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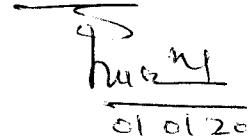
No. NEPRA/TRF-375/EPGL-2017/07-09
January 01, 2020

Subject: **Motion for Leave for Review filed by Etihad Power Generation Limited (EPGL) against Decision of the National Electric Power Regulatory Authority dated 20.02.2017 (Case No. NEPRA/TRF-375/EPGL-2017)**

Dear Sir,

Please find enclosed herewith the subject Decision of the Authority (06 Pages) in the matter of Motion for Leave for Review filed by Etihad Power Generation Limited (EPGL) against Decision of the National Electric Power Regulatory Authority dated 20.02.2017 in Case No. NEPRA/TRF-375/EPGL-2017, for information.

Enclosure: As above



01/01/20

(Syed Safeer Hussain)

Secretary
Ministry of Energy (Power Division)
'A' Block, Pak Secretariat
Islamabad s

CC:

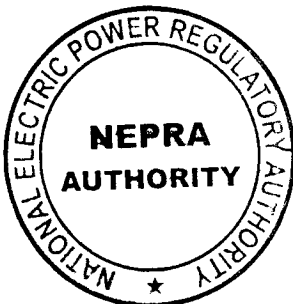
1. Secretary, Cabinet Division, Cabinet Secretariat, Islamabad.
2. Secretary, Ministry of Finance, 'Q' Block, Pak Secretariat, Islamabad.



MOTION FOR LEAVE FOR REVIEW FILED BY ETIHAD POWER GENERATION LIMITED
AGAINST DECISION OF THE NATIONAL ELECTRIC POWER REGULATORY AUTHORITY DATED
FEBRUARY 20, 2017

1. Etihad Power Generation Limited (hereinafter referred to as the "EPGL" or "the petitioner" or "the project company") vide letter dated June 26, 2019 filed subject review petition against the decision of National Electric Power Regulatory Authority (hereinafter referred to as "NEPRA" or "the Authority") dated February 20, 2017 (hereinafter referred to as "impugned decision") issued in the matter of unconditional acceptance of Bagasse Upfront Tariff, 2013 by EPGL for its 74 MW (Gross Capacity) New Bagasse Based Cogeneration Power Plant to be setup in Mauza Karamabad, District Rahim Yar Khan, Punjab. The petitioner submitted that the said review petition has been filed under the relevant NEPRA laws and requested for the grant of extension of 20 months in time of achieving Commercial Operations Date ("COD").
2. The Authority admitted the subject review motion in RM 19-329 held on July 16, 2019 for further processing. The hearing in the matter was scheduled for August 28, 2019 (Wednesday) at 11:00 a.m. at NEPRA Tower, Islamabad. Notices of hearing were sent to relevant stakeholders, i.e. National Transmission & Despatch Company Limited ("NTDCL"), Central Power Purchasing Agency Guarantee Limited ("CPPA-G"), Alternative Energy Development Board ("AEDB"), Ministry of Energy ("MoE") on August 21, 2019 for participation in the hearing/proceedings. In response to notice of hearing, comments were received from AEDB only. The hearing of subject review motion was held on August 28, 2019 which was attended by the representatives of petitioner.
3. It is noted that the subject review is the second petition (hereinafter referred to as "2nd review") filed by EPGL requesting for the extension in the time to achieve COD as given in the impugned decision. Earlier, the petitioner vide its letter dated January 18, 2019 had filed the 1st review motion (hereinafter referred to as "1st review") also requesting for the extension in COD time given in the impugned decision. The Authority vide its decision (hereinafter referred to as "Decision") dated May 28, 2019 dismissed the 1st review motion on the basis of the following:

"14. The Authority noted that the Upfront Tariff, 2013 was unconditionally accepted by the petitioner. That is, it unconditionally accepted, inter alia, to achieve COD within the time frame of two years. This means that EPGL was required to achieve COD by February 19, 2019 and it was the risk and responsibility of the petitioner to meet this timeline. The Authority is of the



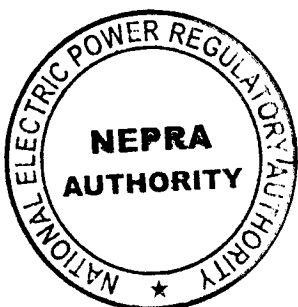
view that the grant of extension of time in achieving COD to EPGL would be tantamount to changing the terms of principal determination of Upfront Tariff, 2013. This action is not appropriate as it would not only distinguish the award of same tariff among different projects but also would be the violation of Upfront Tariff Regulations, 2011.

15. It is noted that award of tariff to EPGL, inter alia, has led to signing of EPA between the petitioner and CPPA-G. The said EPA, which is in force, states in detail the provisions related to treatment of delay in achieving COD. It is observed that other new bagasse cogeneration projects that were awarded Upfront Tariff, 2013 and could not meet the prescribed timeline of COD also dealt the issue of the said delay under the relevant provisions of their respective EPAs. Therefore, the petitioner may consider approaching CPPA-G for the resolution of this issue while presenting all the grounds submitted under this review motion. In case of any dispute with the power purchaser on this issue, the petitioner may consider approaching the Authority under the relevant framework."

4. In the 2nd review motion, EPGL has again requested for an extension of 20 months in the time period to achieve COD and has requested to reckon that time from the date the decision on 2nd review motion is issued by NEPRA. EPGL, in the 2nd review motion, stated that it approached CPPA-G for the extension of the required COD in pursuance of the directive in aforesaid NEPRA's Decision. EPGL submitted that two hearings on May 16, 2019 and June 18, 2019 were granted by the CPPA-G Board, chaired by the Secretary Power Division/Chairman CPPA-G to determine the extension in time of EPGL's required COD. A special committee was also formed by CPPA-G comprising of its two board members to determine delays and causes of delays. The petitioner submitted that CPPA-G after extensive deliberation rendered its decision on June 21, 2019 which forms the basis of the 2nd review motion. A copy of CPPA-G's Decision dated June 21, 2019 has also been submitted by the petitioner; relevant extracts thereof are reproduced as under:

"...The Committee after due deliberation and examination of records reached the conclusion as follows;

- As far as the grant of EPA by CPPA-G is concerned no delay could be proven.
- AEDB has delayed the execution of the Implementation Agreement (IA) by 9.33 months.
- No delays in execution of Direct IA and Direct EPA could be established.

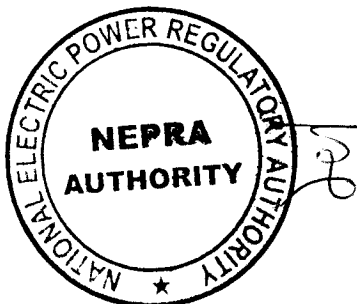


- A delay of 6.33 months in extensions of Letter of Support (LOS) by AEDB has also been established with the proviso that this does not seem to have a bearing on achievement of FINANCIAL CLOSE

...After looking at all the record and giving due opportunity to the Petitioner, it is our considered view that the Petitioner's claim of delays caused by AEDB and subsequent consequences of them not being able to achieve Financial Close can be considered to have merit and substance. It is also worth considering that according to EPGL an amount of USD 37 million has been invested out of total required investment of 100 million with physical progress of 30-40% approximately and going by the spirit of justice, the same should not go waste. Having said this, we are constrained to point out that the EPA and the IA of this project have not become effective because FINANCIAL CLOSE has not been achieved. Hence, NEPRA's direction in para-15 of their order cannot apply to this matter with regards to the provisions of the EPA. The EPA and the IA become effective only once the Financial Close has been achieved. Even in case of the projects where the EPA's clauses relating to extension in RCOD were implemented, the Financial Close had been achieved, which factor NEPRA's order dated 28th May 2019 has not considered while citing their example. In this circumstance where the IA and the EPA are not effective, only the LOS remains as a legally effective document. The LOS does not contain any clause dealing with COD or its extension.

Considering the above discussion, while we agree that the delays established by the CPPA-G's Committee may have had negative impact on the petitioners ability to achieve Financial Close and hence COD within prescribed time, CPPA-G does not have the legal authority to decide on the extension of COD and the Petitioner is advised to approach NEPRA for relief as per the law."

5. During the hearing, the petitioner again highlighted the grounds it submitted earlier in 1st review motion based on which it is requesting for the extension in the COD time. It also put emphasis on the aforesaid decision of CPPA-G while referring the part where CPPA-G has established that delay has occurred on part of AEDB. Post hearing, following additional grounds/comments have also been submitted by EPGL:

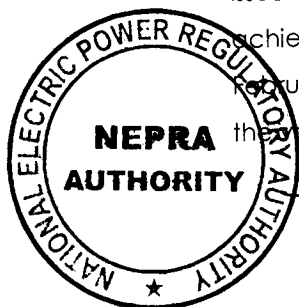




- Any change or modification in the COD time prescribed in the notified Tariff Determination can only be undertaken by NEPRA and would require a revised Tariff Determination which has to be again notified in the official gazette.
- Few clauses of EPA were referred by the petitioner which provides that not achieving COD within 400 days of required COD would result in termination of its EPA.
- Different provisions of NEPRA laws were referred to establish that the Authority can review its decision and a number of precedents were also mentioned by the petitioner where the Authority extended the stated timeline.

Comments of Alternative Energy Development Board (AEDB)

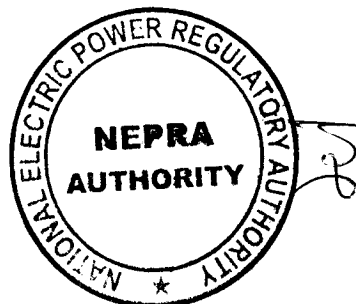
6. AEDB has submitted that Letter of Intent (LOI) and Letter of Support (LOS) was issued to EPGL on May 29, 2014 & March 22, 2017 respectively. The LOS was initially valid up to March 20, 2018. During the initial validity period of the LOS, EPGL signed Energy Purchase Agreement (EPA) with CPPA-G on April 25, 2017 and Implementation Agreement (IA) with AEDB on February 16, 2018. However, the direct agreements (EPA Direct & IA Direct) were not signed with EPGL during the initial validity period of the LOS due to delays on part of GoP entities. Accordingly, EPGL vide letter dated February 12, 2018 requested AEDB for an extension of six (06) months in the validity period of the LOS. However during the pendency of the extension request, AEDB signed the IA Direct with EPGL on May 30, 2018 and CPPA-G signed the EPA Direct with EPGL on August 10, 2018. Later EPGL on September 19, 2018 requested AEDB for an extension of one (01) year in the validity period of LOS and the same was allowed vide letter dated September 26, 2018 i.e. up to March 20, 2019 considering the delays on part of GoP entities. AEDB submitted that all the Security Documents (IA, EPA & Directs) were signed between the GoP entities & EPGL prior to issuance of the LOS extension letter and nothing was pending on part of GoP side. AEDB further submitted that on January 18, 2019, it inquired the status of Financial Close from EPGL. EPGL responded vide letter dated January 21, 2019 that "since major works on financial close and satisfaction of CPs started after getting necessary approvals/execution of agreements with GoP institutions; which were mandatory prerequisite of lenders for financial close. Hence, currently we are finalizing the arrangement of Seller Letter of Credit (the "SLOC") in favor of CPPA-G. The SLOC has been arranged and is due to be issued shortly. Afterward, we will be proceed for issuance of sovereign guaranteed from the GoP in favor of EPGL." However, EPGL failed to achieve the Financial Closing within the extended validity period of the LOS and on February 15, 2019, EPGL once again requested for an extension of another one (01) year in the validity period of the LOS, which is yet to be decided by AEDB's board.



Analysis and Decision of the Authority

7. The Authority has noted that a number of new bagasse cogeneration projects that were awarded upfront tariff, 2013 could not achieve the COD as per the timeline given in their respective tariff decisions. All those projects were able to achieve financial close and dealt the matter of delay in achieving COD under the terms of EPA. It has also been noted that the EPGL had relatively more time (post signing of EPA & IA) than couple of other new bagasse cogeneration projects. Had EPGL achieved the financial close then its delay in achieving COD would also have been dealt under the provisions of EPA (being an effective document) and the same was given in the Decision. Now granting the requested extension to EPGL for achieving financial close would be equivalent of fulfilling the conditions set by its lenders which cannot be considered appropriate especially under the regime of upfront tariff.
8. The Authority has noted that the cases (as referred by the petitioner) where the Authority granted extension were of original upfront tariff determinations, i.e. change was made in the principal upfront tariff determination. Whereas, the petitioner through subject review has applied for the change in the decision whereby the upfront tariff has been granted to an individual project. In its Decision also, the Authority stated that the changing the decision whereby upfront tariff has been granted to some project is not appropriate as it would distinguish the grant of same tariff among different projects. Hence, the cases referred by the petitioner are out of place for this particular case.
9. Notwithstanding above, the Authority again considered that the Clause 10 Part (IV) Guidelines and Standards of Upfront Tariff Regulations, 2011 provides that "the terms and conditions of upfront tariff determined/approved by the Authority shall form part of upfront tariff and once accepted shall not be subject to modification or adjustments except for the adjustments/indexations allowed at the time of approval of the application." The Authority noted that the Upfront Tariff, 2013 was unconditionally accepted by the petitioner. That is, it unconditionally accepted, inter alia, to achieve COD within the time frame of two years. This means that EPGL was required to achieve COD by February 20, 2019 and it was the risk and responsibility of the petitioner to meet this timeline. Accordingly, the grant of extension of time in achieving COD to EPGL means changing the terms of principal determination of Upfront Tariff, 2013. This action is not appropriate as it would be the violation of Upfront Tariff Regulations, 2011.

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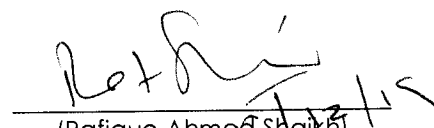
10. CPPA-G in its decision has stated that as per EPGL an amount of USD 37 million has been invested which, going by the spirit of justice, should not go waste. For that purpose, the Authority is of the view that EPGL may consider filing a new tariff petition under NEPRA (Tariff Standards and Procedure) Rules, 1998. For the grant of tariff to EPGL under that regime, the Authority may consider approving the legitimate and prudent cost already incurred by EPGL, subject to submission of verifiable documentary evidence.

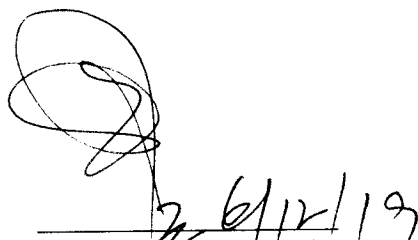
Order


11. The Authority considers that the request of the petitioner for the extension in the timeline of achieving COD is not maintainable. In view thereof, the instant review motion is hereby disposed of.

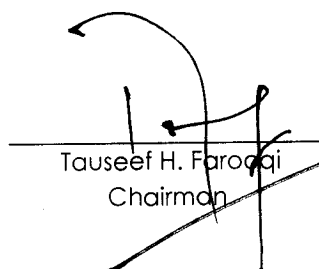
AUTHORITY

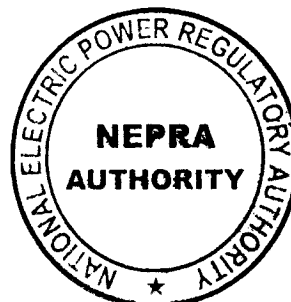

(Saif Ullah Chattha)
Member 5.12.2019

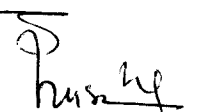

(Rafique Ahmed Shaikh)
Member


(Rehmatullah Baloch)
Member


Engr. Bahadur Shah
Member


Tauseef H. Farooqi
Chairman




01.01.20