

Securities and Exchange Commission of Pakistan

BEFORE THE APPELLATE BENCH

In the matter of

Appeal No. 47 of 2020

Power Holding Limited

...Appellant

Versus

- i. Executive Director/ Head of Adjudication, (Adjudication Department-II)
- ii. Registrar of Companies, Corporatization and Compliance Department,
Company Law Division, Securities and Exchange Commission of Pakistan

...Respondents

Date of Hearing: 29/04/21

Present:

For the Appellant (via Zoom video conferencing):

Mr. Zeeshaan Zafar Hashmi, Counsel

For the Respondents (via Zoom video conferencing)

Mr. Waseem Ahmad Khan, Director (Corporatisation & Compliance Department)

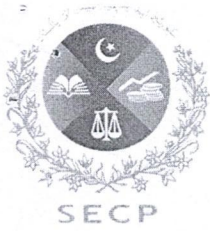
ORDER

1. This Order is passed in Appeal No. 47 of 2020 filed under section 33 of the Securities and Exchange Commission of Pakistan Commission Act, 1997 (the SECP Act) against the Order dated 16/04/20 (the Impugned Order) passed by the Executive Director/Head of Department (Adjudication-II) (Respondent No.1).



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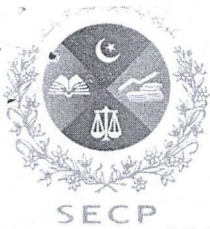
2. The brief facts of the case are that Power Holding Limited (the Appellant) is a public sector company as defined in rule 2(1)(g) of the Public Sector Companies (Corporate Governance) Rules, 2013 (the Rules). In terms of Rule 24(1) of the Rules, a public sector company is required to file with the Securities and Exchange Commission of Pakistan (the Commission) the statement of compliance (the SOC) along with its annual report. The Appellant filed its annual accounts for the year ended 30/06/18 on 17/01/19. However, the Appellant did not file the SOC for the year ended 30/06/18 along with its annual report in violation of rule 24(1) of the Rules.
3. The Show-Cause Notice dated 29/11/19 (the SCN) was served on the Appellant, its Chief Executive and Directors calling upon them to furnish an explanation in writing within fourteen (14) days from the issuance of the SCN as to why penal provisions of Rule 25 of the Rules read with section 508(2) of the Companies Act, 2017 (the Companies Act) may not be invoked. The Appellant submitted its reply dated 12/12/19 and hearing in the matter was held on 24/02/20 and Mr. Fraz Qadri, Company Secretary of the Appellant (the Authorized Representative) appeared before Respondent No.1. The Authorized Representative reiterated the response given by the Appellant and was advised to provide evidence of submission of the request to the concerned ministry for appointment of three independent directors. The Authorized Representative vide letter dated 26/02/20 provided a copy of the letter.
4. Respondent No.1, dissatisfied with the response of the Appellant, *inter alia* held that it was obvious that violation of Rule 24(1) of the Rules had been committed. Furthermore, Respondent No.1 held that as far as the appointment of independent directors is concerned, the same was beyond the scope of the SCN. The Respondent No.1 held that violation of Rule 24(1) of the Rules attracts the penal provisions contained in Rule 25 of the Rules and in exercise of powers delegated to the Respondent No.1 vide S.R.O. 1546(I)/2019 dated 06/12/19, a fine of Rs 175,000/- was imposed on the Appellant for not filing the SOC within the time prescribed under Rule 24(1) of the Rules. The Appellant, its Chief Executive and Directors were further directed by Respondent No.1 to file the overdue SOC for the year ended 30/06/18 within a month of the date of the Impugned Order. Furthermore, the Appellant, its Chief Executive and Directors were advised by Respondent No.1 to comply with the



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regulatory framework in letter and spirit as any future non-compliances of the Rules may result in imposition of higher penalties on the Appellant, its Chief Executive and Directors.

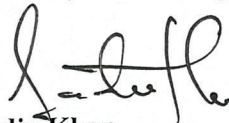
5. The Appellant preferred the instant appeal *inter alia* on the grounds that the inability to file the SOC was for reasons beyond the control of the Appellant as the Appellant could not fulfill the requirement of SOC with respect to appointment of independent directors under the Rules which is the domain of high-level decision makers such as the Prime Minister, Ministry of Energy (the MoE), Ministry of Finance (the MoF) and Economic Coordination Committee of the Federal Cabinet (the ECC). However, the Appellant admitted that it was still a default on their part and in hindsight should have filed the SOC for the year ended 30/06/18. The Appellant further argued that the Appellant acknowledged the importance of implementation of the Rules and undertook to file the SOC in June 2020. Moreover, the Appellant argued that they have already submitted the SOC for the year ended 30/06/19 and for the year ended 30/06/20. Furthermore, the Appellant argued that the superior courts of Pakistan and the Appellate Bench have repeatedly held that penal provisions under the Companies Act can only be invoked where a party knowingly or willfully refuses to comply with the law and not merely on technical contraventions. Furthermore, the Appellant relied on the judgments of the *National Transmission and Despatch Company Limited versus Corporatization and Compliance Department, Securities and Exchange Commission of Pakistan* cited at 2018 CLD 197, *Pakistan Tourism Development Corporation Limited versus Commissioner, Company Law Division, Corporatisation and Companies Department, SECP* cited at 2019 CLD 1372 and *Lahore Parking Company Limited versus Corporatisation and Compliance Department* cited at 2019 CLD 1281, wherein, a lenient view was taken and the penalty imposed was converted into a warning for non-compliance of Rule 24(1) of the Rules. The Appellant further reiterated that they are willing to comply with the provisions of the Rules as well as all applicable Regulations and Guidelines in future.
6. The Respondents have rebutted the arguments of the Appellant *inter alia* on the grounds that violation of Rule 24(1) of the Rules was well established in the instant case and penalty of only Rs. 175,000 was imposed as against the maximum limit of penalty of Rs 500,000 provided under the Rules. The Respondents further argued that the Appellant did not provide any cogent reason for not filing the

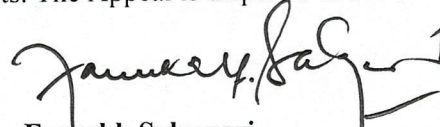


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SOC along with the annual report for the year ended 30/06/18. Furthermore, the Respondents argued that non-appointment of independent directors is not a hurdle in filing of SOC which is a mandatory requirement under the Rules. Furthermore, the Respondents argued that the Appellant had requested for relaxation from the requirements of the Rules until 20/06/20, however, the power to allow for such relaxation lies with the Federal Government in terms of S.R.O. 715 (I)/2019 dated 01/07/19.

7. We have heard the parties i.e. the Appellant and the Respondents. We have perused the record and observed that the Appellant has filed SOCs for the years ended 30/06/19 and 30/06/20. We are of the view that there was no justification for their failure to file SOC for the year ended 30/06/18. The Appellant has already admitted its default and has given no cogent reasons for non-compliance. We are of the view that timely filing of SOC does not depend on appointment of independent directors and is not a plausible reason for non-compliance. In subsequent years, independent directors have not been appointed and yet SOC has been filed by the Appellant for years ended 30/06/19 and 30/06/20. Furthermore, the Appellant's Counsel has argued that a lenient view be taken citing several judgments. We have perused the judgments and are of the view that the facts of the cited judgments are very different in comparison to the instant matter. In the instant case, the Appellant has not only admitted the default but has also not complied with the requirement of filing the SOC even after a lapse of almost 3 years. Furthermore, the argument of the Appellant that the default was not "willful" holds little merit as the Appellants did not exercise the due skill and care required of them as a public sector company. The word "willful default" has been defined in Oxford Dictionary of Law Fifth Edition as "The failure of the person to do what he should do, either intentionally or through recklessness." The default, therefore, would be considered as willful.
8. In view of the foregoing, we see no reason to interfere with the Impugned Order. The Impugned Order is, therefore, upheld with no order as to costs. The Appeal is disposed of accordingly.


Sadia Khan
Commissioner (SCD-S&ED)


Farrukh Sabzwari
Commissioner (SCD-PRDD)

Announced on **10 JUN 2021**