ORDER SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No.723 of 2020
Sitara Energy Limited
Versus
Federation of Pakistan and others

S. No. of order / proceedings	Date of order / Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
08	**19.01.2024**	**M/s Saad M. Hashmi and Nadir Altaf, Advocates for the petitioner.** **Ms. Fatima Midrar, Advocate for respondent No.2.** **M/s M. Yaseen Khan Azad and Sadaqat Ali Jehangir, Advocates for respondent No.3 along with** **Mr. Siddique Akbar, Additional Director (CM), FESCO.**

Through the instant writ petition, the petitioner, Sitara Energy Limited, impugns the order dated 19.12.2019 passed by the National Electric Power Regulatory Authority ("NEPRA") on the review petition filed by the petitioner against NEPRA's earlier decision dated 14.04.2017, whereby the fuel cost component in the tariff for the sale of electric power by the petitioner to Faisalabad Electric Supply Company ("FESCO") was revised from Rs.5.41kwh to Rs.5.09kwh and the applicability of the said revised tariff was made effective from the date when the Power Purchase Agreement ("PPA") came to an end on 07.09.2010.

2. Learned counsel for the petitioner submitted that due to the energy crisis in the years 2005 to 2006, the Government had decided to purchase electric power from Captive Power Plants / Small Power Plants; that in pursuance of the said decision, a PPA was executed between the petitioner and FESCO on 07.04.2007; that the

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said PPA was valid up to September, 2010; that the PPA was subsequently renewed on 03.09.2010 providing for the fuel cost component to be the same as in the earlier PPA; that a Power Acquisition Request ("**PAR**") was made by FESCO on 17.08.2011 to NEPRA, which was admitted on 01.12.2012; that since no proceedings on the said request took place, FESCO, vide letter dated 30.11.2012, informed NEPRA that the validity of the PPA had expired; that the purchase of the electric power continued under the tariff, which was agreed upon between the parties under the expired PPA; that between 2012 to 2015, seven reminders had been issued to NEPRA to take a decision regarding the PAR; that since no decision was being taken by NEPRA, the petitioner, on 24.02.2015, requested FESCO that since the tariff, especially the fuel cost component, was not being revised, it had become financially unviable to sell the electric power at the earlier rates; and that the lack of response caused the petitioner to terminate the power supply on 16.03.2015.

3. Learned counsel for the petitioner further submitted that it was not until 14.04.2017 that NEPRA gave its determination; that this determination was made five years after the submission of PAR; that as a result of this, the fuel cost component was revised downward from Rs.5.41kwh to 5.09kwh; that not just that, it was also decided that the invoices raised with effect from 08.09.2011 would be recalculated and the differential would be recovered from the petitioner; and that NEPRA could not give

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retrospective effect to its decision regarding the determination of the fuel cost component.

4. Furthermore, it was submitted that the petitioner had not been afforded an adequate opportunity of a hearing before the determination in question was made; that only two hearings at NEPRA had taken place on 09.02.2012 and 18.06.2013 before the determination in question was made; that it was a matter of procedural impropriety for the determination to have been made by members of NEPRA / Authority, who had not heard the petitioner; that aggrieved by the said determination dated 14.04.2017, the petitioner preferred a review petition, which had been dismissed vide impugned order dated 19.12.2019; that in the said order, the grounds taken in the review petition have not been addressed; that the decision on the petitioner's review petition has been given by the members of NEPRA / Authority, two of whom had not even heard the petitioner; and that this irregularity renders the resultant order to be void. Learned counsel for the petitioner prayed for the writ petition to be allowed in terms of the relief sought therein.

5. On the other hand, learned counsel for NEPRA raised an objection to the maintainability of the instant petition on the ground that the petitioner could have availed the alternative remedy of filing an appeal in terms of Section 12G of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (**"the NEPRA Act"**). He further submitted that it was prior to the passing of the impugned order dated

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19.12.2019 that the NEPRA Act had been amended so as to provide a remedy of an appeal before the Appellate Tribunal against orders passed by NEPRA / Authority. Learned counsel for NEPRA prayed for the instant petition to be dismissed as not maintainable. He did not make any submissions on the merits of the case.

6. I deem it appropriate, in the first instance, to determine the objection as to the maintainability of the instant petition. It is not disputed that Section 12G was inserted in the NEPRA Act through the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2018 (Act No.XII of 2018) which was enacted on 02.05.2018. Section 12G(1) of the NEPRA Act reads thus:-

> *"Any person aggrieved by a decision or an order of the Authority or a single member thereof or a Tribunal established under section 11 may, within thirty days of the decision or order, prefer an appeal to the Appellate Tribunal in the prescribed manner and the Appellate Tribunal shall decide such appeal within three months after the filing of the appeal."*

7. Section 12G(6) of the NEPRA Act makes the decision of the Appellate Tribunal appealable before the High Court. After Section 12G was inserted in the NEPRA Act, the Law and Justice Division issued notification dated 19.05.2020, whereby the Appellate Tribunal was constituted for the purpose of exercising jurisdiction under the NEPRA Act at Islamabad having territorial jurisdiction all over Pakistan.

8. By the time the order impugned in the instant petition was passed on 19.12.2019, the Appellate Tribunal had not been constituted. In

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such circumstances, the petitioner was well within its rights to have filed the instant petition before this Court. However, on 15.02.2023, NEPRA had made a request to the Registrar of this Court for transmitting all pending writs / cases in this Court where decisions / orders / determinations of NEPRA had been challenged to the Appellate Tribunal. Reference in the said letter was made to judgment dated 16.01.2023 passed by the Hon'ble Supreme Court in Civil Appeal No.513/2014 and connected matters, wherein it was *inter alia* held as follows:-

> ***"The High Court in an emotive manner, entertained a petition in which an alternate remedy exists and was admittedly not availed. Appellate Tribunal of NEPRA consists of specialized members and must be resorted to in the first instance. A right of second appeal has also been given to the High Court concerned. It is well settled that without availing/exhausting remedies provided by law, a party cannot directly invoke the constitutional jurisdiction of the Honourable High Court more so in highly technical matter including those relating to determination of tariff."***

9. In view of the above, the objection to the maintainability of the instant petition succeeds. Bearing in mind the law laid down by the Hon'ble Supreme Court as well as the contents of NEPRA's letter dated 15.02.2023, the instant matter is remitted to the Appellate Tribunal for further proceedings.

10. Petition stands disposed of in the above terms.

(MIANGUL HASSAN AURANGZEB)
JUDGE

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