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IN THE HIGH COURT OF SINDH AT KARACHI

(Original Civil Jurisdiction)

Suit No. 78 of 2017

Presented on 24/03/17

ADDL. REGISTRAR (OS)
[Signature]

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K-ELECTRIC LIMITED

A public limited company existing under the laws of Pakistan having its registered office at KE House, 39-B, Sunset Boulevard, Phase-I, Defence Housing Authority, Karachi.

..... PLAINTIFF

VERSUS

1. **FEDERATION OF PAKISTAN**
Through Secretary
Ministry of Water & Power
Pakistan Secretariat, Islamabad;

2. **NATIONAL ELECTRIC POWER REGULATORY AUTHORITY**
through its Registrar
having its office at
2nd Floor, OPF Building, G-5/2,
Islamabad

..... Defendants

SUIT FOR PERMANENT INJUNCTION

The Plaintiff above-named respectfully submits as follows;

1. The Plaintiff is a privately managed vertically integrated utility company incorporated and existing under the laws of the Islamic Republic of Pakistan established for the purposes of, *inter alia*, generating, transmitting and distributing electric energy to industrial,

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commercial, agricultural and residential consumers in the city of Karachi and its suburbs up to Dhabeji and Gharo in Sindh and Hub, Uthal, Vindhar and Bela in Baluchistan. The Plaintiff has been granted an exclusive Distribution License by the National Electric Power Regulatory Authority under the provisions of the Regulation of Generation, Transmission and Distribution Act, 1997 which is valid for a period of 20 years expiring in 2023. In addition, the Plaintiff has separate generation and transmission licenses issued by Defendant No. 1. Instant action has competently been filed and instituted by the Plaintiff through its duly authorized representative Mr. Asif Shajer.

**TRUE COPY OF THE AUTHORITY IS ANNEXED
HEREWITH AND MARKED AS ANNEXURE "A"**

2. That the Defendant No. 1 is saddled with the responsibility of carrying out and undertaking all executive functions of the Federal Government. The Defendant No. 1 is represented in the instant proceedings through the Ministry of Water & Power which makes overall policies in respect of the power sector with which the Plaintiff is associated, and further receives and evaluates determinations/decisions made by the Defendant No. 2 for notification in due course through the official gazette of the Government of Pakistan, in terms of the prevailing practice & procedure. It is further relevant to point out that the Defendant No. 1 is also a signatory on behalf of the Federation of Pakistan to the Amendment Agreement dated April 13, 2009 executed between the

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Federation of Pakistan and the Plaintiff No. 1 under which it was mutually agreed that subject to certain amendments, the 2002 multiyear tariff determined by the Defendant No. 1 would be amended and made applicable for a further period of 7 years commencing from July 1, 2009 till June 30, 2016.

3. The Defendant No. 2/NEPRA is the authority formed under Section 3 of the Regulation of Generation, Transmission & Distribution of Electric Power Act 1997 ('NEPRA Act'). The Defendant No. 2 is performing its functions under the above mentioned Act by regulating the electric power generation, transmission and distribution activities of various Public and Private Sector entities in Pakistan.
4. Before dilating on the controversy involved in this matter it is deemed necessary to give background of the mechanics of determination of tariff of the Plaintiff. It is submitted that the determined tariff of electricity is set by the Defendant No. 2 on a quarterly basis in consonance with the multiyear tariff already determined by Defendant No. 2 for 07 years.
5. The said tariff is based upon the cost of electricity which is inter alia based upon the amount of natural gas, furnace oil and cost of power purchases that has been used to generate/distribute electricity. A new rate of tariff is determined by NEPRA every quarter due to the dynamic rates of oil, gas and power purchases and also allows yearly CPI on O&M component in tariff in the last

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quarter. This "determined tariff" is notified by the Defendant No 2/NEPRA through a Schedule of Tariff ('SOT'). The determined tariff represents the tariff for cost of generating and distributing electricity by the Plaintiff.

6. The guidelines for fixation of tariff are provided under the law obliging the Defendant No.2 to protect the interests of the companies and consumers alike. In terms of Section 7(6) of the NEPRA Act 1997, the Defendant No.2 in performance of its functions shall, as far as practicable, protect the interests of the consumers and companies providing electric power services (including the Plaintiff), in accordance with the guidelines, not inconsistent with the provisions of the NEPRA Act, laid down by the Federation Government.

7. Provisions of Section 31(1) of the NEPRA Act, 1997 further obliges the Defendant No. 2 to prescribe "procedures and standards for determination, modification or revision of rates charges, and terms and conditions for ... distribution services and power sales to consumers by licensees". Section 31(2) of the Act *ibid* provides that the Defendant No. 2 shall, while determining the standards referred to in Section 31(1) of the Act, *inter alia*, "keep in view the research, development and capital investment programme costs of licensees", "encourage efficiency in licensees operations and quality of service" and "encourage economic efficiency in the electric power industry".

**TRUE COPIES OF THE DETERMINATION 2002
AND AMENDMENT 2009 ARE ANNEXED
HEREWITH AND MARKED AS ANNEXURES "B" &
"B/1" RESPECTIVELY**

8. That pursuant to Sections 7 and 11 of the Act, 1997 NEPRA Tariff (Standards and Procedure) Rules, 1998 ("the Tariff Rules") has been notified.

**TRUE COPIES OF THE TARIFF RULES 1998 ARE
ANNEXED AND MARKED AS ANNEXURE "C"**

9. In The instant case, and as stated above the last multiyear tariff determined by the Defendant No.2 for the Plaintiff has lived its life of 07 years and ended on June 30, 2016. The Plaintiff had accordingly applied for the multiyear tariff determination for the years 2016-2026 vide its Petition dated March 31, 2016 before the Defendant No. 2 ('MYT Petition') in anticipation of 10 years of fixation rather than 07 years for the reasons mentioned therein. The contents of the MYT Petition may kindly be read as an integral part of this Plaint.
10. Amidst the above process, it was noticed that certain elements driven by nefarious agenda started a malicious campaign of maligning the Plaintiff on absolutely frivolous notions far from reality or truth. Part of that campaign was deliberately projected towards the process of determination pending before the Defendant No.2 and thru consistent media trials on the subject the proceedings before the Defendant No.2 were questioned and openly discussed in a maligning manner against the Plaintiff apparently to pressurize

the Defendant No.2 on its decision of determination of tariff. Clearly, and as it later unfolded, the Defendant No.2 under the apparent influence of the media trials of the Plaintiff, acted with malice and irrational manner in complete departure of the Rules of practice and procedure and to the utter shock and surprise of the Plaintiff, issued the Determination of multiyear tariff on March 20, 2017 ('the Determination') to the detriment and prejudice of the Plaintiff.

TRUE COPY OF DETERMINATION DATED MARCH 20, 2017 IS ANNEXED HEREWITH AND MARKED AS ANNEXURE "D".

11. The Tariff Determination did not, inter alia, allow the Plaintiff to recover all costs prudently incurred to meet the demonstrated needs of its consumers and in particular, lowered the baseline of its tariff without lawful justification from that previously set so as to nullify the Plaintiff's efforts over the last 7 years to bring in good governance, prudent utility practice and cost efficiencies. The Plaintiff is seriously aggrieved by the Determination which has been made after a lapse of almost one year from the date of its filing and in particular after a lapse of almost 6 months from the date of its public hearing in Karachi.

12. Strictly without prejudice to right of Review provided under the law to the Plaintiff and for sake of fair assistance only, following are the fundamental reasons, amongst many others, that would suffice to

hold that the Determination is flimsy and unlawful in the circumstances;

13. The Determination is wrong in law on the touchstone of time frame provided under Rule 16(2) of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998;
14. Instead of allowing continuation of existing MYT as requested by the Plaintiff, the Defendant No.2 has rebased the tariff and as a result, performance incentives/ margins that are earned in the past have been eliminated. This has significantly affected the business viability and future investments in the Company.
15. There is significant gap in cost allowed in tariff vs actual cost of Plaintiff, as a result of which Plaintiff's continuation of operation has become unviable. This mainly relate to disallowance of provision of doubtful debt (Rs. 0.97 per unit) and using aggressive heat rates and auxiliary benchmarks (Rs. 0.28 per unit). The Determination is ex-facie discriminatory since the Defendant No.2 allows IPPs (Independent Power Producers) 15%-20% dollar based IRR which is guaranteed by the Government of Pakistan. It may be noted that such returns are being given where the power purchaser from these IPPs is the Government of Pakistan itself as other DISCOs in Pakistan do not run their own generation units but instead purchase power through CPPA/NTDC which itself is wholly owned and controlled by the Government of Pakistan;

16. In principle, distribution business should be more attractive than both generation and transmission projects for the private capital. Higher risk should give higher return. The Defendant No.1 has done the opposite while issuing the Determination and this has a prejudicial effect on a privately managed company like the Plaintiff where the generation, transmission and distribution business is intertwined and interdependent;
17. In addition to rebasing, NEPRA has completely changed the structure of tariff whereby performance incentive previously allowed to the Plaintiff has been entirely removed which Impairs Plaintiff's ability to continue its successful turnaround performance going forward;
18. Further, for the claw-back mechanism the definition of RAB (Regulatory Asset Base) is changed from Equity Side to Asset side. Also EBIT has been changed by adding back Provisions that are made in the accounts. As a result, even if the Plaintiff has an accounting loss or very minimal profit, the mechanism might require the Plaintiff to share amounts with the customer for the relevant period.
19. It is respectfully submitted that the cumulative effect of the fundamental changes highlighted above, apart and besides many others, to the multiyear tariff are beyond the scope and practice adopted by the Defendant No.2 in the previous multiyear tariff fixation and as such is seriously prejudicial to the business

prospects and operations of the Plaintiff company. It is neither viable for the Plaintiff company to continue its operations under the Determination nor it offers any rationale for new investment into the company. The Plaintiff, in short, has been left with no option but to quit and cease its operations under the new regime of tariff.

20. As stated earlier, on March 20, 2017 the Defendant No. 2, to the utter shock and dismay of the Plaintiff, issued its multiyear tariff determination for a period of 7 years commencing July 1, 2016 in which the Plaintiff's legitimate expectations and vested rights for the renewal of its multiyear tariff for a period of 10 years using the same baseline as the earlier tariff was unilaterally reversed so as to turn the Plaintiff from a progressive and viable corporate entity into a loss making enterprise such as the other DISCOs in Pakistan which are under Defendant No. 1's control and are not subject to the same cost efficiencies and T&D loss parameters prescribed for the Plaintiff by the Defendant No.2 as they are based on a cost plus model where their cost of obtaining power from WAPDA is a passed through item in their costs and they enjoy the confidence and support of the Government of Pakistan. In essence, it may be noted that such returns are being given where the power purchaser is the State itself backing its purchase obligations through a sovereign guarantee.

21. Moreover and strictly without prejudice, the Determination is completely arbitrary, illegal, without jurisdiction, and/or in violation of Section 24-A of the General Clauses Act, 1897. It is also contrary to Articles 4, 9, 10-A, 18 and 25 of the Constitution of Pakistan, 1973 and therefore the Determination callously impinge upon the guaranteed fundamental rights of the Plaintiff. In particular it deprives the Plaintiff and by extension shareholders from achieving the fruits of their toils in turning around the loss making enterprise known as KESC prior to its privatisation in November, 2005 into a profitable company which has begun to make yearly profits since only FY 2012 onwards but till date, the Plaintiff has not declared any dividends investing the profits back into the business for the much needed improvements in infrastructure and new generation, however since the tariff has been rebased and all gains and efficiencies have been effectively wiped out by the new MYT tariff regime, the Plaintiff finds itself at the verge of a total collapse.

22. Furthermore, it is respectfully submitted that in the determination of MYT made in 2002, it was envisaged that the right of private investors would be protected. In that it was provided that, "Any private company will invest in KESC and undertake its management only if it is assured of a subsequent period of profitability so that the loss made in the initial years is compensated and a reasonable return is obtained over the entire period." In the case of the Plaintiff, when KE was privatized in November, 2005, its T&D losses were around 40% and upto FY 2016, these have been brought down to around 23.9% nevertheless no dividends were

declared. This should be contrasted with IPPs where dividends have been declared in many instances from the first year of commercial operations. Plaintiff's accumulated pre-tax losses since privatization are 17 billion and even during the last control period the returns have not been reasonable (2.4%), while more than USD 1.2 billion has been invested through debt and equity in the Plaintiff beating the 2009 MYT target by around 22%.

23. As no reasonable returns have been earned to date by the shareholders and investors of Plaintiff, it would have been reasonable to expect that the Defendant No. 1 would permit a longer tariff period of 10 years as requested and avoid rebasing the tariff at the beginning of each control period so as to create a sustainable and viable economic outlook for the Plaintiff and its business prospects and operations. Instead, by rebasing the tariff every 7 years, the Defendant No. 1 and the Defendant No. 2 are disincentivising sustainable development of the infrastructure of the Plaintiff.

24. In other words, the Plaintiff's MYT is a performance based model which is based on reducing cost and encouraging efficiencies but has no guaranteed rate of return. The risk involved in the lack of guarantee of a rate of return was to be compensated through the tariff baseline remaining constant, rather than being rebased every 7 years in order to take into account the Defendant No. 1's concept of ground realities. Till date, the power sector in Pakistan lacks the

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necessary rewards and guarantees of investment which would encourage more local and foreign direct investment but instead is caught in an endless cycle of bureaucratic wrangling and misdirected regulatory and government policies.

25. It is respectfully submitted that the law provides a right of applying for leave to review of the Determination in terms of Rule 16 of the National Electric Power Regulatory Authority (Tariff Standards and Procedure) Rules, 1998 readwith the provisions of National Electric Power Regulatory Authority (Review Procedure) Regulations 2009 and the Plaintiff are in the process of availing the said remedy, however, it has transpired that the Defendants are going to notify the Determined tariff without waiting for the Plaintiff to avail its remedy against the Determination as provided under the law and in that case the statutory remedy of review against the Determination shall be rendered redundant and superfluous. In the attending circumstances the Plaintiff is constrained to approach this Hon'ble Court for appropriate directions towards preservation of the right of review of the Plaintiff as provided under the law and for a fair and reasonable treatment in accordance with law, hence this action.

**TRUE COPY OF THE NATIONAL ELECTRIC
POWER REGULATORY AUTHORITY (REVIEW
PROCEDURE) REGULATIONS 2009 IS ANNEXED
HEREWITH AND MARKED AS ANNEXURE "E".**

26. As a matter of necessary disclosure it may be stated in express terms that nothing herein may be construed or applied in manner prejudicial to the statutory right of review as available to the Plaintiff against the Determination, which right is reserved by the Plaintiff.
27. The cause of action accrued to the Plaintiff on March 31, 2016 when the Application for MYT was filed by the Plaintiff. It further arose on the various dates of hearings set by the Defendant No. 1 in the matter including September 27 and 28, 2016 and it arose on March 20, 2017 when the Determination was apparently issued by the Defendant No.2 and the same continues to accrue till date under the lingering threat of notifying the Determination potentially abridging the statutory right of review of the Plaintiff.
28. The cause of action has accrued within the territorial jurisdiction of this Hon'ble Court and this Hon'ble Court has jurisdiction to adjudicate on the same.
29. That for the purpose of court fee the suit is valued at Rs. 338 Billion for the relief sought and the maximum prescribed court fee of Rs. 15,000/- has been paid.

PRAYER

In view of the foregoing, the Plaintiff humbly pray that this Honourable Court may be pleased to:

- A. Direct the Defendants to act in a fair, reasonable and impartial manner and in accordance with law in respect to the Multiyear tariff and Plaintiff's statutory right of review against the Determination;
- B. Permanent injunction restraining the Defendants, their agents, subordinates, officers and/or any other person acting under them from acting and/or taking any steps towards the implementation of the Determination dated March 20, 2017 and/or issuing any notification of the Determination till the final disposal of the statutory review of the Plaintiff against the same;
- C. Grant any other consequential and/or better relief that this Honourable Court deems fit and proper in the arising circumstances;
- D. Costs.

ABIF SHAJER
Deputy General Manager
Regulatory Affairs
K-ELECTRIC LIMITED

[Handwritten Signature]

FOR AND ON BEHALF OF THE PLAINTIFF

[Handwritten Signature]
ADVOCATE FOR THE PLAINTIFF

KARACHI: .03.2017

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VERIFICATION

I, ASIE SHAJER s/o SHAJRE ALAM, Muslim, adult, resident of H# B-226 Block 3 North Karachi, duly authorised representative of Plaintiff do hereby declare on solemn affirmation and verify on oath at Karachi, this 2 day of March 2017 that whatever is stated in the foregoing paragraphs is true and correct to the best of my knowledge and belief.

[Signature]

ASIF SHAJER
Deputy General Manager
Regulatory Affairs
N-ELECTRIC LIMITED

DEPONENT

0346-8214352

[Signature]
24/3/17

ASSISTANT REGISTRAR-V
AFFIDAVIT & IDENTITY BRANCH
HIGH COURT OF SINDH

DOCUMENTS FILED:

DOCUMENTS RELIED UPON:

Annexures - "A" to "E"

Originals of the above and all other correspondences, notices, etc. relating to the State-matter of this suit.

ADDRESS OF THE PLAINTIFF:

As given in the title of the Plaintiff.

ADDRESS OF ADVOCATES FOR THE PLAINTIFF FOR SERVICE:

MOHSIN TAYEBALY & CO.
Corporate Legal Consultants | Barristers & Advocates High Courts & Supreme Court
2nd Floor, Dime Centre, BC-4 Block-9
Clifton, Karachi-75800 (SBC/Firm No. 1181)
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35872890-36888354 - FAX: 35870240

Drawn by me
Amel Khan Kasi
Amel Khan Kasi
Advocate

To be attached with Affidavit as last Page

IN THE HIGH COURT OF SINDH, KARACHI

773
Suit No: - of 2017

K-Electric Ltd

PLAINTIFF

VERSUS

Federation of Pakistan & another

DEFENDANT

AFFIDAVIT IN SUPPORT OF VERIFICATION OF PLAINT

Mr. Asif Shajer Son of Shajer Alam, resident of House No B-226 Block J North Nazimabad Karachi, affirmed on oath before me at Karachi on this 24-MAR-2017 in the 'Identity Section' of this court

Photograph of Deponent



Signature of Deponent

CNIC: 42101-6178973-5

Call No. 0346-8214352

Email: NIL

Original CNIC verified by Bar Code Reader

Photo taken at I.S.

Biometric Attendance done at I.S.

Video recording done at I.S.

CNIC verified through NADRA

Finger Prints verified through NADRA

**ASSISTANT REGISTRAR-V
AFFIDAVIT & IDENTITY BRANCH
HIGH COURT OF SINDH**

COMMISSIONER FOR TAKING AFFIDAVIT

Tag ID 240317283389

No. of Affidavit: 1/3

Cost received . Rs. 50

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