

IN THE HIGH COURT OF SINDH, KARACHI

Present

**Mr. Justice Syed Hassan Azhar Rizvi
Mr. Justice Zulfiqar Ahmad Khan**

C.P. No. D-2253 of 2020

Alongwith

C.P Nos.D-2287, 2291, 2293, 2295, 2296, 2297, 2298, 2300, 2301, 2304, 2305, 2306, 2309, 2310, 2312, 2313, 2314, 2315, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2332, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2349, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2369, 2370, 2371, 2374, 2381, 2382, 2383, 2385, 2386, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2406, 2410, 2412, 2424, 2435, 2436, 2438, 2446, 2451, 2466, 2493, 2522, 2579, 2581, 2584, 2600, 2613, 2624, 2627, 2634, 2635, 2638, 2684, 2698, 2700, 2704 and 2705, all of 2020

Dates of hearing : 23.04.2020, 28.04.2020, 30.04.2020,
05.05.2020, 12.05.2020, 14.05.2020,
19.05.2020, 21.05.2020, 28.05.2020,
29.05.2020 and 30.05.2020

For petitioners:

M/s. Haider Waheed, Muhammad Ameen Bandukda, Syed Mohsin Ali, Omer Soomro, Shahbakht Pirzada, Maqbool Hussain Shah, Abdul Sattar Pirzada, Khawaja Aizaz Ahsan, Rajindar Kumar, Obaid-ur-Rehman Khan, Salman Yousuf, Ali Kambar Askary, Aijaz Ali, Asad Raza Khan, Qazi Umair Ali, Anas Makhdoom, Ahmed Faraj, Darvesh K. Mandan, Ahmed Madni, Naeem Suleman, Arshad Hussain Shahzad, Manzar Hussain, Abdul Ghaffar Khan, Farhan-ul-Hasan Minhas, Ovais Ali Shah, Sami-ur-Rehman Khan, Faiz Durrani, Shariq Razzaq, Syed Irshad ur Rehman, Muhammad Waleed, Hassan Khurshid Hashmi, Rajesh Kumar Khagaija, Nasir Elahi Siddiqui, Ms. Navin Merchant, Sofia Saeed Shah, Zoha Sirhindi, Tehmina Ashraf and Samia Faiz Durrani, Advocates

For respondents:

Mr. Usman Hadi, DAG alongwith Ms. Durdana Tanveer, Assistant Attorney General

Mr. Kashif Hanif, Advocate for NEPRA alongwith Mr. Atif Hanif, Advocate

M/s. Abid S. Zuberi, Ayan Mustafa Memon and Ali Zuberi, Advocates for K-Electric and M/s. Muhammad Abdullah, Iftikhar Ahmed and Zulfiqar Ali Mirjat, Advocates for K-Electric in some petitions

Syed Amir Ali Shah Jeelani, Advocate for Lasbela Industrial Estates Development Authority

JUDGMENT

Zulfiqar Ahmad Khan, J., Petitioners are industrial consumers of K-Electric (Respondent No.3) engaged in the manufacture of steel and other large scale industrial products, having their factories located in the

territorial limits of Karachi/Balochistan, where K-Electric has exclusive monopoly of generation, transmission and distribution of electricity, granted to it under the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (“the Act”). The Petitioners through these petitions have challenged the issuance and implementation of the Corrigendum dated January 22, 2020 retrospectively withdrawing and modifying KE’s tariffs notified vide SRO 575(I)/2019 dated May 22, 2019 after withdrawal of off-peak hour subsidies through SRO 810(I)/2019 dated 12 July, 2019 on the following grounds:

- (A) That the SRO 810(I)/2019 dated 12.07.2019 (“the July SRO”) purporting to amend SRO 12(I)/2019 dated 01.01.2019 (“the January SRO”) for K-Electric’s industrial consumers had no legal effect after the notification of SRO 575(I)/2019 dated 22.05.2019 (“the New Tariff”) embodying full determination of KE’s tariff, whereupon the January SRO ceased to hold the field in accordance with latter’s paragraph 4;
- (B) That once the earlier relief notified through the January SRO was fully incorporated into the New Tariff, the same could not have been unilaterally modified, amended or altered by the Federal Government through the July SRO or through the Corrigendum without following the mandatory procedure specified by the Act and the NEPRA (Tariff Standards & Procedures) Rules, 1998 (“the Tariff Rules”) where the power to determine, modify, or revise rates, charges and terms and conditions for the provision of electric power was exclusively vested in NEPRA under section 7(3) and 31 of the Act, and that the Federal Government had no power under law to issue the July SRO or the ensuing Corrigendum;
- (C) That a tariff once determined by NEPRA and notified by the Federal Government under section 31(7) of the Act creates vested rights and could only be modified prospectively under section 31(5) of the Act read with the Tariff Rules. Accordingly, and once final determinations were notified, only “adjustments” could be incorporated therein as per the proviso to section 31(7) of the Act by NEPRA as law does

not prescribe any possibility to alter or modify the tariff through unilateral action of the executive via issuance of a corrigendum;

- (D) That it is settled law that executive orders and notifications (i.e. the Corrigendum read with the July SRO) could not be applied or given retrospective effect altering vested rights or to reopen past and closed transactions as the tariff related savings were passed on to the consumers by the Petitioners and the costs and expenses for the production of goods during the six month's period of July 2019 to December 2019 have also been passed on to the end-users;
- (E) That as per section 31(3) of the Act, guidelines are prescribed for the determination, modification or revision of rates, charges, terms and conditions for the provision of electric power, to the extent that "*(i) tariffs should seek to provide stability and predictability for customers; and (j) tariff should be comprehensible, free of misinterpretation and shall state explicitly each component thereof*". Further, per Section 31(2) of the Act, NEPRA in the determination, modification or revision of rates, charges and terms and conditions for provision of electric power services has to keep in view "*(f) the elimination of exploitation and minimization of economic distortions*". On the touchstone of the above statutory provisions alone, the substantive changes attempted through the July SRO or the ensuing corrigendum are in contravention of the letter and spirit of the law;
- (F) That giving effect to the July SRO and the Corrigendum would mean that the Federal Government can bypass NEPRA and unilaterally modify an already approved and determined tariff thereby depriving Petitioners of valuable opportunity to be heard on two statutory forums for redress/appeal under the Act which otherwise would have been available to them, had NEPRA notified a modification to the New Tariff in accordance with law;
- (G) That the Petitioners cannot be penalized under any circumstances for the failure of the Federal Government to follow the Act and the Tariff Rules for modification of an approved and determined tariff; or the failure of NEPRA to intervene or take any action in dereliction of its statutory

duties to ensure that consumers were not unlawfully burdened by the actions of the Federal Government or its licences;

- (H) That even if it is accepted, without conceding, that the earlier reduction/relief notified by the January SRO was not directly incorporated into the New Tariff as a reduced rate for industrial consumers of K-Electric, Federal Government enjoyed no powers to withdraw a subsidy retrospectively in violation of Articles 38 and 9 of the Constitution.

2. Petitioners through these petitions (of which CP No. D-2253/202 is taken as the leading petition) have sought following key declarations:

- I. Declare the Corrigendum dated 22nd January, 2020 as unlawful and void *ab initio*.
- II. Declare that the Respondents are bound to be abided by the original rates specified by the Schedule of Electricity Tariff contained in S.R.O. 575(I)/2019 dated 22 May, 2019 (without reference to the Corrigendum dated 22nd January, 2020).
- III. Declare the SRO 810(I)/2019 dated 12 July, 2019 as unlawful and void *ab initio* to the extent of industrial consumers of K-Electric.
- IV. Declare that neither the Federal Government nor NEPRA can retrospectively modify, amend or alter S.R.O. 575(I)/2019 and that NEPRA can only do so prospectively in accordance with the procedure contained in the Act and the Tariff Rules.
- V. Declare that the Petitioners are not liable to pay the increased rates notified by SRO 810(I)/2019 and Corrigendum for the six-month period from July 2019 to December 2019 (or any time thereafter) and that any bills already issued by K-Electric incorporating such increased rates be declared illegal.

3. Mr. Haider Waheed representing a large number of Petitioners formulated following contentious points and delivered the undermentioned deliberations:-

I: That the Petitioners have a vested right in respect of tariff (as notified through SRO 575 dated 22 May, 2019)

(a) Per learned counsel, subsidy can take two forms (i) via a bare notification issued by the Federal Government in which case the subsidy operated as a reduction or “discount” by the Federal Government; and (ii) as a reduced rate built into, incorporated or subsumed into a tariff (or “part and parcel” of a tariff) notified by the Federal Government with the prior approval of NEPRA, whereupon any subsidy gets subsumed or made part and parcel of the determination as it had lost its separate identity and character.

(b) The Industrial Support Package (admittedly first introduced in January 2016), entered the field through notification issued independently by the Federal Government through SRO 12(I)/2019, but upon the issuance of SRO 575(I)/2019, with the prior approval of NEPRA, ISP became a reduced rate, built-in and subsumed part and parcel of K-Electric’s consumer end tariff as (i) SRO 575/2019 expressly stated that “The above mentioned variable charges under the head of uniform tariff were inclusive of industrial support package notified vide SRO 12(I)/2019”; whilst, (ii) SRO 12/2019 expired and ceased to hold the field in accordance with its paragraph 4 which stated, “The notification unless amended or withdrawn earlier by the Federal Government shall continue to remain in field till notification of new tariff for XWDISCOs and K-Electric.”

(c) Learned counsel admitted that the Petitioners have never claimed any right in respect of a subsidy, however, the Petitioners’ case is that even if it was accepted, without conceding, that the earlier reduction/relief notified through SRO 12/2019 was not directly incorporated into SRO 575/2019 as a reduced rate for industrial consumers of K-Electric, the Federal Government could only withdraw a subsidy in accordance with the established principles of administrative law and had no power to withdraw a subsidy retrospectively in violation of Articles 38 and 9 of the Constitution.

II: That the “left hand column” i.e. consumer-end tariff/uniform tariff for K-Electric in SRO 575/2019 was in law and fact determined by NEPRA.

(a) Per learned counsel, the consumer-end, duly determined tariff could never be notified by the Federal Government on

its own without prior approval of NEPRA as a tariff being outcome of the detailed procedure laid down by section 31(4) and 31(7) of NEPRA Act read with paragraph 3 of NEPRA Determination of Consumer End Tariff (Methodology and Process) Guidelines, 2014 and Rule 17(3) of the Tariff Rules, and if needed to be changed, the process calls for third party and public intervention for this consultative, tripartite procedure.

(b) As per paragraph 13(ii) of the Decision dated 19 December, 2018, during the proceedings, K-Electric submitted an intervention request to which the Federal Government responded stating that upon NEPRA's determination of XWDISCOs tariff, K-Electric's tariff notification will also be dealt with accordingly, meaning thereby in those proceedings no separate determination for KE's tariff was made and only tariff determination for XWDISCOs were made, accordingly the uniform tariff determination made by NEPRA for XWDISCOs dated 19 December, 2018 was explicitly applied to K-Electric by the Federal Government notifying the same through SRO 575/2019 referring to section 31(7) of the Act.

III: SRO 575/2019 cannot be amended without NEPRA's approval or without due process of law.

(a) Per learned counsel section 7(3) of the Act empowers NEPRA to determine, modify or revise the rates, charges and terms and conditions for the provision of electric power services and Section 31 of the Act makes no distinction between a XWDISCO MYT Tariff or KE's Consumer End Tariff and SRO 575/2019 per learned counsel was expressly issued pursuant to section 31(7) of the Act, thus had NEPRA's approval.

(b) The issuance of the Corrigendum dated 22 January, 2020 per learned counsel itself and the fact that it attempted to amend SRO 575/2019 (and not SRO 12/2019 or 810/2019) proves that ISPA subsumed and became part and parcel of the consumer end Tariff. This was also evidenced by the fact that K-Electric removed all references to ISPA in its bills from July 2019 onwards.

IV: Regardless of NEPRA approval, no notification (either of a tariff or a subsidy) can be amended retrospectively or through a Corrigendum.

- (a) Per learned counsel, SRO 12/2019 ceased to hold the field in accordance with its own terms (paragraph 4 thereof) upon notification of the new tariff through SROs 575/2019 and 576/2019 therefore SRO 810/2019 could not amend SRO 12/2019 or bring about any changes to the extent of K-Electric. As there was no “error” or “mistake” to be corrected in SRO 575/2019 by the corrigendum, as SRO 810/2019 did not exist on the date when SRO 575/2019 was issued, hence the corrigendum itself has no legal sanctity.
- (b) The issuance of the corrigendum itself and the fact that it sought to amend (and not merely correct) SRO 575/2019 (and not SRO 12/2019 or 810/2019) proves that the relief/ISPA subsumed as a reduced rate and became part and parcel of Schedule of Tariff notified through SRO 575/2019. Since issuance of a corrigendum is an executive action, it cannot retrospectively operate to disturb vested rights or to open past and closed transactions especially as the costs and expenses for the production during the six-month period from July 2019 to December 2019 have already been accounted for and the same cannot be adjusted or revised retrospectively at this belated stage.
- (c) Additionally, regardless of NEPRA’s approval, a tariff cannot be changed retrospectively as that would violate clause (i) and (j) of Section 31(3) of the Act which state, “(i) *tariffs should seek to provide stability and predictability for customers;* and (j) *tariffs should be comprehensible, free of misinterpretation and shall state explicitly each component thereof*”; and section 31(2)(f) of the Act which provides that the Authority in the determination, modification or revision of rates, charges and terms and conditions for provision of electric power services shall keep in view “(f) *the elimination of exploitation and minimization of economic distortions.*”
- (d) Moreover, such an action would be violative of Rule 17(3)(vii) of the Tariff Rules which states that “*the tariff*

regime should clearly identify inter-class and inter-region subsidies and shall provide such subsidies transparently if found essential, with a view to minimizing if not eliminating them, keeping in view the need for an adequate transition period”.

- (e) That separately, no notification (either of a tariff or a subsidy) can be amended by a corrigendum, prospectively or retrospectively, as a corrigendum can only be issued to correct any clerical or arithmetical errors in a decision and serves not to make any substantive amendments in a previous decision.

V: K-Electric is estopped by their conduct from charging ISPA from its industrial consumers for the period July 2019 to December 2019.

- (a) Per learned counsel even if the change in tariff, or withdrawal of subsidy was not to violate the law and if it was accepted without conceding that SRO 810/2019 applied to the industrial consumers of K-Electric, K-Electric was bound to immediately give effect to the changes brought by SRO 810/2019 through its monthly bills to the consumers, and it is now estopped by its own conduct from demanding the same nine months later.

4. In support of his arguments learned counsel made reference to the cases reported as OGRA through Secretary v. Messrs Midway-II, CNG Station and others (2014 SCMR 220), Al-Noor Sugar Mills Limited and another v. Federation of Pakistan & others [2018 PTD 2082 (SC)], Muhammad Rafiq and others v. Federation of Pakistan & others [2014 PTD 1881(DB)], Secretary to the Government of Pakistan Ministry of Finance and others v. Muhammad Hussain Shah and others (2005 SCMR 675), Government of KPK and others v. Khalid Mehmood (2012 SCMR 619), Messrs Army Welfare Sugar Mills Association Limited and others v. Federation of Pakistan & others (1992 SCMR 1652), Messrs Abdul Ghafoor Furnace v. WAPDA and others [2005 YLR 442 (SB)], Messrs Trade Link Corporation and others v. Federation of Pakistan & others [2016 PTD 1096 (DB)], The Engineer-in-Chief Branch through Ministry of

Defence, Rawalpindi and another v. Jalaluddin) (1992 SC 207) and Government of the Punjab, Education Department through Secretary Higher Education, Punjab Civil Secretariat Lahore and others v. Muhammad Imran and others (2019 SCMR 643).

5. A number of counsel appearing for the Petitioners in these clubbed petitions either adopted arguments of Mr. Waheed or placed their own arguments, however remaining in the ambit of the issues raised by Mr. Waheed as elaborated in the foregoing.

6. Mr. Abid Zuberi, learned counsel representing K-Electric strongly defended his client's position. By way of background, the learned counsel stated that the Industrial Support Package (ISPA) subsidy was first introduced by the Government of Pakistan vide Notification dated 04.02.2016 and the said subsidy was re-introduced on 01.01.2019 through SRO 12/2019 by paragraph 2 thereof. It was pointed out that SRO 12/2019 also prescribed another separate and additional subsidy for "zero rated industrial consumers" through its paragraph 3 and both of these subsidies were approved by the Government of Pakistan without any intervention of NEPRA. The appropriate reductions on account of subsidy were made by K-Electric and XWDISCOS in the consumer bills to give industrial consumers the benefit of the GoP subsidies. The amounts so reduced were paid off by the GoP to the respective DISCOs in the name of "Tariff Differential Subsidy".

7. Mr. Zuberi stated that NEPRA determined KE's latest MYT on 05.07.2018 however the same could not be immediately notified in view of an ad-interim order passed in Suit No. 1467/2018 by this Court. After withdrawal of said suit on 03.04.2019, the Federal Government notified the said duly determined MYT vide SRO 576(I)/2019 dated 22.05.2019 which continues to hold the field. Simultaneously GoP on its own accord issued SRO 575(I)/2019 dated 22.05.2019 and notified the applicable tariff for consumers of KE to bring the consumers of KE at par with the

consumers across the country. Per learned counsel the said applicable tariff was prescribed under the head "Uniform Tariff" and the origins of the said column in SRO 575 /2019 find mention in Paragraph(s) 3, 4, 5 7 of the comments filed by GoP (available at Page 1559) which makes it clear that the right hand column of SRO 575/2019 was issued by the GoP on its own, without NEPRA's involvement as it catered for the subsidies provided by the Government uniformly, whereas the KE's applicable tariff at left hand side was determined by NEPRA vide its determination dated 19.12.2018 (available at Page 1415) and through SRO 575/2019 ISPA subsidy was accounted for in the "Uniform Tariff" right hand side column to ensure that the benefit of the said subsidy is not given twice to the consumers. Per learned counsel, the applicable tariff of other DISCOS as determined vide determination dated 19.12.2018 could not contain ISPA subsidy as the said subsidy was introduced only on 01.01.2019 when the said determination for other XWDISCOs was already made out.

8. In order to support his contentions that despite issuance of SRO 575/2019, SRO 12/2019 still held the field, learned counsel pointed out that the subsidy provided by paragraph 3 of SRO 12/2019 for zero rated consumers (which did not form part of SRO 575/2019) still subsists hence the petitioner's contention that SRO 12/2019 subsumed into SRO 575/2019 does not hold water as the said SRO continued to hold the field, hence the same could be modified, amended or withdrawn, which was subsequently achieved through the impugned corrigendum. Per learned counsel, SRO 810(I)/2019 become applicable immediately, however KE requested GoP to change the numerical figures in SRO 575/2019 in the light of SRO 810(I)/2019 and the same was eventually effected through the corrigendum of 22.01.2020. As a result, the change in subsidy notified vide SRO 810(I)/2019 became applicable to KE's industrial consumers w.e.f. July 2019 at which juncture the consumers approached this Court through the instant Petition and impugned the corrigendum dated 22.01.2020 as well as SRO 810/2019 dated 12.07.2019. To justify the

delay, learned counsel informed the Court that in the month of March 2020 trade associations of various industrial consumers requested KE to defer payment of ISPA amount charged between July and December, 2019 so that they could take up the said issue with GoP. Thereafter, the said amount was charged in consumer bills and consumers were given the option of paying the said amount through three equal monthly installments. Most industrial consumers, per counsel agreed to pay the said amount through such equal installments, whereas the petitioners chose to impugn the same through these petitions. Learned counsel stated that all consumers including the Petitioners have been paying the rates as stated in corrigendum dated 22.01.2020 since January, 2020 whereas KE has been unable to recover the ISPA charges for the period Jul-Dec 2019 from the Petitioners as a result of the ad-interim orders passed in these petitions.

9. Referring to petitioner counsel's assertions, Mr. Zuberi stated that whilst it was firstly argued that petitioners could only be charged the tariff determined by NEPRA and notified by the GoP under SRO 575/2019 without any reference to the corrigendum, but the said argument of the Petitioners was factually incorrect and based upon surmises and conjectures as the first assumption in the argument was that SRO 575/2019 only contained one tariff and the second assumption was that SRO 575/2019 was determined by NEPRA. It was submitted that both these assumptions were incorrect. A bare perusal of SRO 575/2019 could show that it actually contained two tariffs embodied into two different columns. On the left hand side there are figures under the head of "K-Electric Tariff" and on the right hand side there are figures under the head of "Uniform Tariff". Both NEPRA and GoP have clarified in their comments that the tariff contained under the left hand side column of SRO 575/2019 is the tariff which has been determined by NEPRA on 05.07.2018 and eventually notified by GoP vide SRO 576/2019 of even date whereas the tariff on the right hand side column of SRO 575/2019 has no concern with

NEPRA as the same was passed by GoP on its own accord to provide KE consumers the same tariff, inclusive of subsidies as the consumers in the rest of the country were enjoying. KE has been applying the tariff rate given on the right hand side column of SRO 575/2019 as those rates were lower than the tariff determined by NEPRA (shown on the left side). This lower rate included the subsidy of ISPA to industrial consumers. It was submitted that since the right hand side column was notified by GoP on its own accord (without any interference from NEPRA) hence the same could also be changed by GoP on its own through a corrigendum. Thus the Petitioner's arguments regarding SRO 575/2019 were not sustainable.

10. It was next submitted that in case the Petitioners dispute the factual position as submitted by the Respondents in their comments, then it gives rise to factual disputes which cannot be entertained in the writ jurisdiction of this Honorable Court and as a result the Petition would not be maintainable and will become liable to be dismissed. With regards subsumisation of SRO 12/2019 into SRO 575/2019 it was argued that by expressly referring to SRO 12/2019 within the body of SRO 575/2019, GoP has itself clarified that SRO 12/2019 continued to hold the field despite issuance of SRO 575/2019. It was also submitted that if GoP intended to completely supersede SRO 12/2019, it would have completely omitted its reference from the new tariff notification of KE in the light of paragraph 4, however, the actual position is opposite. By expressly referring to SRO 12/2019, GoP has clarified that the said SRO continues despite issuance of KE's new notification. Furthermore, per learned counsel SRO 12/2019 has been given effect continuously after 22.05.2019 by both GoP and as well as KE since the zero rated subsidy as stipulated in paragraph 3 thereof have since continued. As a matter of fact many zero-rated industrial consumers filed CP No. D-655/2020 (Copy available at Page 655/2020) before this Honorable Court for interpretation and implementation of paragraph 3 of SRO 12/2019 as recently as January 2020 wherein this Honorable Court even passed interim orders dated

24.02.2020 (Page 1397) to regulate the interpretation of paragraph 3 of SRO 12(I)/2019. Subsequently on 27.03.2020 the ECC of the Cabinet accepted the interpretation of the consumers and allowed back benefit of the said zero rated subsidy from 01.01.2019 till 30.06.2020 (Page 1401) and such back benefit was immediately applied by KE in eligible consumers' bills who were given the entire benefits in lump sum in April, 2020 Bill (for example the Consumer Bill produced at Page 1405 Calculated at Page 1409). This difference or benefit will, per learned counsel would now be borne by the GoP and will be paid to KE on behalf of consumers as part of the Tariff Differential Subsidy. It was also pointed out that some Petitioners before this Court have also received this zero rated back benefit and continue to benefit from the zero rated subsidy (Petitioner No 62 in CP No. D-2337/2020 was pointed out as an example of such a consumer). The said consumer has itself intimated that it received a benefit of Rs.2,258,775/- on account of zero rated back benefit in its April, 2020 bill but complained that its ISPA charges of Rs.615,325/- (for Jul-Dec 2019) were not deduced from its bill. Such a complaint where admission regarding back benefit of zero rated subsidy is made is available at Page 1575, which per learned counsel is an admission of the fact that SRO 12/2019 continues to hold the field along with SRO 575/2019.

11. With regards enforceability of the corrigendum dated 22.01.2020 on the ground that (a) it has been issued without NEPRA approval/determination and (b) it cannot retrospectively change the tariff rates from July, 2019 learned counsel pointed out that the impugned corrigendum only modifies some values under the "Uniform Tariff" column of SRO 575/2019. As clarified by the GoP and NEPRA, the Uniform Tariff column in SRO 575/2019 has no concern with NEPRA and the same was notified by GoP on its own accord. Hence if GoP was empowered to notify the said column on its own then it also had power to modify it. It was considered position of the learned counsel that the impugned corrigendum

did not in any manner changed or modified the tariff determined by NEPRA (i.e. left hand column of SRO 575/2019) leaving the entire argument of the Petitioner groundless. It was contended that if Honorable Court comes to the conclusion that GoP was never empowered to notify the right hand side column of SRO 575/2019 on its own, then the Petitioners would suffer as they will have to pay the difference between the said right hand side rate and the higher tariff (i.e. tariff determined by NEPRA for KE). With regards second leg of arguments, it was submitted that the corrigendum merely reiterated the changes applied through SRO 810/2019 hence there was no question of any retrospective levy or charge. It was further submitted that through Gazette notification, all industrial consumers acquired knowledge of the changes brought through SRO 810/2019 hence these consumers were well aware of these changes, as such changes were immediately applied all over the country and the Petitioners were well aware of the Uniform Tariff Policy of GoP i.e. National Power Tariff and Subsidy Policy Guidelines, 2014. Per learned counsel, the Petitioners failed to demonstrate that the prices of their products were reduced through change in the electricity rate and they have further failed to produce any evidence of any damage or loss incurred as a result.

12. It was latter submitted that Petitioners' vested rights have not been taken away by the corrigendum as the subsidy from "off peak hours" was withdrawn on 12.07.2019 vide SRO 810/2019 by GoP herself. Since there was no right to receive the subsidy of Rs.3 per kWh *ab initio* or on "off-peak hours" (as a result of SRO 810/2019) the Petitioners could not claim that their vested rights were being taken away retrospectively from July 2019 onwards through the impugned corrigendum as no such vested right existed in claiming Rs.3 per kWh subsidy on "off-peak hours".

13. Learned counsel for K-Electric relied upon the cases of Star Textile Mills Ltd and another v. Government of Sindh and others (2002 MLD 1608), Zaman Cement Company (Pvt.) Ltd v. Central Board of

Revenue and others (2002 SCMR 312) Messrs Bolan Industries (Pvt.) Ltd. through Managing Director and others v. Water and Power Development Authority (WAPDA) through Chairman and others (2014 PLD Balochistan 173), OGRA through Secretary v. Messrs Midway-II, CNG Station and others (2014 SCMR 220) Dossani Travels Pvt. Ltd and others v. Messrs Travels Shop (Pvt.) Ltd and others (2014 PLD SC 1), Abdul Sami Memon and 8 others v. Federation of Pakistan, through Secretary Establishment and 5 others (2020 PLC 125) and Government of Pakistan v. Sikandar Khan and others (1987 PLD Peshawar 68) in support of his arguments.

14. To conclude, it was contended that the Notification No. SRO 810(I)/2019 as well as the corrigendum dated 22.01.2020 were legal documents, issued in accordance with law and petitioners by not acting upon these notifications were trying to unjustly enrich themselves through these petitions.

15. Mr. Usman Hadi, learned DAG supported the case of K-Electric whereas learned counsel for NEPRA chose to stay independent with regards Corrigendum and SRO 810(I)/2019 since these two notifications were admittedly issued by GoP independent of NEPRA's determinations.

16. Heard the learned counsels of respective sides and the learned DAG. To start with, let's look into the tariff determination procedures which result in K-Electric pricing its produce – i.e. electricity. These highly regimented procedures are quite complicated to the extent that none of the counsel was in a position to assist this Court with the various formulae's used for making these determinations. However from legal standpoint, there was consensus across the board that such pricing is enabled through various Multi Year Tariffs ("MYTs") determined by NEPRA under the Act following Tariff Rules wherein, its only through Rules 17(3)(vii) and 17(3)(x) where Government's interference in these commercially independent regimes was permitted, and that too for the provision of any subsidies to the consumers, otherwise such pricing

mechanism is left to electricity generators, transmitters, distributors, consumers and general public to battle amongst themselves, which finally takes the form of a determination or award which is sent to GoP merely for gazetting under section 31(7).

17. The very first MYT to K-Electric was awarded by NEPRA through its tariff determination dated September 10, 2002 for a period of seven years. The said tariff was scheduled to take effect from the date of privatization of K-Electric, which milestone was only reached in the year 2005 through an Implementation Agreement signed between GoP and K-Electric dated November 14, 2005. The said MYT thus took effect from November 2005 for an initial term of seven year expiring in November 2012. However in the year 2009, when major shareholding of K-Electric was taken over by Abraaj Group, an Amended Implementation Agreement ("AIA") was signed between GoP and K-Electric on April 13, 2009. Consequent upon signing of the said AIA, K-Electric filed a tariff petition on April 22, 2009, with NEPRA, for an increase in the base tariff, modification in the adjustment mechanism, terms and conditions of supply and security deposit rates, etc. The Authority decided that petition vide its determination dated December 23, 2009. Tenure of MYT was also extended for the next seven years, i.e. to remain in field from July 1, 2009 to June 30, 2016. Accordingly SRO 10(I)/2010 was issued on 01.01.2010 setting up K-Electric's tariff.

18. The aforementioned MYT expired on June, 30, 2016 whereupon, K-Electric filed its Integrated Multi Year Tariff petition on March 31, 2016, in accordance with Rule 3 (1) of the Tariff Rules, requesting determination of MYT for a period of ten (10) years commencing from July 1, 2016 to June 30, 2026. In the said tariff petition, K-Electric requested for the continuation of then existing MYT for a further period of ten (10) years, with an increase of around Rs.0.60 per kWh in the tariff (i.e. an increase from the then existing tariff of Rs.15.50 per kWh to Rs.16.10 per kWh). The said petition was decided by the Authority, vide

its determination dated March 20, 2017 wherein K-Electric was allowed an overall tariff of Rs.12.0692 per kWh w.e.f. July 01, 2016 for the next 7 years term.

19. K-Electric did not agree to the said determination and being aggrieved, filed a Motion for Leave for Review ("MLR") which was decided by the Authority vide its decision dated October 09, 2017 wherein, K-Electric's tariff was enhanced by Rs 0.70 per kWh from Rs.12.0692 per kWh to Rs.12.7706 per kWh.

20. Still aggrieved, K-Electric, vide its letter dated October 12, 2017, requested the Ministry of Energy, Government of Pakistan to file a reconsideration request with NEPRA to reconsider the determined MYT, pursuant to proviso of Sub-section 4 of Section 31 of the Act read with sub-rule 12 of Rule 16 of the Tariff Rules whereupon the Federal Government, filed a reconsideration request under Section 31(4) of the Act on October 26, 2017 which was decided by the Authority on 05.07.2018 where K-Electric was allowed to charge tariff from its consumers as detailed in Annex -V of the Schedule 9 of the said determination. However the said determination could not be immediately notified under section 31(7) in view of an *ad-interim* order passed in this High Court's Suit No. 1467/2018 where K-Electric herself was the plaintiff. Be that as it may, the said schedule for industrial consumers, effective July 1, 2016 prescribed the following rates (which rates for all practical purposes still hold the field plus-minus any subsidies:-

B INDUSTRIAL SUPPLY TARIFFS				
Sr. No.	TARIFF CATEGORY / PARTICULARS	FIXED CHARGES Rs/kW/M	VARIABLE CHARGES Rs/kWh	
			Peak	Off-Peak
B1	Upto 25 kW (at 400/230 Volts)	-		13.50
B2(a)	25-500 kW (at 400 Volts)	400.00		12.65
B3(a)	For all loads upto 5000 KW (at 11,33 kV)	380.00		12.50
B4(a)	For all loads upto 5000 KW (at 66,132 kV)	360.00		12.00
	Time Of Use			
B1(b)	Upto 25 kW (at 400/230 Volts)	-	16.50	12.50
B2(b)	25-500 kW (at 400 Volts)	400.00	16.50	12.00
B3(b)	For All Loads up to 5000 kW (at 11,33 kV)	380.00	16.50	11.50
B4(b)	For All Loads (at 66,132 kV & above)	360.00	16.50	11.25
B5	For All Loads (at 220 kV & above)	340.00	16.50	10.50

For B1 consumers there shall be a fixed minimum charge of Rs. 350 per month.
For B2 consumers there shall be a fixed minimum charge of Rs. 2,000 per month.
For B3 consumers there shall be a fixed minimum charge of Rs. 50,000 per month.
For B4 consumers there shall be a fixed minimum charge of Rs. 500,000 per month.
For B5 consumers there shall be a fixed minimum charge of Rs. 1000,000 per month.

Table - 1

21. Enabled by the Tariff Rules, Government of Pakistan in the light of its National Power Policy of 2013 ("the Power Policy") aimed to *develop a level playing field by providing power at comparable prices to all industrial users* formulated its National Power Tariff and Subsidy Policy Guidelines in the year 2014 with the objective of *rationalizing, optimizing and targeting deserving segment of consumers*, however ensuring that ***subsidy not to exceed amount funded by national budget*** and issued SRO No.4(18)/201-15 dated 04.02.2016 known as "Support Package for Industrial Consumers" providing that *with effect from 1 January, 2016 payment for the industrial consumers of all XWDISCOs and K-Electric be reduced by Rs.3/kWh, which reduction shall be inclusive of any downward revision of Fuel Price Adjustment notified in or after January 2016 and onwards.....provided that this notification unless modified or withdrawn earlier by the Federal Government shall continue to remain in field till notification or new tariff for XWDISCOs and K-Electric."*

22. It is interesting to note that the said subsidy took effect from 01.01.2016 without NEPRA having issued any amended MYT for K-Electric determined on 05.07.2018 for the next 7 years, to the extent that during the aforementioned Leave and Reconsideration requests, all tariffs presented to NEPRA were independent of any subsidy reflected therein, hence practically those instruments (i.e. the Subsidy Notification SRO No. 4(18)/201-15 and MYT Determination) independently held the field. The said subsidy also became subject matter of SRO12/2019 issued by the Ministry of Energy, GoP on 01.01.2019 in terms of which, while maintaining the said subsidy of Rs.3/kWh for industrial consumers, an additional subsidy was also introduced for zero rated industrial consumers. The relevant portions of the said SRO are reproduced hereunder:

2. In order to further renationalize the payments, XWDISCOs and K-Electric are to receive from its industrial consumers per above, it is hereby notified that payment for the industrial consumers of all XWDISCOs and K-Electric be reduced by Rs. 3/kWh which reduction shall be inclusive of any downward revision of Fuel Price

Adjustment notified from time to time. The difference between the relevant payment due from industrial consumer per above mentioned SROs and special relief package notified hereunder adjusted with any downward revision of Fuel Price Adjustment as above, shall be paid to XWDISCOs and K-Electric by the Federal Government per the notification for rationalization of process of payment of Subsidy.

3. In order to further rationalize the payments for zero rated industrial consumer, XWDISCOs and K-Electric are to receive from such zero rated industrial consumer per above, it is hereby notified that payment from such zero rated industrial consumer shall be reduced upto the rate of 7.5 cent /kWh (inclusive of abovementioned special relief package). For billing purpose of zero rated industrial consumer the Dollar Exchange Rate will be considered as the National Bank day-end Dollar sale rate on the last working day of preceding month. The difference between the relevant payment due from such zero rated industrial consumer per above mentioned SROs and special relief package for such zero rated industrial consumer notified hereunder, shall be paid to XWDISCOs and K-Electric by the Federal Government per the notification for rationalization of process of payment of Subsidy.

23. Incidentally, when these proceedings were taking place, NEPRA in its usual course of business ended up making tariff determinations for seven XWDISCOs (not including K-Electric) for the years 2016-17 and 2017-18 and forwarded those to GoP under Section 31(7) for notification in the official gazette. In response, GoP instead of gazetting those, rather chose to challenge such determinations and preferred a motion for recommendation for a uniform consumer-end tariff on the ground that Section 31(4) of the Act provided that the Authority in the public and consumer interest should determine a uniform tariff for distribution licensees wholly owned and controlled by a common shareholder (i.e. GoP) on the basis of their consolidated accounts. The said motion made references to the Power Policy which was approved by the Council of Common Interests as a consequence of which, National Tariff and Subsidy Policy Guidelines, 2014 were framed. In order to protect public/consumer interest laid down in the Power Policy and the Tariff Policy Guidelines, GoP sought a uniform tariff under Section 31(4) keeping in view her economic and social policies. GoP desired that the upcoming uniform tariff should show subsidies prominently (possibly for

cosmetic reasons so that consumers could easily assimilate the generous subsidy given to them by the Government). It was also desired that the said uniform tariff be notified under Section 31(7) as the final consumer-end tariff modifying and replacing the previously determined notified rates (inclusive of subsidy/tariff rationalization surcharge) notified through SRO 374(1)/2018 to 383(1)/2018 dated March 22, 2018.

24. The said motion was admitted by the Authority on November 12, 2018 and in order to provide a fair opportunity to the stake holders, the Authority decided to conduct a hearing in the matter which was held on November 26, 2018. Notice of hearing was published in newspapers on November 13, 2018 inviting interventions and comments from the interested and affected parties.

25. In response to these notices, intervention request was *inter alia* also filed by K-Electric, where the latter submitted that whilst the Federal Government desired to formulate a uniform tariff throughout the country in accordance with the Tariff Policy Guidelines, however, if the proposed uniform tariff motion was allowed, GoP/NEPRA should also bring up an alike tariff regime for KE too since K-Electric was not subject to the proposed uniform tariff initiative (not being part of XWDISCOs).

26. These assertions of K-Electric were duly answered by the representative of the Federal Government stating that as per practice in vogue, whenever there was a tariff notification for XWDISCOs and the tariff was changed, K-Electric's notification always followed the notification of XWDISCOs. Therefore, once the subject determination was finalized and put in place for XWDISCOs, K-Electric's tariff notification would also be dealt with accordingly.

27. A decision of the Authority in the subject matter came on 19.12.2018 where for the first time, keeping in mind wishes of the Federal Government, a uniform tariff under Section 31(4) was announced wherein the impact of targeted subsidy and inter-disco tariff rationalization in terms of section 31(7) were provided as per Annex-VI and VII respectively. Side-

by-side tables of tariffs (with and without subsidies) were put in place. For industrial consumers, following part of the Schedule became applicable for all XWDISCOs (not including K-Electric) where “Uniform Tariff Variable Charge” (tariff without any Govt subsidy) was presented side-by-side with the subsidized “Applicable Variable Charges.

B INDUSTRIAL SUPPLY TARIFFS					
Sr. No.	TARIFF CATEGORY / PARTICULARS	FIXED CHARGES	Uniform Tariff		Applicable
		Rs/kW/M	Variable Charge		Variable Charges
		A	E		D
B1	Upto 25 kW (at 400/230 Volts)	-	18.32		15.28
B2(a)	exceeding 25-500 kW (at 400 Volts)	400.00	15.79		14.78
	Time Of Use		Peak	Off-Peak	Peak
B1 (b)	Up to 25 KW		20.14	13.46	18.84
B2(b)	exceeding 25-500 kW (at 400 Volts)	400.00	19.93	13.23	18.78
B3	For All Loads up to 5000 kW (at 11,33 kV)	380.00	20.39	12.61	18.78
B4	For All Loads (at 66,132 kV & above)	360.00	20.27	13.25	18.78

For B1 consumers there shall be a fixed minimum charge of Rs. 350 per month.
 For B2 consumers there shall be a fixed minimum charge of Rs. 2,000 per month.
 For B3 consumers there shall be a fixed minimum charge of Rs. 50,000 per month.
 For B4 consumers there shall be a fixed minimum charge of Rs. 500,000 per month.

Table - 2

28. After withdrawal of Suit No. 1467/2018 on 03.04.2019 by K-Electric, the Federal Government notified K-Electric’s MYT as determined on 05.07.2018 (w.e.f. 01.07.2016) vide SRO 576(I)/2019 dated 22.05.2019. Simultaneously GoP also issued SRO 575(I)/2019 dated 22.05.2019 and notified the applicable tariff for consumers of K-Electric to bring the consumers of K-Electric at par with consumers across Pakistan. In respect of K-Electric, the earlier determination dated 05.07.2018 effective 01.07.2016 as tabulated in Table-1 of paragraph 20 above was represented with a side-by-side display of the subsidized tariff as per the requirement of GoP to prominently show Govt’s subsidies towards general public/consumers:-

B INDUSTRIAL SUPPLY TARIFFS						
Sr. No.	TARIFF CATEGORY / PARTICULARS	K-Electric Tariff			Uniform Tariff	
		FIXED CHARGES	VARIABLE CHARGES		FIXED CHARGES	VARIABLE CHARGES
		Rs./kW/M	Rs./kWh		Rs./kW/M	Rs./kWh
		A	B		C	D
B1	Upto 25 kW (at 400/230 Volts)	-	13.50		-	12.28
B2(a)	25-500 kW (at 400 Volts)	400.00	12.65		400.00	11.78
B3(a)	For all loads upto 5000 KW (at 11,33 kV)	380.00	12.50		380.00	12.50
B4(a)	For all loads upto 5000 KW (at 66,132 kV)	360.00	12.00		360.00	12.00
	Time Of Use		Peak	Off-Peak	Peak	Off-Peak
B1(b)	Upto 25 kW (at 400/230 Volts)	-	16.50	12.50	-	15.84
B2(b)	25-500 kW (at 400 Volts)	400.00	16.50	12.00	400.00	15.78
B3(b)	For All Loads up to 5000 kW (at 11,33 kV)	380.00	16.50	11.50	380.00	15.78
B4(b)	For All Loads (at 66,132 kV & above)	360.00	16.50	11.25	360.00	15.78
B5	For All Loads (at 220 kV & above)	340.00	16.50	10.50	340.00	15.78

The above mentioned variable charges under the head of uniform tariff is inclusive of industrial support package notified vide SRO 121(I)/2019 dated 1st January, 2019
 For B1 consumers there shall be a fixed minimum charge of Rs. 350 per month.
 For B2 consumers there shall be a fixed minimum charge of Rs. 2,000 per month.
 For B3 consumers there shall be a fixed minimum charge of Rs. 50,000 per month.
 For B4 consumers there shall be a fixed minimum charge of Rs. 500,000 per month.
 For B5 consumers there shall be a fixed minimum charge of Rs. 1000,000 per month.

Table - 3

29. SRO 575/2019 further clarified that the ISPA subsidy was accounted for in the “Uniform Tariff” (right hand side) column to ensure that the benefit of the said subsidy is not given twice to the consumers. It is pertinent to mention that the applicable tariff of XWDISCOs as determined vide Determination dated 19.12.2018 could not contain such ISPA subsidy as the said subsidy was introduced only on 01.01.2019.

30. It is also an admitted fact that despite issuance of SRO Nos. 576 and 575/2019, the zero rated consumers of K-Electric continued to receive the zero rated subsidy provided under Paragraph 3 of SRO 12(I)/2019 which gives this court reasons to believe that in spite of issuance of the twin SROs on 22.05.2019, SRO 12(I)/ 2019 continued to hold the field, which as would emerge from the later part of this judgment has no relevance to the controversy at hand.

31. Changes in the above situation only came with the issuance of SRO 810(I)/2019 by the Federal Government on 12.07.2019 in terms of which para 2 of SRO 12(I)/2019 dated 01.01.2019 was amended w.e.f. July 1, 2019 and subsidy of Rs.3/kWh given to the industrial consumers of XWDISCOs and K-Electric for peak as well as off-peak hours was reduced to peak hours only. Full text of the said SRO is reproduced hereunder:-

<p>No. Tariff/2018-19 Government of Pakistan Ministry of Energy *****</p> <p style="text-align: right;">Islamabad, the 12th July 2019</p> <p style="text-align: center;"><u>NOTIFICATION</u></p> <p>S.R.O.810(I)/2019. – The Federal Government is pleased to amend and substitute the para 2 of S.R.O. 12(I)/2019 dated 1st January 2019 as follows with effect from July 01, 2019, namely:-</p> <p>2. In order to further rationalize the payments, XWDISCOs and K-Electric are receive from its industrial consumers per above, it is hereby notified that payment for the industrial consumers of all XWDISCOs and K-Electric be reduced by Rs. 3/kwh, only during peak hours, which reduction shall be inclusive of any downward revision of fuel Price Adjustment notified from time to time. The difference between the relevant payment due from industrial consumer per above mentioned SROs and special relief package notified hereunder adjusted with any downward revision of Fuel Price Adjustment as above, shall be paid to XWDISCOs and K-Electric by the Federal Government per the notification for rationalization of process of payment of Subsidy.</p> <p style="text-align: right;">-sd/- (Syed Mateen Ahmed) Section Officer</p>
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32. K-Electric having been given tariff determination on 05.07.2018 effective 01.07.2016 per Table-1 given under paragraph 20, did not immediately remove this subsidy from her bills, rather approached Federal Government to amend the Uniform Tariff column of the table given under paragraph 28 hereof [Table -3] so that effect of SRO 810 could be reflected in SRO 575 to the extent that entries made therein giving subsidy for off peak hours be corrected. Which correction only came in the form of the impugned Corrigendum issued by the Federal Government on 22.01.2020 where Rs.3/kWh was added to all the right hand (off-peak) column entries. Full text of the said corrigendum is reproduced in the following:-

<u>PUBLISHED IN THE OFFICIAL GAZETTE</u> <u>GOVERNMENT OF PAKISTAN</u>		
Government of Pakistan Ministry of Energy Power Division *****		
Islamabad the January 22, 2020		
CORRIGENDUM		
To the Gazette of Pakistan Extra-Ordinary part-II, dated the 22 nd May, 2019 containing Notification No. S.R.O 575 (I)/2019, dated May 22, 2019.-		
In the aforesaid Notification, for Schedule of Electricity tariffs under the heading of "B- INDUSTRIAL SUPPLY TARRIFS, and sub-heading of Uniform Tariff, the following rates shall be substituted and will take effect from 1 st July, 2019, as already notified vide S.R.O No: 810(I)/2019 dated 12 th July, 2019 to maintain uniform tariff across the Country, namely:-		
Sr. No.	Tariff category/particulars	Uniform Tariff
		Variable Charges
		Rs./kWh
		D
		Variable Charges
		Rs./kWh
B1	Upto 25 kW (at 400/230 Volts)	15.28
B2(a)	25-500 kW (at 400 Volts)	14.78
B3(a)	For All loads Upto 5000 KW (at 11,33 kV)	15.50
B4(a)	For all Loads upto 5000 KW (at 66,132 kV)	15.00
	Time of Use	Off Peak
B-1(b)	Upto 25 kW (at 400/230 Volts)	13.28
B-2(b)	25-500 kW (at 400 Volts)	13.07
B-3(b)	For All Loads up to 5000 kW (at 11,33 kV)	12.98
B-4(b)	For All Loads (at 66,132 kV & above)	12.88
B-5	For All Loads (at 220 kV & above)	12.00
[No.PIII-3(2)/2009]		
(Syed Mateen Ahmed) Section Officer (Tariff)		

33. While this controversy has been blown up out of proportion, the only point for our consideration is the effect of withdrawal of off-peak subsidy through SRO 810/2019 in SRO 575/2019, which in our view is a pure mathematical exercise which culminated in the issuance of the corrigendum, however the question is that whether the values shown in the corrigendum are correct or not? Petitioners' main grievance is that the said corrigendum instead of representing true effect of SRO 810/2019 has in fact attempted to put forward some numbers which appear to be a brand new and enhanced determination.

34. There is no cavil to the truth that at present the only determination of K-Electric's tariff is the one which came from NEPRA on 05.07.2018 where after KE's and GoP's challenges, industrial consumers were awarded the following tariff:-

B INDUSTRIAL SUPPLY TARIFFS				
Sr. No.	TARIFF CATEGORY / PARTICULARS	FIXED CHARGES Rs/kw/M	VARIABLE CHARGES Rs/kWh	
			Peak	Off-Peak
B1	Upto 25 kW (at 400/230 Volts)	-		13.50
B2(a)	25-500 kW (at 400 Volts)	400.00		12.65
B3(a)	For all loads upto 5000 KW (at 11,33 kV)	380.00		12.50
B4(a)	For all loads upto 5000 KW (at 66,132 kV)	360.00		12.00
	Time Of Use			
B1(b)	Upto 25 kW (at 400/230 Volts)	-	16.50	12.50
B2(b)	25-500 kW (at 400 Volts)	400.00	16.50	12.00
B3(b)	For All Loads up to 5000 kW (at 11,33 kV)	380.00	16.50	11.50
B4(b)	For All Loads (at 66,132 kV & above)	360.00	16.50	11.25
B5	For All Loads (at 220 kV & above)	340.00	16.50	10.50
For B1 consumers there shall be a fixed minimum charge of Rs. 350 per month. For B2 consumers there shall be a fixed minimum charge of Rs. 2,000 per month. For B3 consumers there shall be a fixed minimum charge of Rs. 50,000 per month. For B4 consumers there shall be a fixed minimum charge of Rs. 500,000 per month. For B5 consumers there shall be a fixed minimum charge of Rs. 1000,000 per month.				

35. If there would have been no SRO 12/2019 giving away subsidy and no SRO 810/2019 taking away subsidy (in toto – for example, i.e. for peak as well as off-peak hours both) KE would be only charging industrial consumers as per the above determination. SRO 575/2019 where a right hand column was provided, in our view was to cosmetically produce GoP's subsidy figures alongside the determined tariff which subsidies were already granted and made part of KE's bills after issuance of SRO 12/2019. To us, SRO 575/2019 is not an outcome of determination *per se*

as it only prints the earlier determined tariff alongside GoP's subsidized tariff, as rightly admitted by the learned counsel of KE and, if at any point in time, any entry on the right hand column was attacked, tariff would fall back to the respective and corresponding entry in the left hand side column, which admittedly is the outcome of actual determination. What to keep in mind is that the amounts in the right hand column could never be higher than those in the left hand column.

36. Now coming to numbers. The determined tariff for various inter-class subsidies vide determination dated 05.07.2018 effective 01.07.2016 is reproduced as under. K-Electric would be charging this tariff if there were no subsidies during peak and off-peak hours. Also, if no stay orders would have been sought in Suit No.1467/2018 notification of this determination could have been made under section 31(7).

Sr. No.	Fixed Charges Rs/kW/M	Variable Charges Rs/kWh	
		Peak	Off Peak
B1	-		13.50
B2(a)	400.00		12.65
B3(a)	380.00		12.50
B4(a)	360.00		12.00
Time of Use	-	Peak	Off Peak
B-1(b)	-	16.50	12.50
B-2(b)	400.00	16.50	12.00
B-3(b)	380.00	16.50	11.50
B-4(b)	360.00	16.50	11.25
B-5	340.00	16.50	10.50

37. Since no independent notification of the above mentioned determination could have been made under section 31(7) of the Act (unlike Notification dated 10.09.2002 for the first determination for K-Electric) on account of stay order granted to K-Electric in the pending Suit No.1467/2018, notification of this determination made on 05.07.2018 (effective 01.07.2016) only came along with similar notification of other XWDISCOs, where GoP's desires to place subsidized tariff alongside the

determined tariff were honored. Thus as a result, the above table took the following shape and it was so notified through SRO 575/2019:

Sr. No.	Fixed Charges Rs/kW/M	K-Electric Variable Charges Rs/kWh		Uniform Tariff Variable Charges Rs/kWh	
		Peak	Off Peak	Peak	Off Peak
B1	-		13.50		12.28
B2(a)	400.00		12.65		11.78
B3(a)	380.00		12.50		12.50
B4(a)	360.00		12.00		12.00
Time of Use	-	Peak	Off Peak	Peak	Off Peak
B-1(b)	-	16.50	12.50	15.84	10.28
B-2(b)	400.00	16.50	12.00	15.78	10.07
B-3(b)	380.00	16.50	11.50	15.78	9.98
B-4(b)	360.00	16.50	11.25	15.78	9.88
B-5	340.00	16.50	10.50	15.78	9.00

The above table clearly shows that instead of passing subsidy of Rs.3/kWh for category B-1(b) for off peak hours the original tariff of Rs.12.50/kWh was only reduced to Rs.10.28/kWh (hence subsidy of Rs.2.22/kWh was given instead of Rs.3/kWh); for category B-2(b) for off peak hours the original tariff of Rs.12.00/kWh was only reduced to Rs.10.07/kWh (subsidy of Rs.1.93/kWh was given instead of Rs.3/kWh); for category B-3(b) for off peak hours the original tariff of Rs.11.50/kWh was only reduced to Rs.9.98/kWh (subsidy of Rs.1.52/kWh was given instead of Rs.3/kWh); for category B-4(b) for off peak hours the original tariff of Rs.11.25/kWh was only reduced to Rs.9.88/kWh (subsidy of Rs.1.37/kWh was given instead of Rs.3/kWh) and for category B-5 for off peak hours the original tariff of Rs.10.50/kWh was only reduced to Rs.9.00/kWh (subsidy of Rs.1.50/kWh was given instead of Rs.3/kWh).

38. As shown from the above table, GoP's subsidy of Rs.3/kWh as provided by SRO 12/2019 is not accurately reflected in any of the subsidized tariff (either in the case of Peak or Off-peak hours). *Aequitas est quasi aequalitas* is an established principle of law meaning 'equality is equity' and prescribes that when there are no reasons for any other basis

of division of property, those entitled to it shall share it equally. With the issuance of SRO 12/2019, subsidy of Rs.3/kWh became personal property of the petitioners and it had to be adjusted in equal amounts into the determined tariff of K-Electric (left hand column). If that benefit would have been passed on judicially, the right hand column would have yielded the following values:

Sr. No.	Fixed Charges Rs/kW/M	K-Electric Variable Charges Rs/kWh		Tariff with True Subsidy of Rs.3/kWh Rs/kWh	
		Peak	Off Peak	Peak	Off Peak
B1	-		13.50		10.50
B2(a)	400.00		12.65		9.65
B3(a)	380.00		12.50		9.50
B4(a)	360.00		12.00		9.00
Time of Use	-	Peak	Off Peak	Peak	Off Peak
B-1(b)	-	16.50	12.50	13.50	9.50
B-2(b)	400.00	16.50	12.00	13.50	9.00
B-3(b)	380.00	16.50	11.50	13.50	8.50
B-4(b)	360.00	16.50	11.25	13.50	8.25
B-5	340.00	16.50	10.50	13.50	7.50

39. The question posed by the Petitioners in true sense is that *what would be the effect of SRO 810/2019 where off-peak hour subsidy of Rs.3/kWh was withdrawn on the actual determinations*. There are three possible extrapolations, (1) The off-peak hour rates would fall back to the original determined tariff rates per determination dated 05.07.2018 effective 01.07.2016 as per Table-1 (2) Rs.3/kwh be added to all off-peak entries mentioned in the right hand column of SRO 575/2019 (as done through corrigendum) or (3) Balance of Rs.3/kWh be added to the residual value of actual subsidy provided through SRO 575/2019. Preceding table shows all these three possibilities:

Sr. No.	Fixed Charges Rs/kW/M	K-Electric Variable Charges Rs/kWh		Uniform Tariff Variable Charges Rs/kWh		Balance of Rs.3/kWh be added to the residual value of actual subsidy provided through SRO 575/2019	
		As Per Tariff Determination dtd 05.07.2018		Added Rs.3/kWh		To Right hand Column of SRO 575/2019	
		I		II		III	
B1	-		13.5		15.28		11.72
B2(a)	400		12.65		14.78		10.52
B3(a)	380		12.5		15.5		9.50
B4(a)	360		12		15		9.00
Time of Use	-	Peak	Off Peak After SRO 810/19	Peak	Off Peak After SRO 810/19	Peak	Off Peak After SRO 810/19
B-1(b)	-	16.5	12.5	15.84	13.28	15.84	11.72
B-2(b)	400	16.5	12	15.78	13.07	15.78	10.93
B-3(b)	380	16.5	11.5	15.78	12.98	15.78	10.02
B-4(b)	360	16.5	11.25	15.78	12.88	15.78	9.62
B-5	340	16.5	10.5	15.78	12.00	15.78	9.00

40. These three possibilities are yielding different results only because the actual subsidy of Rs.3/kWh was not truly reflected in the subsidized tariff notified by SRO 575/2019 (Right hand column). If that would not have been the case, all the entries in the above table would have yielded the same results. Column III of the above table though reproduces the most beneficial results keeping in mind that the actual subsidy of Rs.3/kWh was not passed on, however these values cannot be used since these are lower than the determined values of column I. On the same token values of column II (the corrigendum values) could also not be taken also as these seem to create a new determination where given rates are higher than the determined tariff rates. If this column would have given Rs.3/kWh subsidy truly, value of column I and II (as well as III) would have been the same, i.e. determined values by NEPRA.

41. Coming to the corrigendum itself, if it would have provided true addition of Rs.3.kWh to honestly subsidized tariff, its contents would have yielded corresponding values given in the left hand column of SRO

575/2019 and no one would have objected to it. As this is not the case and the corrigendum is showing values higher than the determined values, this document has no legal sanctity in the eyes of this Court, since determination could only be made through the procedure laid down under the Act by NEPRA. Executive authority can only be used to provide for or recall subsidies built in a determined tariff through Rules as detailed in the foregoing.

42. It is for these reasons, we dispose of all of these connected petitions and those directed to be treated as reserved with the connected bunch in the following terms:-

- (a) The Corrigendum dated 22.01.2020 is declared to be illegal, void, issued in excess of authority hence quashed. K-Electric is restrained from enforcing the same in any manner whatsoever as it has resulted in a determination (higher than NEPRA's determined tariff) and it is not correcting any errors.
- (b) Industrial consumers of K-Electric to be charged tariff as per the left hand column (K-Electric Tariff) of SRO 575(I)/2019 dated 22.05.2019 as determined vide determination dated 05.07.2018 in respect of variable "off-peak hours" charges, and right hand column (Uniform Tariff) in respect of variable "peak hours" charges, as long as subsidy for "peak hours" provided through SRO 12(I)/2019 dated 01.01.2019 holds the field. At any point in time when the "peak hour" subsidy is withdrawn, values shown in the right hand column would become meaningless and tariff will completely fall back to the left hand column (unless any new determination has taken the field).
- (c) SRO 810(I)/2019 dated 12.07.2019 is lawful as GoP is solely competent to provide or withdraw any subsidy.
- (d) Any sums charged and paid by the Petitioners per the rates specified in the corrigendum after deducting the rates provided in the left hand column (K-Electric Tariff) of SRO 575(I)/2019 as determined vide determination dated

05.07.2018 in respect of variable “off-peak hours” charges shall be refunded or adjusted towards the future bills.

- (e) Petitioners who have not paid any previous bills or ISPA component for the period July-2019 to Jan-2020 be reissued bills for this period on the basis of the values provided in the left hand column (K-Electric Tariff) of SRO 575(I)/2019 dated 22.05.2019 as determined vide determination dated 05.07.2018 in respect of variable “off-peak” hours charges and be given a reasonable period to make payments as per the foregoing.

There will be no order as to costs.

Karachi: ____ September, 2020

Judge

Judge