

Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No.3 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. 3 of 2019 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 (SECP Act) against the order (Impugned Order) dated 03/12/18 passed by the Executive Director (the Respondent).



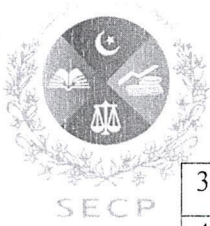
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2. The brief facts of the case are that K-Electric Limited (the Company) failed to file its interim financial statements for the following period with the Securities and Exchange Commission of Pakistan (the Commission) within the time stipulated pursuant to section 237 of the Companies Act, 2017 (the Companies Act).

Quarter ended	Filing due on
September 30, 2017	October 31, 2017

3. Show-Cause Notice dated 23/04/18 (the SCN) was issued to Directors of the Company (the Appellants) to show-cause as to why penal action may not be taken against them for failing to conform to section 237 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 conference held on 01/10/18 and vide Commission's letter of the same date. Moreover, the electric power sector's apex regulator, National Electric Power Authority (the NEPRA), had evidently stated that no impediment exists, which would preclude the Company from adhering to the legal framework with prudence i.e. tariff from the year 2016-17 until 2022-23 had been determined by the Authority, therefore, could be used by the Company for preparation of its financial statements with additional disclosures in light of NEPRA's letter dated 19/06/18. The Respondent further held that pertinent provisions of the law had been violated and deemed it appropriate to render Appellants liable to penal action in terms of section 237 of the Companies Act as a result of failing to file the Company's interim financial statements for the quarter ended 30/09/17 with the Commission as required under the law. Therefore, in exercise of powers conferred under section 237(1) of the Companies Act, a fine of Rs 5,000 was imposed on each of the Appellants aggregating to Rs 65,000 as per the following particulars:

S. No.	Board of Directors	Amount in Rupees
1.	Mr. Waqar Hasan Siddique (Chairman)	5,000
2.	Mr. Muhammad Tayyab Tareen (CEO)	5,000

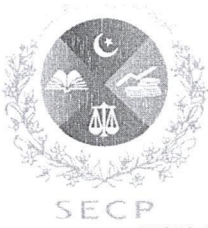


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3.	Mr. Khalid Rafi	5,000
4.	Mr. Aamer Ahmed	5,000
5.	Mr. Muhammad Anwar Shaikh	5,000
6.	Mr. Muhammad Zubair Motiwala	5,000
7.	Mr. Omar Khan Lodhi	5,000
8.	Mr. Shan A. Ashary	5,000
9.	Mr. Mubasher H. Sheikh	5,000
10.	Mr. Nayyer Hussain	5,000
11.	Mr. Frederic Sicre	5,000
12.	Mr. Aziz Moolji	5,000
13.	Mr. Ch. Khaqan Saadullah Khan	5,000
	TOTAL	65,000

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 being under consideration of NEPRA. The expectation of 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 despite these facts.
- b) 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



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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.
- 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 filing of accounts. The Impugned Order is also liable to be withdrawn as mandated under section 20(6)(c) of the 1997 Act for 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, "2. *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. 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*



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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.”

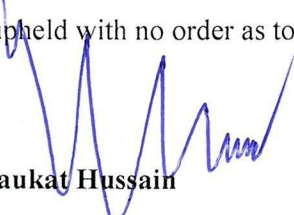
- g) The Company and its management are law-abiding citizens and remain genuinely committed to complying with all the relevant and applicable laws, rules and regulations. Therefore, no penal action should be taken against the Company and the Impugned Order set aside.
6. The Respondent rebutted the arguments 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. 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) Timing of filing of interim financial statements is of essence, disclosure and audit requirements of these accounts have been kept to a bare minimum. Interim financial statements prepared accurately and in a timely manner provide to its users a reliable source of information regarding a Company's financial position and performance. In order to ensure transparency, all companies must meticulously adhere to the law for preparation and circulation of interim financial statements. 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 the electric power sector, had categorically stated that the financial statements could have been prepared along with necessary disclosures.
7. We have heard the parties i.e. the Appellant and the Respondent. We are of the view that timely filing of quarterly accounts is a strict requirement of the law. Section 237 of the Companies Act is clear and

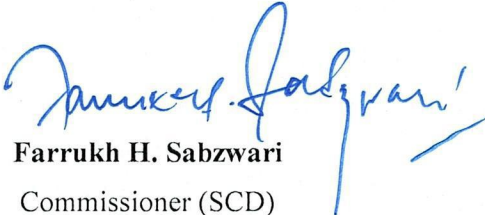


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unequivocal in terms of the requirements of the law to file timely quarterly accounts. Section 237 of the Companies Act provides, “1) Every listed company shall prepare the quarterly financial information within the period of- (a) one month of the close of first and third quarters of its year of accounts; and (b) two months of the close of its second quarter of its year of accounts...”. 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 accounts could have still been filed and they could include a note which would have stated that a Reconsideration Request was under consideration by NEPRA. Furthermore, we concur with the 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 did not prevent the Company from preparation of financial statements. 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.

8. In view of the foregoing, we see no reason to interfere with the Impugned Order. The Impugned Order is upheld with no order as to costs.


Shaukat Hussain
Commissioner (CCD, Insurance)


Farrukh H. Sabzwari
Commissioner (SCD)

Announced on: **19 OCT 2020**