



# National Electric Power Regulatory Authority

Islamic Republic of Pakistan

2nd Floor, OPF Building, G-5/2, Islamabad

Ph: 9206500, 9207200, Fax : 9210215

E-mail: registrar@nepra.org.pk

Registrar

No.NEPRA/R/TRF-68/APL-2007/42-44

January 3, 2011

**Subject: Decision of the Authority in the matter of Motion for Leave for Review filed by Atlas Power Ltd. (APL) Pursuant to Rule 16(6) of NEPRA (Tariff Standards and Procedure) Rules, 1998 against Tariff Determination of APL by the Authority at the time of Commercial Operation Date (COD)**

Dear Sir,

Enclosed please find herewith the Decision of the Authority (06 pages) in the matter of Motion for Leave for Review filed by Atlas Power Ltd. pursuant to Rule 16(6) NEPRA (Tariff Standards and Procedure) Rules, 1998 against the Decision/Determination of the Authority dated 19<sup>th</sup> May, 2010 in respect of Atlas Power Ltd. in Case No. NEPRA/TRF-68/APL-2007, for information please.

Encl: As above

( 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, Islamabad.



DECISION OF THE AUTHORITY IN THE MATTER OF MOTION FOR LEAVE FOR  
REVIEW FILED BY ATLAS POWER LIMITED (APL) PURSUANT TO RULE 16(6) OF  
TARIFF STANDARD AND PROCEDURE RULES – 1998 AGAINST TARIFF  
DETERMINATION OF APL BY THE AUTHORITY AT THE TIME OF COMMERCIAL  
OPERATION DATE (COD)

**Background**

1.1 Atlas Power Limited (hereinafter referred to as the "APL") filed motion for leave for review (hereinafter referred to as the Review Petition) on 31<sup>st</sup> May 2010 in pursuance of Rule 16(6) of Tariff Standards and Procedure Rules, 1998 (hereinafter referred to as the Tariff Rules) against the determination of the Authority dated 19<sup>th</sup> May 2010 regarding APL. The Review Petition was based on the following grounds:

- Construction Period;
- Delay in COD due to Force Majeure; and
- Certain Exchange Rate Adjustment.

**2. Proceedings**

2.1 The Review Petition was admitted by the Authority on 3<sup>rd</sup> June 2010. The hearing in the matter was held on 8<sup>th</sup> July 2010 at NEPRA main office. Accordingly individual letters were sent to the key stakeholders. Representatives from Ministry of Water & Power, Atlas Power Limited, Power Purchaser and other stakeholders participated in the hearing.

**3. Issues**

3.1 APL during and after the hearing through its revised submissions dated 22<sup>nd</sup> July 2010 requested the Authority to allow it to withdraw the submission in Para 1 of the motion for leave for review dated 28<sup>th</sup> May 2010 regarding construction period. The Authority, pursuant to the request of APL allowed it to withdraw the submission as requested.

3.2 Based on the Petitioner's initial and supplemental submission, comment of the Power Purchaser & PPIB, the following issues emerged:

- i) Delay in COD due to Force Majeure; and
- ii) Certain Exchange Rate Adjustment.



4. Delay in COD due to Force Majeure:

4.1 According to the Power Purchase Agreement (PPA), the required COD of APL was 31<sup>st</sup> March 2009, however, APL achieved actual COD on 17<sup>th</sup> December 2009. The Authority in its decision dated 19<sup>th</sup> May 2010 allowed the construction period of APL till RCOD as mentioned in the PPA.

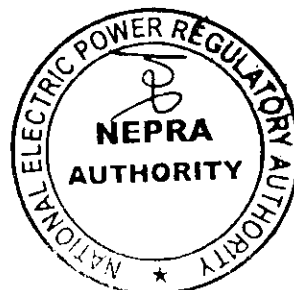
4.2 The Petitioner in its Motion for Review submitted that the delay in COD was due to Force Majeure. According to the Petitioner due to the occurrence of a continuing Force Majeure situation in the most critical commissioning phase of the Project its COD was delayed until 17<sup>th</sup> December 2009. APL requested the Authority to allow the adjustment of costs associated with delay in COD in the sum of Rs. 3,051 million (equivalent to US\$38.146 million) on account of IDC and Rs.985.198 million (equivalent to US\$13.263 million) on account of return on equity during construction ("ROEDC"). According to the Petitioner:

- From November 2008 until December 2009, APL faced a combination of events and circumstances (including respective effects thereof) arising out of Pakistan's precarious security situation, which imposed severe constraints on APL's ability to commission the Project and achieve COD in a proper and timely fashion by the Required Commercial Operation Date (RCOD).
- The precariousness of the security situation in Pakistan, starting from the possibility of a cross border conflict in November 2008, and followed by a campaign of terrorism in Pakistan (via a series of events continuing until December 2009 and also to date), is known and well understood to everyone in Pakistan and the world over without any doubt. Internationally, it is believed that Pakistan is now a more dangerous country than Afghanistan and Iraq.

4.3 APL submitted that it is necessary to set out the following ever expanding list of events and circumstances as a matter of record that remained beyond its control, and which materially and adversely affected the proper and timely commissioning of the Project and the achievement of the COD by the RCOD:

- i. Commissioning engineers (for installation, erection and testing at the Complex) were scheduled to reach Pakistan in December 2008, but the war-like situation between India and Pakistan after Mumbai attacks in November 2008 caused them to cancel their trip. After untiring efforts in persuading the respective equipment manufacturers, the EPC Contractor finally succeeded in bringing five engineers to Pakistan between December 2008 and January 2009.

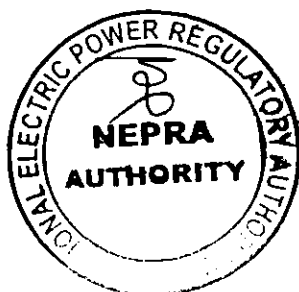
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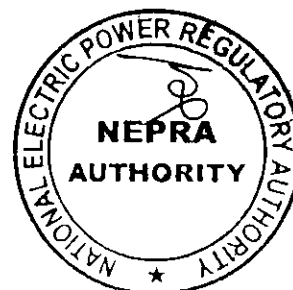
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- ii. Despite the killing of a Polish engineer in Pakistan on February 2, 2009 and the kidnapping of a United Nation's official in Pakistan on February 8, 2009, which halted the arrival of commissioning engineers for the entire month of February 2009, combined with the terrorist attack on the Sri Lankan cricket team in Lahore on March 3, 2009, which caused an additional unforeseen delay of two weeks in our Commissioning process, vigorous efforts on our part and that of the EPC Contractor, brought about the inflow of six commissioning engineers into Pakistan between March 15 and March 29, 2009.
- iii. Thereafter, the terrorist attack on the Police Training Center in Manawan near Lahore on March 30, 2009 yet again caused an unforeseen delay in engineer traffic into Pakistan, but the untiring efforts of the EPC Contractor and the Company resulted in an additional thirteen commissioning engineers arriving at the Site between April 20 and May 27, 2009.
- iv. On May 27, 2009, after a massive truck bomb exploded outside the Rescue 15 building in Lahore, the commissioning engineers from Dresser-Rand (who were to carry out the testing and commissioning of the steam turbine at the Complex) refused to come to Pakistan, and the EPC Contractor and the Company entered into continuous talks with Dresser-Rand to address the problem, resulting in the dispatch of a local team to meet with Dresser-Rand representatives in the U.A.E. on June 24 and 25, 2009 with a view to finalizing certain technical and commercial parameters to get Dresser-Rand's certification for the local Commissioning team for steam turbine at the Complex by proxy without adversely impacting the associated warranty provisions.
- v. Adverse impact on APL's commissioning schedule due to the devastating suicide attack on a seminary in Lahore in June 2009 wherein a very influential religious leader was killed, resulting in a massive strike and the declaration of a local holiday by the City District Government of Lahore.
- vi. After a brief interregnum during the later summer months, deadly terrorist attacks continued in Pakistan, which became so frequent and involved such high-profile targets, that international concern about travel to Pakistan rose to an unprecedented level. Such attacks included but were not limited to:
  1. An armed attack and hostage-taking at the Pakistan Army's General Headquarters in Rawalpindi in October 2009.
  2. A triple attack on the FIA Building in Lahore, the Police Training Academy in Manawan near Lahore, and the Police Training Center in Bedian near Lahore in October 2009.



3. Gun attacks on senior military personnel in Islamabad, and bomb and gun attacks on various targets in Peshawar, on an almost daily basis during the months of October and November 2009.
  4. Deadly terrorist attacks on a mosque in Parade Lane, Rawalpindi, at Moon Market in Lahore, and at a market in Dera Ghazi Khan in December 2009.
  5. It is a known fact that power shortages were an international phenomenon during the period between 2007 and 2010. Contractors involved in the engineering, procurement, supply and commissioning of reciprocating engine based power plants were fully occupied in different parts of the world, especially in South America, Asia and Europe. The best commissioning engineers obviously preferred to work in safe environments rather than travelling to Pakistan due to its precarious security situation. This enabled the travel of only low-tier engineers to perform commissioning activities in Pakistan, and is very pronounced in the case of reciprocating engine based power plants whereby not a single project in the country achieved its RCOD, even though equipment involving each such project arrived and was installed as per the contractually agreed project timelines. It was the inferior workmanship of low-tier engineers that caused delay in testing and commissioning of the equipment in all projects
- 4.4 According to APL in the foregoing circumstances, the performance of APL's EPC Contractor was seriously impaired and continuously delayed, at critical points in time during the commissioning phase of the Project, because of travel advisories issued to their citizens by the countries of origin of APL's plant, machinery and equipment (mostly in Europe and America) due to the precarious security situation in and involving Pakistan. Consequently the citizens of such countries were constantly refusing to travel to Pakistan, which, in APL's case, continuously caused delays in the performance of the EPC Contractor.
- 4.5 APL submitted that despite the virtually insurmountable Force Majeure challenges described above the COD was achieved on December 17, 2009. APL requested the Authority to allow the adjustments of the costs associated with overcoming these challenges, in the sum of Rs. 1,468.620 million (equivalent to US\$ 18.360 million) on account of IDC and Rs. 518.540 million (equivalent to US\$ 6.600 million) on account of ROEDC.
- 4.6 PPIB while disagreeing with APL's stance, pointed out that the relevant provision 15.6 of PPA express the events of relevant Force Majeure. In its decision the Authority has fully endorsed the view point of PPIB that APL's claim regarding



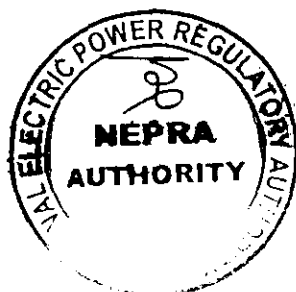


Force Majeure events does not match the provisions expressed in accordance with the provisions of PPA & IA. In the instance case, claim of APL regarding Force Majeure events is not correct. Clause 15.6 of the PPA expresses the events of the Force Majeure and how to give a notice when Force Majeure is rejected. There is dispute resolution mechanism under clause 15.7 of the PPA, which APL should have resorted to while working under the PPA and under the IA. So APL should have gone through that mechanism which is expressly available in IA & PPA. PPIB also stated that this case would become a precedent for another 9 or 10 projects and NEPRA has rightly upheld that there is no mechanism available in tariff approval for condoning the delays through adjustment of tariff at COD.

- 4.7 Representative of WPPO fully endorsed the opinion of the PPIB. WPPO submitted that the events which were highlighted by APL were unfortunately quite common in the country after 2007. WPPO submitted that the sponsors of the APL have huge business in the country and these kinds of smaller issues should have been the part of their project management. WPPO requested the Authority to decline the APL's request.
- 4.8 In light of above discussion, the Authority considers that there is no mechanism available in tariff for condoning the delays through adjustment of tariff at COD. Primarily this is a contractual issue between the parties as rightly pointed out by PPIB. Since a mechanism has been provided in the PPA to resolve such types of issues, APL may resort to such clauses of PPA. The Authority further considers that PPIB and Power Purchaser did not support the Petitioner's request for allowing the adjustment for delay in COD. In view thereof, the Authority finds no justification to alter its earlier decision.

5. Certain Exchange Rate Adjustment

- 5.1 APL submitted that as per specified Tariff Table on the first page of the decision dated 19<sup>th</sup> May 2010, the indexation of return on equity ("ROE") and ROEDC was on quarterly basis as in the case of other indexations. APL mentioned that they expect that the same will be implemented in the coming quarterly indexations accordingly. APL also refers to paragraph I of the decision wherein the formula for adjustments in insurance component was given. APL requested that the figure of US\$ 202.07 million may kindly be replaced with the correct figure of US\$ 207.07 million.
- 5.2 The APL management was informed during the hearing that all the quarterly adjustments have been given to the Petitioner though Authority's decision. As regards paragraph I of the decision, it was a typographical error in the formula of Insurance component and corrigendum in this regard will be issued separately.







6. Decision

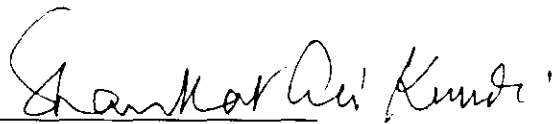
Having considered all the facts and figures it is hereby decided that:

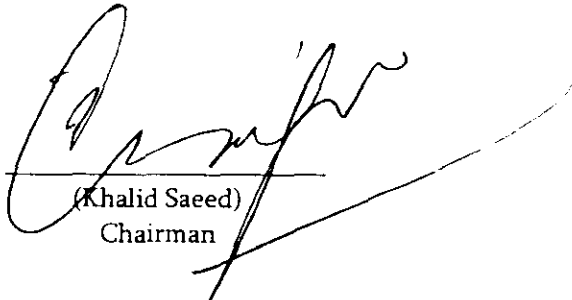
- i) There is no mechanism available in tariff to allow adjustment on account of delay in achieving COD. This is not in the domain of NEPRA. APL may get relief under the PPA and the IA. The Authority has therefore decided to reject the Review Petition to this extent. The decision earlier passed by the Authority in this regard shall remain intact.
- ii) The typographical error will be corrected and corrigendum will be issued separately in this regard. *b*

AUTHORITY

  
(Maqbool Ahmad Khawaja)  
Member

  
(Ghiasuddin Ahmed)  
Member

  
(Shaukat Ali Kundi)  
Vice Chairman  
31.12.2010

  
(Khalid Saeed)  
Chairman

