, Messrs Gandoon Textile Mills & 814 others Vs. Wapda and others (1997 SCMR 641) and Mr. Muhammad Jamil Asghar Vs. Improvement Trust Rawalpindi (PLD 1965 S.C 698).

3. On behalf of the Respondent it was submitted that under Section 7 (1) of Regulation of Generation Transmission and Distribution of Electric Power Act, 1997, the respondent is exclusively responsible for providing of Generation Transmission and Distribution of Electric Power and other services incidental thereto; that Section 7 empowers NEPRA to determine tariff, rates, charges and other terms and conditions for supply of Electric Power Services by Generation Transmission and Distribution Companies. In this behalf it was contended that once the tariff is determined by Federal Government it can make a petition for reconsideration which in the instant case was not done by the Federal Government and it accepted the tariff determination by the respondent; that the respondent is a separate entity from Federal Government and is not a part or department of the same; that Section 45 of the 1997, Act, exclusively empowers the respondent to determine the rates/charges; that the respondent did not make any representation on the basis of which the petitioner can claim promissory estoppel against the respondent or can raise the plea of legitimate expectation. It was further contended that the scope of Section 7 (6) of the 1997, Act, is subject to and subordinate to the exclusive regulatory powers and functions of NEPRA; that initial determination as well as the determination on the review petition is elaborate and based on valid reasons and accounts for all the issues raised by the petitioner. In support of his contentions, the learned counsel placed reliance on cases reported as Pak Telecomm Mobile Limited Vs. Pakistan Telecommunication Authority, Islamabad (PLD 2014 S.C 478), Engineer Iqbal Zafar Jhagra & others Vs. Federation of Pakistan & others (PLD 2013 S.C 224), Alleged Corruption in Rental Power Plants etc (2012

S.C.M.R 773), 'M/s Gadoon Textile Mills & 814 Others Vs. WAPDA & others' (1997 SCMR 641), Constitution Petition No.127/2012 Begum Nusrat Ali Gonda Vs. Federation of Pakistan & others (PLD 2013 S.C 829), Union of India and others Vs. Hindustan Development Corpn & others (1994 AIR S.C 988), Mian Nazir Sons Industries Ltd & another Vs. Government of Pakistan & others (1992 SCMR 883) and Lever Brothers Pakistan Ltd. & another Vs. Government of Punjab through Secretary, Health Department & others (PLD 2000 Lahore 01). It was also contended that the Cogen Policy has not been approved by the Council of Common Interests, therefore is not binding and being followed. Reliance was placed on Watan Party through President Vs. Federation of Pakistan through Cabinet Committee of Privatization, Islamabad and others (PLD 2006 S.C 697).

4. The petitioners are aggrieved of the initial determination made by the respondent and its refusal to grant leave for Review Motion to the petitioner vide orders dated 17.6.2016 and 18.10.2016 respectively. The respondent while exercising power regarding determination of tariff and/or deciding the Motion for Review acts in an executive/quasi judicial capacity. The petitioner seeks judicial review of the referred decisions rendered by the respondent while exercising such authority. The Hon'ble Supreme Court of Pakistan in case reported as Dr. Akhtar Hassan and others Vs Federation of Pakistan and others (2012 SCMR 455) laid down the parameters and circumstances in which this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 of the Constitution can Review the decisions of executive and/or quasi judicial bodies; it was 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 socalled 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".

The respondent is created under Regulation of Generation Transmission and Distribution of Electric Power, Act, 1997 (The Act); Section 3 of the Act provides for establishment of the authority and Section 7 ibid provides functions and Powers of the same; under Section 7(3) ibid, it is function of the respondent to determine tariff, charges and other terms and conditions for supply of Electric Power Services by the Generation, Transmission and Distribution Companies and recommend the same to the Federal Government for notification. Moreover, under Section 7 (6) of the Act, in performing functions under the Act, the authority is to act as far as practicable in such a way so as to protect the interests of the consumer and companies providing electric power services in accordance with guidelines not inconsistent with the provisions of the Act, laid down by the Federal Government.

Under Section 31 of the Act the authority/respondent is to determine tariff on an application/petition made by, inter-alia, Power Producing Company. The summary of the above provisions of the 1997 Act is that one of the functions of the respondent is to determine tariff with respect to, inter-alia, Power Producing Companies and the same is done on a petition filed by the Company which is to be decided by respondent in line with standards formed by it on considerations provided in Section 31 ibid. Moreover, in performance of its functions the respondent is to follow guidelines as laid down by the Federal Government which are not inconsistent with the provisions of the Act.

5. The basic grievance of the petitioner is that the tariff has not been determined by the respondent in light with the Cogen Policy propounded by the Federal Government. In this regard it is the case of the petitioner that the policy provides a two part tariff i.e. based on the capacity and the energy produced and sold which otherwise is referred as Take or Pay Tariff, whereas the respondent has fixed the tariff on the basis of Take and Pay i.e. on the basis of the actual energy produced. This Court in exercise of powers under Article 199 of the Constitution is not to act as a Court of appeal against the decisions of the respondent rather in exercise of powers under Article 199 of the Constitution is to examine whether there is any illegality or jurisdictional error committed by the executive or a quasi judicial body which can be interfered in writ jurisdiction. In this behalf for the purpose of present controversy the sole issue before this Court is whether the tariff petition filed by the petitioner was to be examined under or on the basis of Cogen Policy and the tariff was to be fixed

accordingly or the respondent could have deviated from the same and decide the petition otherwise.

6. The case of the petitioner is that when the respondent decided the tariff petition of Pakistan Sugar Mills Association (PSMA) and set out an indicative tariff therein it was a representation to all the power producers who wished to install unites for manufacturing electricity from Bagasse that the Cogen Policy shall govern the case and the tariff would be determined accordingly. The learned counsel for the petitioner contended that since the determination of the tariff on the petition of PSMA amounted to representation of the petitioner acted to its detriment in setting up the Plant and Unit, therefore the respondent is estopped from claiming that the Cogen Policy is not applicable. It was also contended that fixation of tariff by the respondent on the basis of Cogen Policy vis-à-vis other similarly placed power producers created legitimate expectation that the petitioner shall also be treated in the same manner. In support of his contentions the learned counsel for the petitioner placed reliance on case reported as Makhdoom Muhammad Mukhtar Member of Provincial Assembly Vs. Province of Punjab through Principal Secretary to Chief Minister, Punjab, Lahore and 2 others (PLD 2007 Lahore 61) wherein the Lahore High Court observed as follows:

> “Another aspect of the matter is that the act of approving the scheme must have given rise to hopes and expectations not only to the petitioner but the local population about its implementation. Reference in this context may be made to "Judicial Review of Public Actions" by Justice (Retd.) Fazl Karim Volume-2 Page- 1365, where the doctrine of "legitimate expectation" and "promissory estoppel" is stated to have roots in "fairness". The relevant passage reads like this:
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> "The justification for treating `legitimate expectation' and `promissory estoppel' together

> as grounds for judicial review is, one, that they both fall under the general head `fairness'; and too, that `legitimate expectation' is akin to an estoppel. As was explained by Simon' Brown LJ in R v. Devon CC,' the various authorities show "that the claimant's right will only be found established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or the other body will be held bound in fairness by the representation made unless only its promise or undertaking as to how its power would be exercised is inconsistent with the statutory duties imposed upon it". The relationship between them is more clearly brought out by what Bingham LJ stated in R v. IRC ex p IMK. "
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> "If a public authority so conducts itself as to create a legitimate expectation that a certain course will be followed it would often be unfair if the authority were permitted to follow a different course to the detriment of one who entertained the expectation, particularly if he acted on it. If in private law a body would be in breach of contract in so acting or estopped from so acting a public authority should generally be in no better position. The doctrine of legitimate expectation is rooted in fairness".
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> The reasonableness, fairness and justness all demand the implementation and execution of the first scheme duly approved and put in operation".

Similar view was expressed in case titled as Muhammad Nawaz Malik and others Vs. Government of Punjab and others (PLD 2011 Lahore 160). It is an established principle that where the department has a long established practice then to depart from the same without any justification or basis would lead to interference by the Courts. Reliance is placed in case titled as Nazir Ahmad Vs. Pakistan and 11 others (PLD 1970 SC 453) as well as Asian Food Industries Limited and others Vs. Pakistan and others (1985 SCMR 1753). The Court of appeal in an English case reported as Regina Vs. North and East Devon Health Authority [2001] Q.B. 213 observed as follows:

> "That if a public body exercising a statutory function made a promise as to how it would behave in the future which induced a legitimate expectation of a benefit which was

> substantive, rather than merely procedural, to frustrate that expectation could be so unfair that it would amount to an abuse of power; that, in such circumstances, the court had to determine whether there was a sufficient overriding interest to justify a departure from what had previously been promised; that in view of the importance of the promise to the applicant, the fact that it was limited to a few individuals and that the consequences to the health authority of honouring it were likely to be financial only, the applicant had a legitimate expectation that the health authority would not resile from its promise unless there was an overreaching justification for doing so; that, in the circumstances, including the fact that the quality of the alternative accommodation to be offered to the applicant was not known, the closure decision was an unjustified breach of that promise which constituted unfairness amounting to an abuse of power".

Conversely the learned counsel for respondent has denied that there was any representation on part of the respondent, hence no legitimate expectation has arisen or the principle of promissory estoppel can be invoked, however, it is not denied by the respondent that the Cogen Policy has not been invoked in past or that a tariff petition on behalf of PSMA was decided by the respondent. These two circumstances created a legitimate expectation on part of the petitioner that the tariff petition filed by him shall meet the same fate i.e. would be decided in accordance with Cogen Policy which was not done in the instant case.

7. There is no cavil with the arguments of the learned counsel for the respondent that NEPRA is an independent body and is not subservient to the Federal Government or any of its department (s). There is also no cavil with the preposition that fixation/determination of the tariff is the exclusive function of NEPRA, however, the Respondent is to exercise its powers in accordance with the provisions of the Act and the Rules made in this behalf. Under Section 7 (6) of the Act, the powers are to exercise and functions are to be performed by

NEPRA in accordance with the guidelines issued by the Federal Government insofar as they are not inconsistent with the Act. It is the case of the respondent that Cogen Policy is not binding on NEPRA and it can determine the tariff independently. In similar circumstances this Court while interpreting Section 7 of the Act in case titled as Lahore Electric Power Supply Company Limited (LESCO) and others Vs. National Electric Power Regulatory Authority and another in W.P No.2771 of 2016 observed as follows:

> " 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:-
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> "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:--
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> "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"
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> 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".

8. In view of the judgment of this Court though the guidelines are not binding on the authority but also cannot be ignored, however, if the respondent is of the view that they are inconsistent with the provisions of the Act then the proprietary demands that the reasons for not following the same or the part of Policy/guidelines which are inconsistent with the Act, should be highlighted which was not done in the instant case. Neither the initial determination nor the decision in Motion for Review clearly spell out the reasons for not following the Cogen Policy and the same or any part of it being inconsistent with the 1997, Act. The learned counsel for the respondent pointed out that the

authority has already written to the Federal Government for amending the Cogen Policy. In this behalf the Federal Government replied the respondent on 3.11.2016 through letter the contents of which are as follows:-

NO Tariff/2011/60 **Matter Most Urgent**
Government of Pakistan
Ministry of Water & Power

Registrar NEPRA, **Islamabad the November 3 2016**
2nd Floor, Building,
G-5/2 Islamabad.

Subject: **ADVISORY TO GOP REGARDING INCENTIVES OFFERED UNDER COGEN POLICY 2008 & FRAMEWORK FOR POWER CO-GENERATION 2013 (BAGASSE/BIOMASS)**

This regarding your letter No.NEPRA/SAT-I/MCM-04/3974-13987 dated October 7, 2016, wherein you have advised the Federal Government regarding the National Policy for Power Co-Generation by Sugar Industry, 2008 (Cogen Policy and ECC Framework of 2013 for Power Co-Generation in Bagasse/Biomass (ECC Framework).

2. Insofar as the recommendations for the Cogen Policy are concerned, it would have been appropriate if NEPRA allowed generation tariffs on take and pay basis after requisite amendments to a policy which has been approved by competent forum instead of unilaterally changing policy decisions and requiring the Federal Government and CCI to bring the documented policy in line with such decision. NEPRA is therefore advised to continue working within the approved framework till such time that any formal amendments, if any, are made to the Cogen Policy .

3. Having said that, the recommendations of NEPRA regarding Cogen Policy as well as the ECC Framework are being deliberated at the Federal Government level. For this purpose, consultation will be done with the relevant stakeholders and NEPRA will also be invited to further explain their stance in this regard. Based on these deliberations, a decision will be taken and submitted to competent forums for their approvals.

4. It is however, reiterated that till such time a Policy amendment is made NEPRA is bound to work within the given framework.

In terms of the reply it is evident that Cogen Policy is in existence and the Federal Government has advised the respondent to apply the same till such time the same is amended and the amendments in the same are under consideration.

9. It is also the case of respondent that Cogen Policy was not approved by Council of Common Interests (CCI) which was mandatory therefore is not binding. The referred arguments of the respondent has no substance inasmuch as it was not denied by the respondent that in past the respondent had followed the Cogen Policy and has also written to the Federal Government to amend the same meaning thereby that the respondent admits the validity and existence of the same.

10. For the reasons setout above, the instant petition is allowed and the impugned decisions dated 17.6.2016 and 18.10.2016 are setaside; consequently the tariff petition filed by the petitioner shall be deemed pending before the respondent which shall be decided by it in accordance with law as well as keeping in view the letter dated 3.11.2016 by the Federal Government and observations made herein above.

(AAMER FAROOQ)
JUDGE

Announced in Open Court on 06.09.2017

JUDGE

Niqab M