JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD

C.M.A. NO. 397 OF 2024

K-Electric Limited
Versus
Federation of Pakistan, etc.

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Versus
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(In both appeals)

Appellant by	**:**	**Mian Muhammad Kashif and Mr. Nasir Mehmood, Advocates.**
Respondents by	**:**	**Mr. Taimoor Aslam Khan, Advocate for Respondent No.2.** **Mr. Haider Waheed, Ms. Zohra Sirhindi, and Mr. Usama Rauf, Advocates for Respondents No.5 to 7.** **Raja Muhammad Saeed, D.A.G.** **Syed Mateen, Deputy Secretary, Ministry of Energy.**
Assisted by	**:**	**Ms. Noor Imran, Law Clerk.**
Date of hearing	**:**	**23.10.2026**

READING ONLY

MUHAMMAD AZAM KHAN, J.

1. By way of this judgment, I intend to dispose of the captioned Civil Miscellaneous Appeals filed under Section 12G(6) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 **(hereinafter referred to as the "Act")**, whereby the appellant K-Electric Limited **(hereinafter referred to as the "Appellant" or "KE"**) has called in question the consolidated judgment dated 11.07.2024 passed by the learned Appellate Tribunal, whereby Appeal Nos. 03/NT/2022 and 07/NT/2022, arising out of the determination dated 11.01.2022 and review order dated 11.05.2022 passed by the National Electric Power Regulatory Authority **(hereinafter referred to as "NEPRA")**, were dismissed. The controversy primarily relates to the determination of the reimbursement mechanism applicable to the Incremental Consumption Package **(hereinafter referred to as "ICP-2")** introduced by the Federal Government for industrial consumers, particularly the applicability of

marginal costs to electricity supplied beyond the prescribed benchmark and the alleged discriminatory denial of the benefits of the said package to industrial consumers within the service territory of KE.

2. Briefly, the Federal Government initially introduced an incentive package for industrial electricity consumption with effect from 01.11.2020, which was approved by NEPRA on 01.12.2020 and remained operative until 30.06.2021. Subsequently, the Economic Coordination Committee (ECC), on 16.08.2021, approved the extension of the package, which was ratified by the Federal Cabinet on 24.08.2021, for the period commencing on 01.07.2021 and ending on 31.10.2023. Upon a request made by the Ministry of Energy, NEPRA considered the proposed arrangement and issued its determination dated 11.01.2022, prescribing a benchmark for identifying incremental industrial consumption and providing that KE would be entitled to recover only marginal costs in respect of electricity supplied beyond the prescribed benchmark. KE sought review of the said determination, which was declined by NEPRA vide order dated 11.05.2022. Thereafter, KE preferred two appeals before the learned Appellate Tribunal, which were dismissed through the consolidated judgment dated 11.07.2024. Hence, the instant appeals.

3. Learned counsel for the appellant, while assailing the impugned judgment, submits that KE is a licensed electricity utility operating under a Multi-Year Tariff (MYT) determined by NEPRA for the control period ending in June 2023. The approved tariff comprises power purchase and generation costs, operation and maintenance expenses, depreciation and return on investment, all of which constitute legitimate components of the appellant's determined tariff. It is contended that the MYT is equally applicable to electricity units sold pursuant to the Government's subsidy package and, therefore, restricting reimbursement to marginal costs in respect of incremental units adversely affects the appellant's approved tariff, compelling it to bear a portion of the costs associated with electricity supplied to industrial consumers. Learned counsel further submits that the approved MYT cannot be displaced or modified through a subsidy arrangement introduced subsequently by the Federal Government. According to him, the earlier

industrial incentive package adopted a mechanism whereby the difference between the determined tariff and the concessional rate payable by industrial consumers was reimbursable to the utility. Therefore, NEPRA was not justified in adopting a different methodology for ICP-2 without furnishing any lawful or cogent justification. It is argued that the fixed-cost components recognized under the approved MYT could not have been excluded while determining the amount payable to KE in respect of electricity supplied under the extended package. Learned counsel for the appellant further challenges the benchmark adopted by NEPRA for determining incremental consumption and disputes the exclusion of certain components of the approved tariff from the reimbursement mechanism. It is maintained that the determination dated 11.01.2022 and the subsequent review order dated 11.05.2022 have adversely affected the appellant's contractual and regulatory rights under the MYT and that the learned Appellate Tribunal failed to appreciate the true nature and effect of the impugned mechanism. Accordingly, it is prayed that the impugned judgment, along with the underlying determination and review order, may be set aside.

4. Conversely, learned counsel appearing on behalf of respondents Nos. 5 to 7, representing the industrial consumers of Karachi, opposes the appeal and submits that the controversy between KE and the Federal Government concerning reimbursement of the alleged shortfall cannot deprive the industrial consumers of Karachi of the benefits of ICP-2. It is contended that the package was introduced for the benefit of industrial consumers throughout the country and that industrial consumers within KE's service territory were entitled to treatment similar to that extended to industrial consumers served by other distribution companies. Learned counsel for respondents Nos. 5 to 7 further submits that KE has admitted in paragraph 22 of its Memorandum of Appeal that it has not billed its consumers at the subsidized rate. According to learned counsel, notwithstanding the determination of NEPRA notifying a concessional rate of Rs.12.96 per kWh on incremental consumption, KE continued charging industrial consumers the full tariff and retained the difference for approximately five years, thereby earning billions of rupees by way of markup. It is argued that such conduct amounts to unjust enrichment, particularly when KE has withheld the benefit of a Government-

funded concession intended exclusively for the industrial consumers. Learned counsel maintains that the appellant cannot collect its fixed overheads twice on electricity units attributable to the Government subsidy and that all amounts retained from the consumers, together with the markup earned thereon, are liable to be restored. Learned counsel further argues that KE has failed to produce any authentic evidence establishing the alleged financial loss before NEPRA, in review proceedings, before the learned Appellate Tribunal or even before this Court. Reference is made to paragraph 36 of the impugned judgment, wherein the learned Tribunal observed that no authentic data, record or third-party analysis adverse to its conclusion had been placed on record. It is contended that the figures mentioned in Ground D.6 of the Memorandum of Appeal are merely assertions unsupported by any accounts, audit or independent financial assessment. Learned counsel for respondents Nos. 5 to 7 further submits that before seeking any reimbursement from the Federal Government, KE was required to extend the notified concession to the eligible industrial consumers and thereafter submit its claim before the competent regulatory authority in accordance with the prescribed mechanism. However, instead of following the notified procedure, the appellant withheld the consumers' money and made the reimbursement dispute a pretext for denying the entire benefit of ICP-2. In this regard, reliance is placed upon paragraph 8 of the Federal Government's report, wherein it has been stated that KE was required to submit its claim for allocation and payment along with the marginal cost determined by NEPRA, but failed to lodge the requisite claim with the Ministry of Energy. Learned counsel further contends that the conduct of KE is also evident from the fact that the appellant itself approached the Federal Government seeking extension of the industrial incentive package, as admitted in paragraph 14 of its Memorandum of Appeal. It is submitted that KE raised no objection to the proposal placed before the ECC and the Federal Cabinet, which expressly contemplated reimbursement on the basis of marginal cost. Despite having participated in the process leading to the extension of the package, the appellant continued charging industrial consumers at the full tariff instead of extending the notified concession. Learned counsel argues that KE cannot seek the extension of a package intended for the benefit of industrial consumers and subsequently refuse

to pass on its benefits on the basis of a separate dispute regarding reimbursement from the Federal Government. Learned counsel for respondents Nos. 5 to 7 further submits that the dispute raised by KE is confined to approximately 17% of the package, whereas the remaining approximately 83% is not even disputed by the appellant. Therefore, withholding the entire benefit of ICP-2 on account of a limited reimbursement dispute is wholly unjustified. It is argued that the appellant cannot make the industrial consumers suffer for a dispute to which they are not parties, particularly when the concession granted by the Federal Government remained operative during the relevant period. Learned counsel also contends that industrial consumers throughout Pakistan, including those in other cities of Sindh, were extended the benefits of ICP-2, whereas industrial consumers in Karachi were deprived of the same from 01.07.2021 to 31.10.2023. Reference is made to the position of industrial consumers in Hyderabad, who were served by HESCO and received the benefit of the package. It is argued that such differential treatment increased the production costs of industrial consumers in Karachi and adversely affected their competitiveness, particularly in relation to standard industrial products such as steel. According to learned counsel, the discriminatory treatment is violative of Articles 4, 18 and 25 of the Constitution of the Islamic Republic of Pakistan, 1973. In support of the above contention, learned counsel relies upon paragraph 35 of the impugned judgment, wherein the learned Appellate Tribunal observed that industrial consumers of KE were badly discriminated against in comparison with industrial consumers served by XWDISCOs and consequently became uncompetitive. It is submitted that even if KE has a legitimate dispute with the Federal Government regarding reimbursement beyond marginal costs, such dispute cannot deprive the industrial consumers of their constitutional right to equal treatment. The entitlement of the consumers under the notified package, according to learned counsel, is independent of the reimbursement dispute between KE and the Federal Government.

5. Learned counsel for respondents Nos. 5 to 7 has also raised a preliminary objection regarding the maintainability of the appeal, contending that the concurrent findings recorded by NEPRA and the learned Appellate Tribunal are not liable to be interfered with in the absence of any misreading or non-reading of

evidence, perversity or substantial error of law. Reference is made to Section 100 of the Code of Civil Procedure, 1908 (CPC), to submit that the scope of interference in a second appeal is limited. It is further contended that the doctrine of election precluded KE from pursuing an appeal against the original determination after having already invoked the review jurisdiction of NEPRA. On these grounds, dismissal of the appeal is sought. Learned counsel further submits that the concept of benchmark units was introduced to identify the additional electricity consumption attributable exclusively to the Government subsidy and to prevent a private, profit-oriented utility from obtaining undue financial benefits from additional sales generated through the incentive package. In this regard, reliance is placed upon paragraph 6.1.2 of NEPRA's determination dated 11.01.2022, which records that benchmark sales were calculated by applying the annual growth incorporated in KE's MYT on a monthly basis to the actual industrial sales for the reference months. Learned counsel also refers to paragraphs 6.2.3 and 6.2.4 of NEPRA's review order dated 11.05.2022, wherein the Authority reiterated that the growth rate allowed under KE's MYT had already been incorporated while calculating benchmark sales. It is contended that the appellant was consequently allowed recovery of its determined tariff, including the fixed-cost components, on sales up to the benchmark, whereas only marginal costs were allowed on additional sales beyond the benchmark. Learned counsel further distinguishes between the determined tariff/MYT and the consumer-end tariff. It is submitted that the MYT represents the tariff determined for the distribution utility, whereas the consumer-end tariff incorporates the subsidies provided by the Federal Government to reduce the financial burden upon consumers. The subsidy is intended to benefit consumers and does not alter the MYT of the distribution utility. Therefore, the appellant's contention that the grant of subsidy necessarily entitles it to recover the full determined tariff on every additional unit is misconceived.

6. The Federal Government, through the Ministry of Energy (Power Division), has also opposed the appeal and sought its dismissal with costs. In its report, the Federal Government has described the grounds raised by KE as misleading, flawed and motivated and has disputed the appellant's assertion regarding the alleged unfunded subsidy obligation. It is stated that the appellant itself contributed to the

exhaustion or lapse of the subsidy allocation by failing to submit the requisite claims in accordance with the mechanism determined by NEPRA. In paragraph 8 of its report, the Federal Government has specifically stated that KE was required to submit the marginal cost determined by NEPRA along with its claim for allocation and payment. However, instead of lodging the requisite claim before the Ministry, the appellant challenged the determination before different forums, as a result whereof the amounts could not be allocated and the available funds were utilized or lapsed in favour of other claims duly lodged for processing. The Federal Government, therefore, maintains that KE cannot attribute the consequences of its own omission to the Government or seek interference with the determination on that basis.

7. NEPRA, being the statutory regulatory authority entrusted with the determination of tariffs under the Act, has also opposed the appeal. It maintains that the determination dated 11.01.2022 and the review order dated 11.05.2022 were passed in accordance with the applicable statutory framework after considering the relevant material and objections raised by the stakeholders. NEPRA's position is that the MYT continued to govern ordinary industrial sales up to the prescribed benchmark, whereas marginal cost was applicable only to additional sales beyond that benchmark. It is further maintained that the appellant has failed to establish any legal infirmity in the determination or the subsequent review order warranting interference by this Court.

8. In view of the respective submissions advanced by learned counsel for the parties and the material available on record, the following questions arise for determination:

i. *Whether NEPRA was legally competent under the Act to prescribe a benchmark and restrict reimbursement to marginal costs in respect of electricity supplied beyond such benchmark under ICP-2?*

ii. *Whether the impugned determination and review order are inconsistent with the approved MYT of KE or otherwise amount to an unlawful modification thereof?*

iii. *Whether the learned Appellate Tribunal committed any illegality, misreading or non-reading of material evidence while upholding the determination of NEPRA?*

iv. *Whether the failure of KE to extend the notified benefits of ICP-2 to eligible industrial consumers can be justified on the basis of its separate reimbursement dispute with the Federal Government?*

v. *Whether the appellant has made out any ground warranting interference with the impugned judgment in the exercise of appellate jurisdiction under Section 12G(6) of the Act?*

9. I have heard learned counsel for the parties at considerable length and have examined the available record, the impugned determination, the review order, the judgment of the learned Appellate Tribunal and the relevant statutory provisions. The principal controversy concerns the legality of the benchmark and marginal-cost mechanism adopted by NEPRA for ICP-2. The connected question relates to the entitlement of industrial consumers of Karachi to receive the benefit of the package, notwithstanding the reimbursement dispute between KE and the Federal Government.

10. At the outset, the preliminary objection raised by learned counsel for respondents Nos. 5 to 7 regarding the applicability of Section 100 CPC requires consideration. The instant appeal has been preferred under Section 12G(6) of the Act against the judgment of the learned Appellate Tribunal. Although learned counsel for the respondents has invoked the limitations ordinarily applicable to a second appeal under Section 100 CPC, this Court is not inclined to confine its examination exclusively to those limitations. The controversy has independently been examined on its merits, including the relevant statutory provisions, the regulatory determination and the submissions advanced by all parties. Even upon such examination, no illegality, material misreading or non-reading of evidence, or error of law has been found in the conclusions recorded by NEPRA and subsequently maintained by the learned Appellate Tribunal.

11. For completeness, Section 100 CPC, in its material part, provides as follows:

> *"100.— (1) Save where otherwise expressly provided in the body of this Code or by any other law for the time being in force, an appeal shall lie to the High Court from every decree passed in appeal by any Court subordinate to a High Court on any of the following grounds, namely:*

> *(a) the decision being contrary to law or to some usage having the force of law;*
> *(b) the decision having failed to determine some material issue of law or usage having the force of law;*
> *(c) a substantial error or defect in the procedure provided by this Code or by any other law for the time being in force, which may possibly have produced error or defect in the decision of the case upon merits."*

The above provision has been reproduced as it was specifically invoked by learned counsel for the respondents. Nevertheless, the present proceedings arise under the special appellate jurisdiction conferred by Section 12G(6) of the Act, and the Court has examined the substantive objections raised by the appellant without restricting itself to the ordinary limitations associated with Section 100 CPC.

12. The objection based on the doctrine of election has also been considered. Learned counsel for respondents Nos. 5 to 7 has contended that KE, having already invoked the review jurisdiction of NEPRA against the original determination, could not subsequently maintain an appeal against the same determination. However, the learned Appellate Tribunal entertained both appeals and adjudicated the controversy on its merits. In these circumstances, this Court does not consider it necessary to non-suit the appellant on the said preliminary objection. The question is accordingly left open, and the appeal is decided on the substantive grounds urged by the parties.

13. Coming to the principal controversy, it is an admitted position that KE is a licensed electricity utility operating under an MYT determined by NEPRA for a specified control period. The appellant's contention is that the approved tariff includes various cost components, including operation and maintenance, depreciation, and return on investment, which cannot be excluded while calculating reimbursement for electricity supplied under ICP-2. Conversely, the respondents maintain that the benchmark mechanism already takes into account the ordinary growth contemplated under the MYT and that the appellant cannot claim recovery of fixed-cost components a second time on additional electricity sales generated through the Government's subsidy.

14. To appreciate the rival contentions, reference to the statutory framework is necessary. Under Section 7 of the Act, NEPRA is entrusted with the regulatory

functions relating to electric power services, including tariff determination. Section 31 governs the determination, modification and revision of rates, charges and terms and conditions for electric power services. Section 31(3)(a) recognizes the recovery of prudently incurred costs, whereas Section 31(3)(e) provides that tariffs should reflect marginal-cost principles to the extent feasible, keeping in view the financial stability of the sector. These provisions are required to be read harmoniously.

15. Section 31(3)(e) of the Act provides as follows:

> *"Tariffs should reflect marginal cost principles to the extent feasible, keeping in view the financial stability of the sector."*

Likewise, Section 31(2)(e), as relied upon by the parties, requires NEPRA, while determining, modifying or revising rates and charges, to take into consideration the economic and social policy objectives of the Federal Government. Section 31(1) also requires the Authority to be guided by the National Electricity Policy, National Electricity Plan and relevant guidelines issued by the Federal Government.

16. The distinction between the policy-making role of the Federal Government and the statutory authority of NEPRA to determine tariffs has been considered by the Honorable Supreme Court of Pakistan in *K-Electric Limited v. Federation of Pakistan*, reported as **PLD 2023 SC 412**. In paragraph 13 of the said judgment, the Honorable Supreme Court observed:

> *"13. The scheme of the tariff determination legal regime is such that in terms of the Act, Section 7 read with Section 31, tariff determination can only be made by the Authority. This is one of the core functions of NEPRA and cannot be delegated to anyone. The Federal Government is required to notify the tariff determined by NEPRA but cannot exercise this function itself. NEPRA determines the tariff as per the guidelines provided in Section 31(3) of the Act and is also to be guided by the National Electricity Policy, the National Electricity Plan and any Guidelines issued by the Federal Government from time to time with respect to the tariff. In this context, the Federal Government can make policies to protect consumer interest, encourage economic efficiency and to eliminate exploitation and economic distortions with respect to the consumption of electricity, which means it can offer subsidies to the consumers of electricity in furtherance of its policies. Consequently, Section 31(2) of the Act binds the Authority to consider all directions given by the Federal Government under the 2014*

Guidelines, which sets out the government's subsidy policy. The mandate of the Act as given in Section 31 read with the 1998 Rules, being that NEPRA as the tariff determining authority, shall consider and build into the tariff any electricity subsidy offered by the Federal Government as per the 2014 Guidelines and issue the required SOT. In the context of the dispute before the Court, the process for determining the uniform tariff for K-Electric is an issue because K-Electric is a privatized public utility, being the only vertically integrated power utility in Pakistan, which means that it generates and distributes electricity for its consumers. The uniform tariff for K-Electric by way of practice was determined and notified by the Federal Government and not NEPRA due to K-Electric's unique feature of having a multiyear tariff and being vertically integrated. As a consequence, the Federal Government would also adjust any subsidy in the tariff to give effect to its policies as it was issuing the SOT for the uniform tariff. This has become the basis of the dispute before the Court."

17. The principle emerging from the aforesaid judgment is that although the Federal Government is competent to formulate policies and provide subsidies for the benefit of electricity consumers, the statutory authority to determine tariffs and give effect to such policies in accordance with the Act rests with NEPRA. Therefore, the introduction or extension of ICP-2 by the Federal Government did not, by itself, determine the reimbursement mechanism applicable to KE. The proposed arrangement was placed before NEPRA, which exercised its statutory jurisdiction by issuing the determination dated 11.01.2022 and subsequently deciding the appellant's objections through the review order dated 11.05.2022.

18. The appellant's reliance upon the mechanism adopted under the initial industrial package is also not sufficient to establish the illegality of the subsequent determination. The earlier package was introduced for a defined period and remained operative until 30.06.2021, whereas ICP-2 was separately approved by the competent governmental authorities and independently considered by NEPRA. Merely because a particular reimbursement methodology was adopted under the earlier package does not create a legal obligation upon NEPRA to adopt an identical mechanism for the subsequent package. The legality of the latter arrangement must be examined independently in the light of the applicable statutory provisions and the reasons recorded by the regulator.

19. The record further reflects that KE itself approached the Federal Government seeking an extension of the industrial incentive package. The summary placed before the ECC and the Federal Cabinet contemplated reimbursement on the basis of marginal costs. The learned Appellate Tribunal also took note of the fact that KE had not raised any objection to the said proposal at the relevant stage. Subsequently, the Ministry of Energy approached NEPRA, which conducted proceedings and afforded the stakeholders, including KE, an opportunity of hearing. The appellant was also heard in review proceedings on 29.03.2022.

20. These circumstances demonstrate that the appellant was afforded an opportunity to raise its objections before the competent regulatory authority. Although participation in the process or failure to object at an earlier stage cannot, by itself, render an otherwise unlawful determination immune from judicial scrutiny, the same is relevant while examining the appellant's allegation that the marginal-cost mechanism was introduced without notice or justification. No material has been brought to the notice of this Court establishing that the prescribed process was denied to the appellant.

21. The principal objection raised by KE concerns the restriction of reimbursement to marginal costs in respect of electricity supplied beyond the benchmark. In this regard, paragraph 6.1.2 of NEPRA's determination dated 11.01.2022 provides:

> *"The Authority has decided that KE shall only be allowed Marginal Cost on sales above the benchmarked units and no other adjustment as un-recovered cost e.g. O&M, RoRB, Depreciation, Base Rate and Bad Debit etc., will be provided. In case K-Electric recovers any amount over & above the Marginal Cost on the incremental units either through tariff or through subsidy etc., the same would be adjusted from K-Electric subsequently."*

The above provision clearly demonstrates that the marginal-cost mechanism is confined to electricity sales exceeding the prescribed benchmark. It does not replace the determined tariff in respect of all industrial electricity sales.

22. Similarly, paragraph 6.3.4 of NEPRA's review order dated 11.05.2022 clarifies the position in the following terms:

> *"It is clear from the above, that marginal cost is only applicable for the incremental sales over and above the benchmarked units, meaning thereby that sales up-to benchmarked units would be treated based on NEPRA determined tariff."*

It is, therefore, evident that the determined tariff continues to govern sales up to the benchmark, whereas marginal cost applies only to the additional units supplied beyond that benchmark. Consequently, the appellant's assertion that its entire MYT has been displaced by the impugned mechanism is not supported by the determination itself.

23. The learned Appellate Tribunal also considered this aspect and observed in paragraph 12 of its judgment that marginal cost is not a new concept introduced through the impugned determination, rather it already exists as one of the general guidelines for NEPRA under Section 31(3)(e) of the Act. This Court finds no legal infirmity in the said reasoning. Although the provision does not require NEPRA to apply marginal-cost principles in every case, it certainly recognises such principles as part of the statutory tariff framework. Therefore, the mere adoption of marginal costs for additional electricity consumption under a temporary industrial incentive package does not establish that NEPRA acted beyond its statutory authority.

24. The distinction between ordinary sales and additional consumption generated through the subsidy is also material. The MYT determines the tariff structure for the utility on the basis of projections and assumptions, including anticipated sales growth and associated costs. Where the benchmark itself incorporates the ordinary growth already recognised under the MYT, the utility remains entitled to recover its determined tariff, including the relevant fixed-cost components, on sales up to that benchmark. However, the position of additional units sold beyond the benchmark pursuant to a specific Government incentive is different. NEPRA considered it appropriate to restrict recovery in respect of such additional units to marginal costs so that the utility would not receive a second recovery of fixed-cost components already accounted for in the tariff structure.

25. The appellant has not demonstrated that the Act requires reimbursement of the entire determined tariff, including all fixed-cost components, on every unit sold beyond the benchmark. Nor has it established that the impugned mechanism

unlawfully amended or displaced the approved MYT. The distinction drawn by NEPRA between benchmark and above-benchmark consumption is supported by the statutory recognition of marginal-cost principles and the stated object of the industrial incentive package.

26. The method adopted for calculating the benchmark also requires consideration. Paragraph 6.1.2 of NEPRA's determination dated 11.01.2022 records that benchmark sales were calculated by applying the annual growth incorporated in KE's MYT on a monthly basis to the actual industrial sales for the reference months. The relevant portion reads:

> *"The Authority has worked out benchmark sales by applying annual growth built in the MYT of K-Electric on monthly basis on the total actual industrial sales (excluding temporary) for the reference months."*

The learned Appellate Tribunal examined this methodology and observed in paragraph 27 of its judgment:

> *"It was further noted during the arguments of both parties that the benchmark tariff was calculated by NEPRA considering sales over and above natural yearly growth (5% growth factor as was allowed to K.E in its MYT). Thus, since the benchmark units included 5% yearly growth, K.E was allowed to recover the tariff which included components like O&M, RORB, and Depreciation Base Rate, however, on the sales beyond the benchmark units, K.E was allowed, only recovery of its marginal cost, which was Rs. 14.61/kWh determined (for the duration period) by NEPRA in the Impugned Order."*

27. The record refers to different figures, including approximately 4.42%, 4.5% and 5%, in relation to the growth factor. These figures cannot be treated as interchangeable. However, the appellant's legal objection can be examined on the basis of the methodology accepted by the learned Appellate Tribunal, namely, that the benchmark was calculated with reference to KE's actual industrial sales and the growth contemplated under its MYT. In the absence of a reconciled calculation establishing a specific numerical error, this Court does not consider it appropriate to record an independent finding regarding the precise growth percentage.

28. The learned Appellate Tribunal also examined the contention that the impugned mechanism had materially altered the approved MYT. In paragraph 28 of its judgment, the Tribunal observed:

> *"The MYT of K.E was not largely changed, the possible impact (if any) was limited to the extent of B1 category industrial consumers (July 2021 to October 2023) only and its remaining tariff categories were unchanged, for this period."*

The above observation demonstrates that the Tribunal considered the scope and effect of the impugned mechanism and found that its application was confined to a particular category of industrial consumers for a specified period. The appellant has not been able to establish that the entire tariff structure under its MYT was modified or that the impugned determination unlawfully disturbed its other tariff categories.

29. The objection concerning the letter dated 06.08.2021 has also been considered. The learned Appellate Tribunal examined the said communication in paragraphs 29 to 31 of its judgment and observed that the earlier letter could not operate as res judicata or as an absolutely binding determination upon NEPRA. It was also noted that the appellant had not relied upon the said letter before the Authority. This Court finds no reason to disagree with the said reasoning. A communication issued by the Registrar's office before completion of the statutory determination could not conclusively determine the reimbursement mechanism to be adopted for the extended package. Likewise, the methodology followed under the expired first package could not, by itself, create an enforceable right in favour of the appellant to insist upon identical treatment under ICP-2.

30. The contention of learned counsel for the industrial consumers that they were deprived of the benefit of ICP-2 despite the package having been implemented for industrial consumers throughout the country also requires consideration. The material before the Court indicates that industrial consumers served by other distribution companies received the benefit of the package, whereas industrial consumers within KE's service territory were subjected to a different treatment. The learned Appellate Tribunal also took notice of this disparity and observed in paragraph 35 of its judgment:

> *"... the industrial consumer of K.E. was badly discriminated against by the rest of the industrial consumers (B1 Tariff) of XWDISCOs (as they implemented it) and became uncompetitive for standard products like steel."*

31. The above observation raises an important distinction between the dispute concerning reimbursement payable to KE and the entitlement of eligible industrial consumers to receive the notified concession. The two matters cannot be treated as identical. The controversy regarding the amount recoverable by KE from the Federal Government does not, by itself, extinguish or suspend the benefit conferred upon eligible industrial consumers under the notified package. In the absence of any lawful suspension or modification of the applicable determination, the utility cannot justify withholding the consumers' benefit merely because it disputes the reimbursement mechanism determined by NEPRA.

32. In this regard, Section 12G(5) of the Act is relevant, which provides:

> *"A decision or order of the Authority or Tribunal, as the case may be, shall be given full force and effect during the pendency of any appeal of such determination."*

The statutory provision makes it clear that the filing or pendency of an appeal does not, by itself, suspend the operation of a determination passed by NEPRA or the learned Appellate Tribunal. Any interim protection granted by a competent forum must, of course, be examined in accordance with its actual terms. However, in the absence of an order expressly suspending the relevant determination or restraining its implementation, the mere pendency of litigation cannot be treated as a lawful justification for withholding the notified concession from eligible consumers.

33. The constitutional argument advanced by learned counsel for respondents Nos. 5 to 7 also merits consideration. It is contended that industrial consumers of Karachi were discriminated against in comparison with similarly situated consumers served by other distribution companies, in violation of Articles 4, 18 and 25 of the Constitution. The disparity identified by the learned Appellate Tribunal indicates that the consumers of Karachi were placed at a competitive disadvantage during the relevant period. However, for the purposes of the present appeal, it is sufficient to observe that the reimbursement dispute between KE and the Federal Government cannot, independently of any lawful suspension or modification of the notified package, constitute a justification for denying eligible consumers the benefit of the concession.

34. The monetary claims raised by respondents Nos. 5 to 7 require a separate examination. Learned counsel has referred to the amounts allegedly retained by KE, including the difference between the full tariff and the concessional rate, and has claimed that the consumers are entitled to restoration of the amounts withheld along with the markup earned thereon. Reference has also been made to the figures of Rs.5,717 million, Rs.33,354 million and approximately Rs.27,636 million in support of the respective claims and assertions of the parties. However, these figures cannot be treated as finally established liabilities without examination of the underlying consumption, billing, payment and adjustment records.

35. Similarly, the allegations of mala fide conduct and unjust enrichment raised by the industrial consumers, as well as the appellant's assertion regarding financial losses, involve factual and financial questions requiring verification by the competent authority. The learned Appellate Tribunal, in paragraph 36 of its judgment, observed:

> *"From the above discussion, it is cleared that in pursuance of implementation of ICP, sales of K.E stood increased. The Appellant throughout the proceedings has not objected the aforenoted summary presented to ECC and the Cabinet. Even no authentic data/record or third party analysis, adverse to this conclusion has been placed on record or brought to our notice to answer these issues in Appellant's favor."*

The aforesaid finding demonstrates that the appellant failed to place reliable material before the regulatory and appellate forums to substantiate its financial objections. Nevertheless, the precise amount payable or adjustable under ICP-2 cannot be determined in the present proceedings without examination of the relevant records.

36. The Federal Government's report further indicates that KE did not submit its reimbursement claims in accordance with the mechanism determined by NEPRA, resulting in the non-allocation or lapse of the available subsidy funds. The report states that the appellant was required to submit the marginal cost determined by NEPRA along with its claim for allocation and payment, but instead pursued litigation before different forums. This position has been specifically disputed by the appellant and its financial consequences are not required to be conclusively

determined in the present appeal. It is, however, evident that the failure to pursue the prescribed reimbursement mechanism cannot, by itself, justify denial of the notified benefit to eligible industrial consumers.

37. The learned Appellate Tribunal also observed in paragraph 36 of its judgment:

> *"As the Impugned Order was not implemented by the Appellant by resorting to injunctive order and even misinterpreting interim order of this Tribunal in this regard and as such the industrial consumer of K.E have been adversely affected."*

The above observation reflects the adverse consequences suffered by industrial consumers due to non-implementation of the package. Nevertheless, the present appeal is primarily concerned with the legality of NEPRA's determination and the correctness of the learned Appellate Tribunal's decision. It is, therefore, neither necessary nor appropriate to record any independent finding regarding the precise monetary liability, markup or allegations of mala fides without examining the relevant evidence and applicable judicial orders.

38. The appellant's contention regarding the expiry of ICP-2 and the alleged exhaustion or lapse of the allocated funds also does not affect the legality of the determination when made. The package remained operative for a specified period, and the rights and obligations arising during that period are required to be dealt with in accordance with law. The subsequent expiry of the package does not render the original determination unlawful or extinguish obligations, if any, accrued during its operation. Likewise, the question of availability of funds and the processing of reimbursement claims is distinct from the validity of the regulatory mechanism determined by NEPRA.

39. In view of the foregoing discussion, this Court is of the considered opinion that NEPRA acted within its statutory authority while prescribing the benchmark and marginal-cost mechanism for ICP-2. The determination dated 11.01.2022 and review order dated 11.05.2022 clearly distinguish between electricity sales up to the prescribed benchmark and additional sales beyond it. The appellant has failed to establish that the impugned mechanism unlawfully modified its approved MYT or that the learned Appellate Tribunal committed any illegality, material

misreading or non-reading of evidence while upholding the regulatory determination. Consequently, no ground warranting interference with the impugned judgment has been made out.

40. For the reasons recorded above, the instant appeals, being devoid of merit, are hereby ***DISMISSED***. The determination dated 11.01.2022 passed by NEPRA, the review order dated 11.05.2022 and the consolidated judgment dated 11.07.2024 passed by the learned Appellate Tribunal are maintained.

41. The appellant and the concerned respondents shall ensure implementation of the determination of NEPRA, as upheld by the learned Appellate Tribunal and this Court, including extension of the benefits of ICP-2 to eligible industrial consumers falling within the service territory of KE, subject to the applicable terms of the package and any subsisting judicial directions.

42. The competent authorities shall, upon verification of the relevant consumption, billing and adjustment records, determine the amounts payable or adjustable under ICP-2 in accordance with the applicable determination and ensure expeditious implementation thereof. It is clarified that this Court has not independently adjudicated the disputed monetary claims, markup, or allegations of mala fide conduct, which shall be dealt with by the competent authority in accordance with law. There shall be no order as to costs.

FOR

(MUHAMMAD AZAM KHAN)
JUDGE

Announced in the open Court on this _____ day of November, 2026.

JUDGE

Sajid

Approved for reporting