

Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 1 of 2019

Directors of K-Electric Limited:

- i. Mr. Waqar Hasan Siddique
- ii. Mr. Muhammad Tayyab Tareen
- iii. Mr. Khalid Rafi
- iv. Mr. Aamer Ahmed
- v. Mr. Muhammad Anwer Shaikh
- vi. Mr. Muhammad Zubair Motiwala
- vii. Mr. Omar Khan Lodhi
- viii. Mr. Shan A. Ashary
- ix. Mr. Mubasher H. Sheikh
- x. Mr. Nayyer Hussain
- xi. Mr. Frederic Sicre
- xii. Mr. Aziz Moolji
- xiii. Mr. Ch.Khaqan Saadullah Khan

...Appellants

Versus

Executive Director (Corporate Supervision Department),
Securities and Exchange Commission of Pakistan

...Respondent

Date of Hearing: 16/07/2020

Present:

For the Appellant:

Mr. Rashid Sadiq, CEO RS Corporate Advisory

For the Respondent:

- i. Mr. Amir Saleem, Joint Director (Adjudication-1)
- ii. Mr. Sardar Sohaib Amin, Assistant Director (Adjudication-1)

ORDER

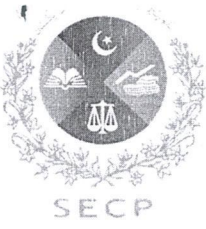
1. This Order is passed in the matter of Appeal No.1 of 2019 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 (the SECP Act) against the order



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SECP dated 03/12/18 (the Impugned Order) passed by the Executive Director (Corporate Supervision Department) (the Respondent).

2. The brief facts of the case are that K-Electric Limited (the Company) was required to hold its annual general meeting (the AGM) for the financial year ended 30/06/17 within a period of one hundred and twenty days following the close of its financial year pursuant to section 132(1) of the Companies Act, 2017 (the Companies Act). The Company was granted extension until 23/11/17 to convene its past due AGM vide the Commission's directive dated 09/10/17, however, a review of the Company records revealed that it failed to hold its AGM as had been advised vide the aforementioned directive. The chief executive and the directors of the Company had, prima facie, contravened the provisions of section 132 by failing to convene the AGM as stipulated under the law.
3. Show-Cause Notice dated 23/04/18 (the SCN) was issued to the Board of Directors (the Appellants) to show-cause as to why penal action may not be taken against them for failing to conform to section 132 of the Companies Act. The Company, through its legal counsel, submitted a written response dated 11/05/18. Hearing in the matter was held before the Respondent on 14/05/18 and Mr. Rashid Sadiq, CEO, RS Corporate Advisory appeared on behalf of the Appellants.
4. The Respondent dissatisfied with the response of the Appellants held that interim order of the Honourable Sindh High Court (the Court Order) does not bar the Commission from taking action vis-a-vis violations of the provisions of the Companies Act which was also communicated to the Company through video conferencing held on 01/10/18 and vide Commission's letter of the same date. Moreover, the Respondent held that the electric power sector's apex regulator, National Electric Regulatory Authority (the NEPRA), had evidently stated that no impediment exists which would preclude the Company from adhering to the legal framework with prudence. The Respondent further held that the aforementioned provisions of the law are unambiguous and explicit and holding of the AGM is a vital statutory event in that it provides an opportunity to the shareholders to participate in the discussion and voting on agenda items of the AGM which includes consideration and approval of the Company's financial statements. Furthermore, the Respondent held that in order to ensure transparency and protect the shareholders' rights, all companies must meticulously adhere to the law by following the procedure prescribed under the Companies Act for holding the AGMs. Moreover, in addition to their responsibilities of overseeing and managing the affairs of the company, the directors also have fiduciary duties towards their company and its shareholders.



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Therefore, they are liable to a higher level of accountability, which requires them to be vigilant and perform their duties with utmost care and prudence. The Respondent held that Appellants were liable to penal action in terms of section 132 of the Companies Act as a result of failing to holding to hold the Company's AGM for the financial year ended 30/06/17 as stipulated under the law and a fine of Rs 50,000 was imposed on each of the Appellants in the following manner:

S. No.	Board of Directors	Amount in Rupees
1.	Mr. Waqar Hasan Siddique (Chairman)	50,000
2.	Mr. Muhammad Tayyab Tareen (CEO)	50,000
3.	Mr. Khalid Rafi	50,000
4.	Mr. Aamer Ahmed	50,000
5.	Mr. Muhammad Anwar Shaikh	50,000
6.	Mr. Muhammad Zubair Motiwala	50,000
7.	Mr. Omar Khan Lodhi	50,000
8.	Mr. Shan A. Ashary	50,000
9.	Mr. Mubasher H. Sheikh	50,000
10.	Mr. Nayyer Hussain	50,000
11.	Mr. Frederic Sicre	50,000
12.	Mr. Aziz Moolji	50,000
13.	Mr. Ch. Khaqan Saadullah Khan	50,000
	TOTAL	650,000

5. The Appellant preferred the appeal *inter alia* on the following grounds:

- a) The Impugned Order speaks of feedback received from NEPRA where it is recommended by NEPRA that an un-notified tariff be used as a reference point for financials to be produced by the Company and if needed, financial statements may add a note regarding Reconsideration Request under consideration of NEPRA. The expectation of the Securities and Exchange Commission of Pakistan (the Commission) that the Company rely on the instructions of a government institution for producing financials relying on a premature multi-year tariff (the MYT) is highly unreasonable and unjustified. It was specifically submitted to the Respondent that the Reconsideration Request of the Government of Pakistan was pending with NEPRA and its determination will be notified in due course. The Appellants were served with SCNs.



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- SECPb) The law expressly states that notification of the final tariff will be done by the Federal Government through the official Gazette, therefore, it would also be unreasonable for the Commission to rely on representations of NEPRA when Court Order was in place recognizing the potential of the harm that may be caused by notification of the detriment tariff and the mandatory application of the tariff once it is notified.
- c) The Appellants had time and time again reasoned that circumstances existed which were likely to disseminate misinformation through financials if accounts were prepared and AGM for approval of premature financial statements was held. Therefore, without notification of a final MYT by NEPRA, the Company was not in a position to provide accurate information to its shareholders. The responsibility of accurate representation of the financials of a company rests with the management of the company. Additionally, being a listed entity, the Company and its stakeholders were more likely to suffer from any negative impact on the share price as a result of misinformed accounts. This had also been recognized by the Commission in its previous order while adjudicating delay in holding of AGM for the year 2016 by the Company.
- d) The fundamental reason for delay in releasing financial statements for the financial year 2017 was that the Company did not have a valid tariff for the year starting from 01/07/16 and could not prepare the financial statements on the basis of an estimation in the absence of a basic topline revenue number. It would have been entirely irresponsible to invest resources of the Company to arrange an AGM only to leave matters unresolved due to the impossibility of presenting financials as a result of the delay in notification of the final favourable tariff. The AGM was subsequently held in July 2019 after the tariff issued was resolved.
- e) The Commission also needs to determine whether the default was committed knowingly and willfully. It was held by the Honourable Bench in the matter of Fauji Cement Company Limited versus Director (MSRD) dated 24/08/15 that, "... penalty can only be imposed under section 224(4) of the Ordinance if the failure to comply was willful which has not been established on the facts of the instance case." Similarly, in the case of Next Capital Limited versus Director (MSRD) Appeal No. 26 of 2015, "The word "willful" can be used interchangeably with the word "intentional". The above judgments of the honourable Appellate Bench are also applicable in the instant case and the Impugned Order should be withdrawn without any adverse consequences for the Company or its management.
- f) The Commission has realized the difficulty in cases concerning other utilities, therefore, no notices have been issued to them for delays in holding of their respective AGMs. The Impugned Order is also liable to be withdrawn as mandated under section 20(6)(c) of the 1997 Act for



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maintaining uniformity in exercise of the powers in cases having identical and indistinguishable set of circumstances. There are precedents where the Commission has declared that no penal action will be taken when circumstances are beyond the control of the company. In the letter dated 28/10/13 addressed to SNGPL, it was stated, *"In this connection I am advised to inform you that the law does not envisage any extension in time for preparation and circulation of quarterly accounts. However, the reasons provided by the Company for expected delay in submission of quarterly accounts for the period ended 30/09/13 appear to be cogent and beyond the control of the Company, therefore, no penal action will be taken by the Commission."* This was allowed by the Commission as the Final Revenue Determination by the Oil and Gas Regulatory Authority was not available and even in the case of SNGPL, the AGM for the year 2013 was held after more than two years and the delay was considered as cogent and beyond the control of the management. The circumstances of the Company, SNGPL and even SSGCL are identical in nature, therefore, it merits similar treatment as required by the law. Furthermore, even in the case of merging companies, the Commission has recognized that the circumstances of the company can limit compliance with the mandatory requirements of section 132 of the Companies Act. The letters of the Commission show that they have accepted the absence of revenue/tariff determination as a cogent reason for not holding the AGM and no adverse order or warnings have been issued in the past. A different treatment with the Company would amount to unfair, unjust and discriminatory treatment and would contravene the letter and spirit of the scheme envisaged under section 20(6)(c) of the SECP Act. The matter of uniformity of application of the law was discussed in the Honourable Lahore High Court Judgment of Nishat Mills Limited versus SECP Appellate Bench in which it was observed by Justice Shams Mahmood Mirza that, *"The perusal of these orders clearly shows that SECP condoned delay on the assurance and undertaking given by the defaulters for timely filing of the returns in future...The case of the Appellant is at par with cases of those companies where delay was condoned and fine was not imposed, the appellant was entitled to similar treatment."*

- g) Section 132 of the Companies Act has repealed section 158 of the Companies Ordinance, which provided that that the company and its officers who willingly committed the default would be responsible. Section 132 of the Companies Act provides that the requirement to hold an AGM is the responsibility of the Company, therefore, penalties to be attracted for non-compliance become the liability of the Company and not individual directors. Furthermore, Section 484 of the Companies Act provides that, *"In any proceedings against a body corporate for an offence against any provisions of this Act a notice to show cause or appear may be sent to or served on*



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the body corporate by registered post or in any other manner laid down for the service of summons issued by a court under the Code of Civil Procedure, 1908 (Act V of 1908), at its registered office...” Therefore, SCN under 132 of the Companies Act should have been issued to the Company and the process followed for trial of corporate body as prescribed in section 484 of the Companies Act. The Impugned Order should be set aside on this ground alone.

h) The Company and its management are law-abiding citizens and remain genuinely committed to complying with all the relevant and applicable laws, rules and regulations. Therefore, no penal action should be taken against the Company and the Impugned Order set aside.

6. The Respondent rebutted the arguments of the Appellant on the following grounds:

- a) NEPRA had determined tariff of the Company for the tariff control period i.e. FY 2016-17 to 2022-23 which could be used by the Company for preparation of its financial statements with additional disclosures and accordingly hold its AGM. This had also been explicitly stated in the Authority’s letter dated 19/06/18. Reliance on NEPRA’s view on the subject matter is not unreasonable and unjustified as they conduct their core functions and duties in a fair, unbiased and non-discriminatory manner.
- b) A company is required to hold its AGM within a period of 120 days from the close of its financial year. Holding of the AGM is a vital statutory event, in that it provides an opportunity to the shareholders to participate in the discussion and voting on agenda items of the AGM which includes consideration and approval of the company’s financial statements. In order to ensure transparency and protect the shareholders’ rights, all companies must meticulously adhere to the law by following the procedure prescribed under the Companies Act for convening AGMs. Moreover, NEPRA had given its stance on the matter and clearly stated that the Company could have prepared its financial statements along with additional disclosures. Therefore, the Company and stakeholders would not have suffered as the factual position would have been presented to them.
- c) While the Commission may not have issued notices in the past for delay in holding the AGMs and granted extension of time covering the same, it must be emphasized that the Impugned Order has been passed subsequent to seeking opinion of NEPRA on the subject matter. It is reiterated that NEPRA has the primary responsibility of determination of tariff for electric power sector in the country. The instant case has its own circumstances and judgments cited by the Appellant are not relevant to this case. In the instant matter, NEPRA being the primary tariff setting body of



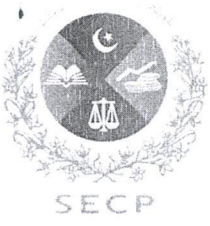
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the electric power sector, had categorically stated that the financial statements could have been prepared along with necessary disclosures.

d) Section 132 of the Companies Act mandatorily requires convening of AGM within a specified period and non-compliance with respect to holding of AGM attracts penal provisions. In this regard, section 183 of the Companies Act pertinently states that: —(1) *The business of a company shall be managed by the board, who may exercise all such powers of the company as are not by this Act, or by the articles, or by a special resolution, required to be exercised by the company in general meeting...*” The Company, as a legal entity, is managed by its Board of Directors which exercises all powers including holding of AGM on behalf of the Company. In the instant case, therefore, the board of directors are responsible for the violation under Section 132 of the Companies Act.

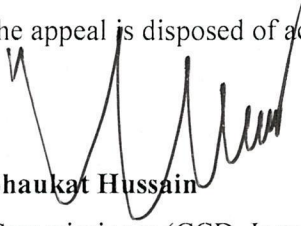
7. We have heard the parties i.e. the Appellant and the Respondent and perused the additional submissions submitted by the Appellant subsequent to the hearing. We are of the view that holding of AGM is a strict requirement of the law. Section 132 of the Companies Act is clear and unequivocal in terms of the requirements of the law to hold AGM. Section 132 of the Companies Act provides that, “(1) *Every company, shall hold, an annual general meeting within sixteen months from the date of its incorporation and thereafter once in every calendar year within a period of four months following the close of its financial year...*” Furthermore, International Accounting Standard-8 (IAS-8) provides that, “.... *Changes in accounting policies and corrections of errors are generally retrospectively accounted for...*”. We are of the view that even if the final tariff had not been determined, timely AGM could have still been held and the accounts could include a note which would have stated that a Reconsideration Request was under consideration by NEPRA. Furthermore, we concur with Respondent that the circumstances of every case are different and the judgments cited of other companies which were not penalized in a similar situation are irrelevant to the instant case as show-cause proceedings were initiated only after seeking NEPRA’s opinion on the matter and they had clearly stated that, “*Tariff of K-Electric...for the tariff control period i.e. FY 2016-17 to FY 2022-23 had been determined by the Authority which may be used for preparation of the Financial Statement. If needed, Financial Statement can add a note regarding Reconsideration Request being under consideration of the Authority.*”. Furthermore, the Court Order neither prevented the Company from preparation of financial statements nor from holding its AGM. Moreover, in light of IAS-8 correction of errors in the financials such as tariff adjustments could still take place, retrospectively, after final determination of the tariff. We, however, do not agree with the Respondent that section 183 of the Companies Act can be invoked in the

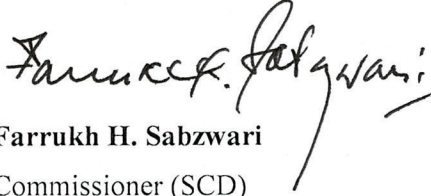


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instant case as show-cause proceedings were initiated under section 132 of the Companies Act which clearly states that penalty will be imposed on the Company for non-holding of AGM and not on the Appellants as directors. Therefore, SCN under section 132 of the Companies Act should have been issued to the Company which was not so in the instant case.

8. In view of the foregoing, we set aside the Impugned Order and remand the same to the Respondent to initiate fresh show cause proceedings against the Company within 30 days of passing of this Order.
9. The appeal is disposed of accordingly with no order as to costs.


Shaukat Hussain
Commissioner (CCD, Insurance)


Farrukh H. Sabzwari
Commissioner (SCD)

Announced on: **26 OCT 2020**