

January 28, 2020

The Registrar
National Electric Power Regulatory Authority
Atta Turk Avenue (East)
G- 5/1, NEPRA Tower
Islamabad

For information & rfa H.
— DRO I / DRg-I
Gp ch:
— SA (Tech) — SAT-II
— DG (MSE) — ADG (LH)
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e: chairman
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m(OA) - m(LH)

SUBJECT: REVIEW BY FAISALABAD ELECTRIC SUPPLY COMPANY AGAINST DETERMINATION DATED 31.12.2019 OF THE NATIONAL ELECTRIC AND POWER REGULATORY AUTHORITY (THE "AUTHORITY") IN THE MATTER OF APPROVAL OF LICENSEE PROPOSED MODIFICATION IN THE GENERATION LICENSE OF FATIMA ENERGY LIMITED ("FEL")

Dear Sir,

1. The titled review motion is being filed by FESCO under Section 7(2)(g) of the Regulation of Generation, Transmission and Distribution of Electric Power Act, 1997 (the "NEPRA Act"), against the determination dated 31.12.2019 (the "Determination"), whereby the Authority has been pleased to allow modification (the "Modification") in the Generation License No. SGC/96/2013 dated 31.12.2013 of FEL (the "Generation License").
2. The brief facts leading to filing of the instant review motion are that:
 - (a) the Generation License was granted to FEL on 31.12.2013. Along with the Generation License, an authorization to engage in second-tier supply business was also granted under inter alia Section 22 (as it then was) of the NEPRA Act, whereby FEL was authorized to sell electric power to certain bulk power consumers;
 - (b) thereafter, on 14.09.2015, the Authority approved a modification in the Generation License, whereby FEL was allowed to inter alia sell electric power to CPPA-G, XW-DISCOs, KEL, or to any other bulk power consumers (subject to details of bulk power consumers being intimated to the Authority and inclusion thereof in the Generation License);
 - (c) On 21.08.2019, FEL made an application seeking another modification in the Generation License, seeking inclusion of several other bulk power consumers located in the service territories of various XW-DISCOs (the "Application"). Despite there being cogent legal and factual grounds for rejection of the Application, the Authority has approved the Modification vide the Determination.
3. Being aggrieved of the same, the instant review motion is being filed, *inter alia*, on the following grounds:

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Dir (Res)

Same as in the
case of NTDX

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GROUNDS

- a) At the outset, it is submitted that the Determination suffers from errors, infirmities and is violative of the letter and spirit of the NEPRA Act. The same is therefore, bad in law and liable to be reviewed.
- b) In the year 2018, the legislature made several amendments to the NEPRA Act *vide* the Regulation of Generation, Transmission and Distribution of Electric Power (Amendment) Act, 2018 (“**Amendment Act**”). In light of the amendments made in the NEPRA Act, it is crystal clear that the Determination is violative of statutory prescriptions and liable to be reviewed.
- c) *Vide* the Amendment Act, Section 23E has been inserted in the NEPRA Act, sub section (1) of which provides as follows:-

“23E. Electric Power Supply license- (1) No person shall, unless licensed by the Authority under this Act, engage in the supply of electric power to a consumer”

[Emphasis Added]

Therefore, after the Amendment Act, supply of electric power to a consumer, which includes bulk power consumer by virtue of Section 2(ii) and (iv) of the NEPRA Act, is prohibited unless an *electric power supply license* is obtained from the Authority under Section 23E of the NEPRA Act. The proviso to Section 23E of the NEPRA Act affirms this by inserting a deeming provision providing that from the date of promulgation of the Amendment till a period of five years from such date, all distribution licensees shall be deemed to hold a license for supply of electric power under Section 23E. It is not disputed that FEL has not obtained any license under Section 23E of the NEPRA Act. In the absence thereof, the Modification made *vide* the Determination is against the specific intent of the law and, accordingly, liable to be reviewed.

- d) In this regard, reference is also made to Section 14D(3) of the NEPRA Act, which deals with the duties of the generating companies, and provides as follows:-

“A generating company may supply electricity to any transmission, distribution, supply or market trader licensee in accordance with this Act and the rules and regulations made thereunder and may, subject to Section 23E, supply electricity to any consumer...”

[Emphasis Added]

Section 23E of the NEPRA Act read with Section 14(D) leaves no iota of doubt that after the Amendment Act, the right of a generation licensee to engage in

supply of electricity to any consumer, including any bulk power consumer, has been made subject to a supply license to be obtained under Section 23E of the NEPRA Act. Any attempt by a generation licensee to engage in such supply would tantamount to contravention of the NEPRA Act, which is punishable under *inter alia* Section 27B thereof. Consequently, the Determination and the Modification are in contravention of the NEPRA Act and are liable to be reviewed/recalled.

e) Additionally, Section 14(B)(4) of the NEPRA Act deals with the obligations of FEL as a generation licensee, and provides as follows:-

“(4) In case of a generation facility connecting directly or indirectly to the transmission facilities of the national grid company, the licensee shall make the generation facility available to the national grid company for the safe, reliable, non-discriminatory economic dispatch and operation of the national transmission grid and connected facilities...”

[Emphasis Added]

The same provision is also reflected in, *inter alia*, Rule 10 of the Licensing (Generation) Rules, 2000, and therefore, forms a part of the Generation License. In the instant case, the arrangement of supply of electricity envisaged in the Generation License includes connectivity between the FEL's generating facilities and National Transmission and Despatch Company Limited (NTDCL). Evidently, FEL is obliged under the NEPRA Act to make available its generation facilities for economic dispatch to NTDCL. However, vide the Modification and the License, the Authority has, *prima facie*, enabled FEL to bypass these essential requirements of the NEPRA Act in derogation of *inter alia* Section 14(B)(4) of the NEPRA Act. Consequently, the Determination is liable to be recalled/reviewed.

f) That, absolutely without prejudice to the submissions above, under Section 22(2) of the NEPRA Act, certain formalities are required to be fulfilled before a bulk power consumer can stop purchasing electric power from a distribution company. In this regard, Section 22(2) provides as follows:-

“(2) Where a bulk power consumer intends to stop purchase of electric power from a distribution company, it shall convey its intention by notice in writing one year before such stoppage.”

The Modification and the Determination allows several consumers of various XW-DISCOs to stop purchasing power from the same without giving any formal and mandatory notice, as required under Section 22(2) of the NEPRA Act, which is violative of the NEPRA Act. Hence, the Modification and the Determination are liable to be recalled/reviewed.

g) That post the Amendment Act, it is not obligatory on the distribution companies to distribute electric power sold by generation companies to the bulk power consumers. The changes made *vide* the Amendment Act, including the omission of the term 'bulk power consumers' from Section 23 of the NEPRA Act by the legislature leave no doubt regarding the intention of the legislature. Consequently, the Modification and the Determination are contrary to the provisions of the NEPRA Act and liable to be declared as such and reviewed/recalled.

h) Without prejudice to the above, under the NEPRA Act, the Authority has been given the power to regulate the provisioning of the electric power services. The preamble to the NEPRA Act recognizes that the same is aimed at *inter alia* ensuring highest standards of transparent, certain and effective regulation of electric power markets in Pakistan. In the same vein, Section 7(6) of the NEPRA Act provides that in performance of its functions, the Authority shall protect the interests of the consumers and companies providing electric power services in accordance with the principles of transparency and impartiality. Hence, a duty has been imposed on the Authority to ensure that the interests of the consumers as well as the licensees are protected. It is humbly submitted that the Modification and the License even otherwise have been issued in disregard of the aforesaid principles, due to *inter alia* the following reasons:-

- (i) As the Authority is aware, several deficiencies which go to the root of the sustainability of the power sector are present, and have been identified in the existing wheeling regime. These include and relate to, without limitation, lack of specialized role of entities performing market operation, dispatch and settlement functions in the wheeling arrangement, recovery of network losses, use of system charges, cross-subsidy charge, stranded assets cost, discriminatory impacts due to difference of consumer charges, economic dispatch, issues pertaining to banked energy, renewable wheeling and hybrid nature of bulk power consumers. Under the auspices of the Authority, several deliberations and consultative sessions have been held to address these deficiencies/areas, and reform the existing wheeling regime. Pending such reform process and during the existence of such deficiencies, the approval of the Modification by the Authority is contrary to Section 7(6) of the NEPRA Act.
- (ii) The existing legal, regulatory and technical framework is not enabled to deal with the type and form of wheeling arrangement envisaged in the Modification. Furthermore, the current Grid Code and Distribution Code also do not enable such an arrangement. Thus, the Determination will, *inter alia*, lead to several difficulties, including those of technical nature, and shall also affect the performance standards of distribution and transmission sector.
- (iii) It is evident from the foregoing that the Modification and the Determination will lower the revenue generating streams for the distribution companies and

may lead to financial repercussions for the same. As such, it is neither in the interests of the distribution companies, nor their respective consumers.

- (iv) The current tariff structure prescribes for cross subsidization for the small consumers and is applicable on all consumers irrespective of the source of purchase of electricity. The Modification is prejudicial to such an arrangement reflected in the current regime. Therefore, it is submitted that the Determination may kindly be reviewed.
- i) Under the respective Distribution Licenses of the XW-DISCOs, the same has the exclusive right to engage in provision of distribution services or sale of electric power in the Service Territory. However, by virtue of the Modification and the Determination, the said assurance has been dispensed contrary to its legitimate expectations and settled principles of law.
- j) The National Electric Power Regulatory Authority Licensing (Application and Modification Procedure) Regulations, 1999 (the "Regulations") have been framed to structure the discretion of the Authority vis-à-vis the grant and modification of the licenses. Regulation 10(5) of the Regulations provide that the Authority may modify a license, if in its opinion, such modification *inter alia*:
 - a. does not cause the Authority to act or acquiesce in any act or omission of the licensee in a manner contrary to the provisions of the NEPRA Act or the sub-ordinate legislation made thereunder;
 - b. is or is likely to be beneficial to the consumers; and
 - c. is reasonably necessary for the licensee to effectively and efficiently perform its obligations under the license;

It is submitted that the Determination and the License have been issued against the principles enshrined under Regulation 10(5) of the Regulations and are liable to be recalled/reviewed on the basis of *inter alia* the following:-

- a. From the submissions made in foregoing paragraphs, it is evident that the Determination and the Modification are contrary to the provisions of the NEPRA Act. Consequently, the Authority has acted and acquiesced in FEL's contraventions of various provisions of the NEPRA Act. The Determination and the Modification are liable to be recalled/reviewed on this ground alone.
- b. One of the foundational and integral duties of the Authority while performing its functions under the NEPRA Act is to protect the interests of consumers, as also envisaged in Section 7(6) thereof. It is evident from the foregoing that the effectuation of the arrangement envisaged by FEL

in its Application and sanctioned by the Authority *vide* the Modification and the Determination will be prejudicial to the power sector on multiple grounds, including technical, practical and financial, besides leading to increase in the cost of electric power for the general consumers. Such issues were necessary to be addressed in the Determination, as required by Regulation 10(5) of the Regulations. By omitting to do so, the Authority has overlooked the interests of such consumers and has not undertaken a balancing act. Consequently, the Determination and the Modification are liable to be recalled/reviewed on this ground alone.

- c. The Authority under the Regulations is to allow a modification only where it is reasonably necessary for licensee to perform existing obligations under the license. The condition clearly stipulates that any modification would be allowed only if it relates to performance of obligations, which already exist under the license. However, contrary to the same, Authority has allowed FEL to simultaneously add new obligations *vide* the Modification. It is a settled principle of law that if something is required to be done in a manner it should be done in that manner alone, or not at all. In light of the foregoing, it is evident that the Modification and the Determination have been issued against the Regulations.
- k) The Applicant/Petitioner reserves its right to urge, agitate or raise any additional ground at any time either prior to the hearing and/or at the time of the hearing.

In light of the above, it is requested that Modification and the Determination may kindly be reviewed/recalled in light of submissions made above. It is requested that a hearing be provided for the purposes of providing detailed submissions, including a session with the technical professional team of the Authority prior to hearing.

Yours Sincerely,



Chief Executive Officer
FESCO Faisalabad