



**Registrar**

# **National Electric Power Regulatory Authority**

## **Islamic Republic of Pakistan**

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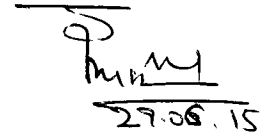
No. NEPRA/TRF-268/HEPL-2013/9778-9780  
June 29, 2015

Subject: **Decision of the Authority in the Matter of Motion for Leave for Review filed by Hawa Energy (Private) Ltd. (Case No. NEPRA/TRF-268/HEPL-2013)**

Dear Sir,

Please find enclosed herewith the subject Decision of the Authority (08 pages) in the matter of Motion for Leave for Review filed by Hawa Energy (Private) Ltd. against Authority's Decision dated 20.06.2014 in Case No. NEPRA/TRF-268/HEPL-2013 for information.

Enclosure: As above



29.06.15

( Syed Safeer Hussain )

Secretary  
Ministry of Water & Power  
'A' Block, Pak Secretariat  
Islamabad

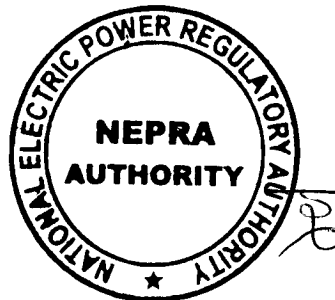
CC:

1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad.
2. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad.



**DECISION OF THE AUTHORITY IN THE MATTER OF MOTION FOR LEAVE FOR REVIEW**  
**FILED BY HAWA ENERGY (PRIVATE) LIMITED**

1. Hawa Energy (Private) Limited (hereinafter referred to as "HEPL") vide its letter no. Nil dated April 03, 2015, received in this office on April 06, 2015, filed a motion for leave for review (hereinafter referred to as "review motion"), seeking review of decision of the National Electric Power Regulatory Authority (hereinafter referred to as the "Authority") dated June 20, 2014 (hereinafter referred to as the "impugned decision") granting upfront tariff to HEPL along with all assumptions, terms and conditions as contained in the determination of upfront tariff for wind power generation dated April 24, 2013 (hereinafter referred to as "upfront tariff, 2013").
2. The review motion was filed in terms of rule 16 (6) of the National Electric Power Regulatory Authority Tariff (Standards and Procedure) Rules, 1998 (hereinafter referred to as "tariff rules"), regulation 3 of National Electric Power Regulatory Authority (Review Procedure) Regulations, 2009 (hereinafter referred to as "review regulations") and other applicable provisions of law.
3. Rule 16 (6) of the tariff rules requires that within ten days of service of a final decision of the Authority, a party may file a review motion. As per Regulation 3 (2) of the review regulations, a review motion is competent only upon discovery of new and important matter of evidence or on account of some mistake or error apparent on the face of record or from any other sufficient reasons. Further rule 16 (9) of tariff rules provides that the Authority may refuse leave for review if it considers that the review would not result in the withdrawal or modification of final order, determination or decision.
4. The review motion of HEPL was examined and it was found to be barred by time as it was filed after a delay of more than nine months of the issuance of impugned decision, however, HEPL had requested the Authority to condone the delay in filing of the review motion. The Authority while considering the request of HEPL and to determine the merits of the case, decided to condone the delay in filing of the review motion in exercise of its powers under regulation 3(3) of review regulations and accordingly admitted the review motion.





5. To consider the contentions of HEPL and to provide it an opportunity to explain its point of view, a hearing in the matter was held on May 05, 2015 for which letters/notices were sent to HEPL, parties to the tariff determination proceedings of upfront tariff, 2013 and to the concerned government agencies on April 28, 2015. The hearing was attended by HEPL, Alternative Energy Development Board (hereinafter referred to as "AEDB") and various other stakeholders.
6. Brief facts of the case are that HEPL was allowed upfront tariff, 2013 for its proposed wind power generation project of 50 MW installed capacity to be located at Jhimpir vide the impugned decision. Paragraph 4 (iv) of the impugned decision reads as follows:

*"The applicant will have to achieve financial close by March 31, 2015. The upfront tariff granted to the applicant will no longer remain applicable/valid, if financial close is not achieved by the applicant by March 31, 2015 or generation license is declined to the applicant."*

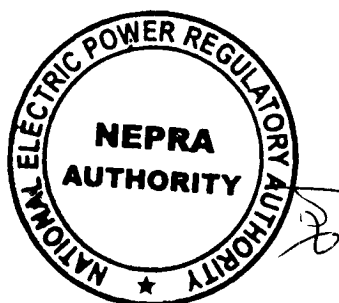
HEPL was unable to achieve financial close by March 31, 2015.

7. In its review motion, HEPL has prayed for reasonable extension in achieving the financial close, for a period of not less than three months commencing from the date of decision on this review motion and resolution of issues highlighted in the review motion.
8. The subject review motion was filed by HEPL on, inter alia, following grounds;
- i. HEPL submitted application for the unconditional acceptance of upfront tariff, 2013 on May 24, 2013. The Authority initiated processing of eleven projects, including the one of HEPL, under the upfront tariff, 2013 with a cumulative capacity of 579 MW. Subsequently, the Authority decided to return the application of one project (50MW out of 579 MW) declaring it to be deficient and kept under process the total installed capacity of approximately 527 MW against the maximum capacity cap of 500 MW (prescribed in the upfront tariff, 2013).





- ii. Through its letter in April, 2014, the Authority, after processing HEPL's application for eleven months, declined the same, inter alia, on the grounds that the upfront tariff was only valid for the first 500 MW capacity. The Authority stated in the aforesaid letter that it has already accepted applications for 476.60 MW capacity and owing to non-availability of capacity in the up-front tariff, 2013 application of HEPL for the entire project size of 50 MW capacity cannot be accepted by the Authority. The aforesaid letter further stated to convey unconditional acceptance of the upfront tariff, 2013 for a project size not exceeding 23.40 MW.
- iii. On May 02, 2014, the Authority while exercising its review jurisdiction, reviewed upfront tariff, 2013 and in light of that, HEPL's application was considered by the Authority and approved on June 20, 2014. The Authority in its decision in the matter of review of determination of upfront tariff for wind power generation (hereinafter referred to as "upfront review decision") dated May 02, 2014, has failed to distinguish between the companies who already got their tariffs approved by the Authority (in November 2013, December 2013 and April 2014), from the companies whose applications for upfront tariff were formerly refused or declined by the Authority for different reasons.
- iv. Post issuance of impugned decision, the letter of support (hereinafter referred to as "LOS") was issued by AEDB on November 19, 2014 leaving slightly more than four months for HEPL to achieve the financial close. HEPL timely approached AEDB, however AEDB consumed unreasonably long time in processing the bank guarantee and issuance of LOS.
- v. While other projects got head start to achieve the financial closing by 31 March 2015 (as they got their tariff rulings in the months of November 2013, December 2013 and April 2014), HEPL's project got delayed by several months, for faults not attributable to HEPL, and was placed behind the other projects. Record would establish that HEPL filed its application for the acceptance of upfront tariff on May 24, 2013 (under the upfront tariff, 2013), ahead of the tariff applications of all projects other than United Energy and Hydrochina Dawood.
- vi. Given that the project is being developed through US funding agency Overseas Private Investment Corporation (hereinafter referred to as "OPIC"), meeting the requirements of foreign lenders in

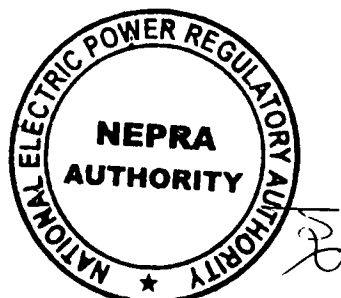


such short time frame was challenging from the very inception. Unlike other lenders (local and Chinese lenders in particular) who might be more flexible in granting waivers and deferrals to the borrowers in meeting the conditions, precedents and obtaining consents prior to the financial closing, OPIC requirements for the financial closing are much rigid.

- vii. Issues relating to site lease, which in case of HEPL is being directly leased by the Government of Sindh, caused unreasonable delay in the development of the project. The issues relating to security interests and assignment of rights of HEPL in favor of the lenders over the project land and allowing step in rights could not be satisfied in accordance with OPIC's requirement within the available time frame.

9. **Submissions of different stakeholders:** Summary of the pre, post and during the hearing submissions of different stakeholders, regarding the review motion filed by HEPL are as follows:

- i. Mr. Michael Ratliff, Managing Director, Renewable Energy Finance, OPIC wrote an email to Chairman of the Authority to express support for review motion. He submitted that due to delayed issuance of impugned decision, LOS and time consumed to sort our land lease issues with the Government of Sindh, HEPL did not have as much time to reach the required financial close as was available with other wind power projects.
- ii. AEDB during the hearing as well as in writing, along with the list of the events and supporting documents, apprised the Authority that the claim made by HEPL in its review motion regarding delay on the part of AEDB in the issuance of LOS is not correct and contrary to the facts. Subsequent to the hearing, AEDB vide letter no. B/3/1/HAWA/11 dated May 19, 2015 submitted that the Authority may favorably consider the request of HEPL for the grant of extension in the deadline of financial closing as per rules/policy.
- iii. Energy Department, Government of Sindh on March 20, 2015 requested the Authority for extension in date of financial closing for HEPL by three months as it has completed all the project milestones stipulated within LOI and LOS except the finalization of IA, which was about to be finalized by the time



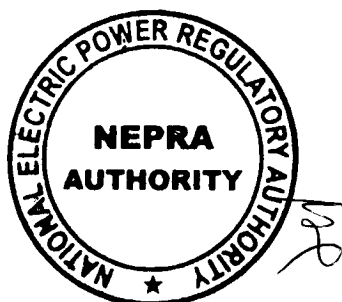
the tariff expired on March 31, 2015. Energy Department, Government of Sindh assured that the project sponsors will be facilitated in resolving the concerns of OPIC relating to land risk issues, within the time period /extension, allowed by the Authority for achieving the financial close.

10. Arguments heard and record perused.

- i. Upfront tariff, 2013 stipulated that it would be only be valid for approvals given for the first 500 MW of companies. Most of the applications initially submitted by wind power projects were in incomplete form i.e. they were not in accordance with the requirements set out in the National Electric Power Regulatory Authority Upfront Tariff (Standards and Procedure) Regulations, 2011 (hereinafter referred to as "upfront tariff regulations") and upfront tariff, 2013. The impugned decision at paragraph 1 specifies that on scrutiny, the application of HEPL was found incomplete and the Registrar asked HEPL to furnish the necessary information documents. HEPL thereafter furnished the deficient information/documents/explanations. This part of the impugned decision has not been challenged by HEPL.
- ii. The Authority in order to avoid any issues regarding evacuation of power, required in the upfront tariff, 2013, a certification from the power purchaser regarding availability of necessary arrangements and decided to settle the issue of evacuation of power before the grant of upfront tariff. On the basis of confirmation provided by the power purchaser regarding availability of evacuation arrangements, applications of four wind power companies considered in stage 2 and 3 by the power purchaser were accepted by the Authority in 2013. Further, decisions on applications opting for upfront tariff for five other projects having combined installed capacity of approximately 250 MW were issued on April 23, 2014, after confirmation regarding evacuation of power arrangements from the power purchaser. HEPL was informed vide letter no. NEPRA/R/TRF-100-WPT/4106 dated April 23, 2014 i.e. on the same date as the issuance of decisions of aforementioned 250 MW capacity, that:

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2. The Authority has considered your aforementioned application and has noted that according to the terms and conditions of upfront tariff, the upfront tariff was only valid for approvals given for the first 500 MW of companies. Further, first applications for 476.60 MW of



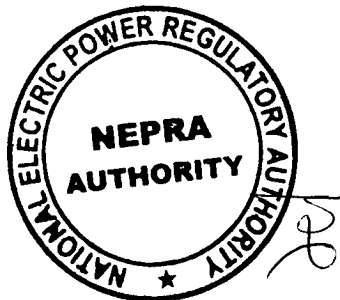
other wind power generation companies have already been accepted by the Authority, leaving thereby a balance of only 23.40 MW available in the upfront tariff.

3. Since the upfront tariff was only valid for first 500 MW capacity therefore the Authority strictly followed the merit while considering all applications and accepted applications who first fulfilled the requirements of National Electric Power Regulatory Authority (Approval and Procedure) Regulations, 2011 and upfront tariff. Accordingly the Authority has already accepted applications for 476.60 MW as detailed above and your application stands next in the list however, owing to non-availability of capacity in the upfront tariff, your application for the entire project size of 50 MW capacity cannot be accepted by the Authority.

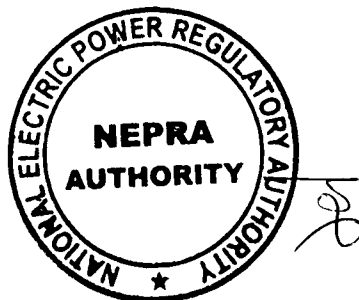
4. The Authority has decided to consider your application, provided you convey your unconditional acceptance of the upfront tariff for a project size not exceeding 23.40 MW i.e. capacity available in the upfront tariff, within ten working days of receipt of this letter.

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- iii. The upfront tariff, 2013 always envisaged a fixed time line for achievement of financial close, meaning thereby that it was up to the applicants to submit their applications, duly completed in all respects, at the earliest. The concept of fixed timeline for financial close was known to all the stakeholders right from the inception i.e. from the date of issuance of upfront tariff, 2013 therefore HEPL has not been discriminated against on this account in any manner. The decisions on applications opting for upfront tariff of other wind power projects issued by the Authority, prior to the issuance of impugned decision, are not comparable with HEPL, as they submitted and completed their applications earlier than HEPL. Further, HEPL was aware that earlier financial close deadline was September 30, 2014 and considering the reasonable time for achievement of financial close, the deadline was extended from September 30, 2014 to March 31, 2015 through upfront review decision of the Authority.
- iv. HEPL was a beneficiary of upfront review decision, as it was allowed upfront tariff, for the entire installed capacity applied for, in light thereof, otherwise, its application for the entire installed capacity was not entitled for acceptance due to cap of 500 MW in upfront tariff, 2013.



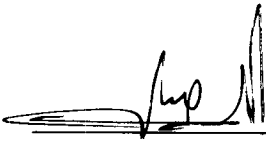
- v. AEDB during the hearing as well in writing has submitted that submissions of HEPL regarding delay on the part of AEDB in the issuance of LOS are not correct and contrary to the facts. AEDB brought to the knowledge of the Authority that HEPL vide letter dated July 16, 2014 requested AEDB for the issuance of LOS i.e. after lapse of about one month from the issuance of impugned decision. Further, AEDB provided the detailed facts which established that HEPL failed to promptly meet AEDB requirements for issuance of LOS and thereafter requested to change its main sponsor on more than one occasion. AEDB also submitted that HEPL was repeatedly informed by it that any claim for extension in the deadline of achieving financial close will not be entertained.
- vi. HEPL had more than nine months rather than four months to achieve financial close, from the date of impugned decision. In a comparable case of Sapphire Wind Power Company Limited, one of the wind power producer allowed upfront tariff, 2013 on November 21, 2013, it was able to achieve financial close on July 07, 2014 i.e. within a span of less than eight months.
- vii. Few projects were successful in achieving financial close, even with the direct lease from the Government of Sindh. HEPL's failure to achieve, what others were able to achieve, due to its unique circumstances cannot be considered as a valid basis for extending financial close deadline by the Authority. Paragraph 44 of the upfront tariff, 2013 on this issue is pertinent to consider which provides that "The upfront tariff is a take it or leave it package deal. Any request for modification in upfront tariff or any of its terms/conditions, to meet the specific or unique requirements of any of the wind power generation companies, shall not be considered by the Authority whatsoever. -----"
- viii. HEPL has already given unconditional acceptance of upfront tariff, 2013 with assumptions and conditions as approved by the Authority, therefore seeking modification of a term already unconditionally accepted by it, cannot be considered by the Authority.
- ix. The Authority has already determined a new upfront tariff for wind power generation which can be opted by HEPL. Since HEPL has already fulfilled the requirements of NEPRA Upfront Tariff (Approval & Procedure) Regulations, 2011 for grant of upfront tariff, therefore, it is eligible and can apply for grant of new upfront tariff for wind power generation in the prescribed manner.

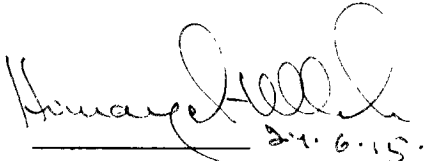





11. In view of the all the above stated facts, the Authority is of view that the review motion is not maintainable, therefore, the same is hereby dismissed. HEPL, however, can opt for the latest upfront tariff determined by the Authority in the prescribed manner .

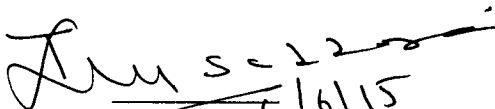
**AUTHORITY**

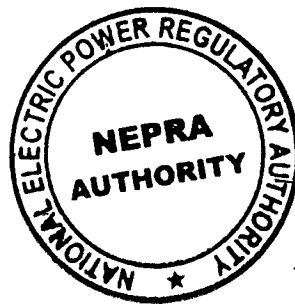
  
(Khawaja Muhammad Naeem) 24/6/15  
Member

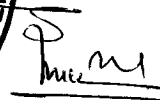
  
(Himayat Ullah Khan) 24.6.15  
Member

  
(Syed Masood ul Hassan Naqvi) 25/6  
Member

  
(Maj. (R) Haroon Rashid) 25/6/15  
Member

  
(Brig. (R) Tariq Saddozai) 26/6/15  
Chairman



  
27.06.15