



National Electric Power Regulatory Authority Islamic Republic of Pakistan

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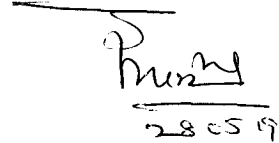
No. NEPRA/TRF-375/EPGL-2017/9084-9086
May 28, 2019

Subject: **Decision 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 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



(Syed Safeer Hussain)

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

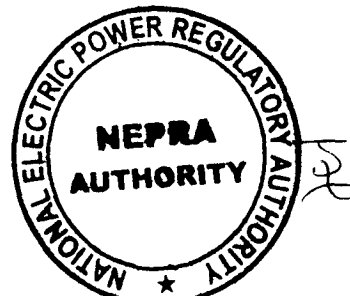
CC:

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

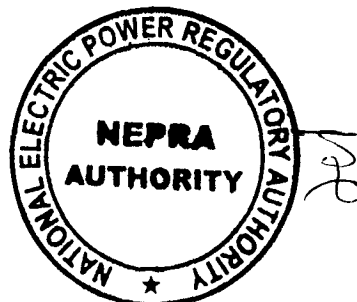
1. Etihad Power Generation Limited (hereinafter referred to as the "EPGL" or "the petitioner" or "the project company/company") vide letter dated January 18, 2019 filed motion for leave for review ("review motion") seeking review of the decision of National Electric Power Regulatory Authority ("NEPRA" or "the Authority") dated February 20, 2017 ("Decision" or "Impugned Decision"). The petitioner requested the Authority to grant extension in achieving the Commercial Operations Date ("COD").
2. The review motion was filed by the petitioner under the Regulations of Generation, Transmission and Distribution of Electric Power Act, 1997 ("the Act") read with Regulation 3(2) of NEPRA (Review Procedure) Regulations, 2009 ("Review Regulations") and applicable provisions of NEPRA laws.
3. Rule 16 (6) of the NEPRA (Tariff Standards and Procedure) Rules, 1998 ("Tariff Rules, 1998") requires that within ten days of service of a final order, determination or 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.
4. The review motion of EPGL was examined and it was found to be barred by time as it was filed after a delay of twenty three (23) months of the issuance of Impugned Decision. However, EPGL had requested the Authority to condone the delay in filing of the review motion. The Authority while considering the request of EPGL and to determine the merits of the case decided to condone the delay in filing of the review motion in terms of regulation 3(3) of Review Regulations and accordingly admitted the review motion.
5. To consider the contentions of EPGL and to provide it an opportunity to explain its point of view, the Authority decided to hold a hearing on this matter on February 27, 2019. Notices of hearing were sent to National Transmission and Despatch Company Limited ("NTDCL"), Central Power Purchasing Agency Guarantee Limited (CPPA-G"), Alternative Energy Development Board ("AEDB") and Ministry of Energy ("MOE") on February 20, 2019 for participation in the hearing.
6. In response to notice of hearing, CPPA-G submitted its comments vide letter dated February 22, 2019. The hearing on February 27, 2019 was attended by the representatives of the petitioner, AEDB and CPPA-G. During the hearing, the petitioner presented its case

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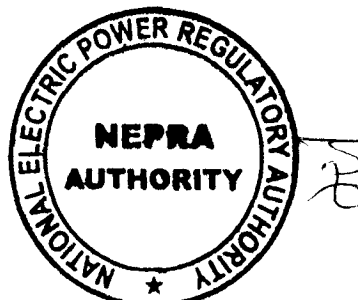


and the comments were submitted by the representative of AEDB. Later, AEDB also submitted its comments in writing on March 04, 2019.

7. Brief facts of the case are that the Authority approved Upfront Tariff for Bagasse Cogeneration Power Projects based on high pressure boilers (60 bars and above) vide its determination dated May 29, 2013 ("Upfront Tariff, 2013") in accordance with the NEPRA Upfront Tariff (Approval and Procedure) Regulations, 2011 ("Upfront Tariff Regulations, 2011").
8. EPGL applied for unconditional acceptance of Upfront Tariff, 2013 for its 74.40 MW project on November 11, 2016 and was awarded the same vide Impugned Decision on February 20, 2017. Clause 3 (IV) (iv) of the Order part of the Decision provides that "the applicant is required to achieve COD within two years from the date of its issuance". In accordance thereto, the prescribed date to achieve COD under the Decision was February 19, 2019.
9. In the review motion, the petitioner, inter alia, requested the Authority that the time to achieve COD as specified in the Impugned Decision may be extended by twenty (20) months. The brief of the grounds/submissions of the petitioner as given in the review motion and during the hearing are given below.
 - EPGL has submitted that its project has faced unprecedented delays due to, inter alia, the execution of concession documents, i.e. Implementation Agreement ("IA") Energy Purchase Agreement ("EPA"). It submitted that these documents are the essential preconditions for commencing the due diligence process that leads up to financial close and COD.
 - The petitioner submitted that CPPA-G signed the EPA with it on April 25, 2017 for which it applied on January 02, 2017, i.e. nearly after four (04) months. The Direct Agreement to the EPA with CPPA-G was executed on August 10, 2018 for which application was submitted by the project company on March 21, 2018, i.e. after five (05) months.
 - EPGL submitted that its Letter of Intent ("LOI") dated May 29, 2014 provides that the standard time of signing IA is fifteen (15) days from the date of application. However, it submitted that AEDB executed the IA with EPGL on February 16, 2018, i.e. after ten (10) months from the date of application in April, 2017. It stated that this delay was on account of AEDB's admitted inability to finalize and engage a legal counsel. The petitioner also submitted that following the execution of the IA, AEDB executed Direct Agreement to IA on May 30, 2018 for which application was submitted on March 21, 2018, i.e. after around two (02) months



- The petitioner submitted that it was awarded LOS pursuant to which the required financial closing date was March 20, 2018. In light of the foregoing delays in signing of IA, the petitioner submitted that it made an application to AEDB on February 12, 2018 requesting an extension of time for achieving financial closing. AEDB granted that extension on September 26, 2018 for twelve months, i.e. up to March 20, 2019. The petitioner highlighted that AEDB granted extension to the LOS without an enhancement to the performance guarantee amount, which is otherwise required if the reasons for extension are attributable to the project company.
- The petitioner submitted that the aforesaid delays left the company and the project financiers with only five (5) months (when calculated from the date of extension of LOS) to carry out their due diligence criteria/satisfaction of other condition precedents, achieve financial close and complete the construction of the project.
- The petitioner submitted that despite the challenges, the company has successfully executed major financing documents and expects to achieve financial close on March 15, 2019. The petitioner further submitted that the company has so far spent approximately USD 37 million in project development and construction activities which shows company's commitment and interest in the development of the project.
- The petitioner also submitted that it understands that the company's failure to achieve COD within two years from the date of Decision does not invalidate tariff granted to it. To support this submission, the petitioner referred the Determination of the Authority regarding Upfront Tariff 2017 for New Bagasse based Co-Generation Projects dated November 10, 2017 (Upfront Tariff, 2017") whereby the Authority acknowledged that the failure of a project to complete construction within the prescribed time period will not invalidate that tariff granted to it. The petitioner also referred the cases of two projects namely Hamza Sugar Mills Limited (HSML) and Thal Industries Corporation Limited (TICL) that could not achieve COD in the specified time frame of twenty four (24) months but their tariffs remained valid.
- The petitioner submitted that the Required COD under EPA is linked with the Impugned Decision; hence, the delay in achieving COD within the prescribed time will cause the project company to pay liquidated damages.
- Stating above, the petitioner has requested that the time of achieving COD as prescribed in its Decision may be extended by twenty months (commencing from the



date of decision on review motion) and CPPA-G be directed to amend the EPA and extend the RCOD accordingly.

Comments of Alternative Energy Development Board

- AEDB during the hearing and through letter dated March 04, 2019 submitted that the LOS to EPGL was issued on March 22, 2017 which was initially valid till March 20, 2018. In terms of LOS, EPGL signed EPA with CPPA-G on April 25, 2017. For review /negotiation of the draft IA, EPGL approached AEDB during May, 2017 and the IA was executed with M/s EPGL on February 16, 2018. The project company requested AEDB for extension in the validity of LOS to achieve its remaining milestones on the basis of delays faced on the part of Government agencies. AEDB, after seeking clarification with regards to Cabinet Committee on Energy ("CCOE") decision dated December 12, 2017, granted extension in validity of the LOS of EPGL on September 26, 2018 till March 20, 2019. In the meantime, AEDB also executed Direct Agreement to the IA with EPGL on May 30, 2018 whereas its Direct Agreement to the EPA was executed on August 10, 2018. AEDB submitted that the company commenced construction of the project in September 2017. All the relevant agreements with CPPA-G/AEDB had been signed by EPGL prior to AEDB's grant of extension in LOS on September 26, 2018 giving approximate six (06) months for achievement of financial close. AEDB submitted that at present, the project company has requested AEDB for grant of another extension in the validity of LOS which is being processed as per rules. During the hearing, the representative of AEDB submitted that it supports the request of the petitioner with respect to extension in the time of achieving COD.

Comments of Central Power Purchasing Agency Guarantee Limited

- CPPA-G vide letter dated February 22, 2019 submitted that EPGL has unconditionally accepted the Upfront Tariff, 2013 therefore, EPGL is obligated to comply the regulatory requirements attached to that determination in order to gain benefits under the said tariff. CPPA-G submitted that Upfront Tariff, 2013 of Rs. 10.4078 /kWh had expired on May 28, 2017 and new Upfront Tariff, 2017 of Rs. 7.9741/kWh has been determined by the Authority on November 10, 2017 which is the representative of technological advancement, risk matrix of the sector, higher efficiency benchmarks, reduced return on equity and increased energy output. Therefore award of Upfront Tariff, 2013 to EPGL in the current circumstances will adversely affect the basket price and will burden the end consumer by Rs. 650 million annually. Further, CPPA-G



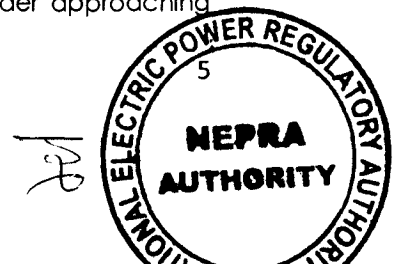
submitted that CCoE on December 12, 2017 decided that all projects based-on wind, solar, small hydel and bagasse energy will be awarded through competitive bidding.

10. EPGL advanced its response on the comments of CPPA-G and submitted that delay in achieving COD does not invalidate its tariff and decision of CCoE does not apply on its project as that is valid for the projects whose EPA or IA had not been signed till the date of that decision.
11. The Authority also noted that Multan Electric Power Company ("MEPCO") vide its letter dated March 04, 2019 forwarded the information (enclosed therewith) received from the Project Director, Grid System Construction, MEPCO. In that enclosed letter, Project Director, MEPCO stated that the expected completion of feeding transmission line, i.e. interconnection of 74 MW EPGL is up to December, 2019.

Analysis and Decision of the Authority

12. Upfront Tariff, 2013 states that "the project sponsors will be required to achieve COD within two years from date of grant of Upfront Tariff by the Authority".
13. 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".
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 the 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

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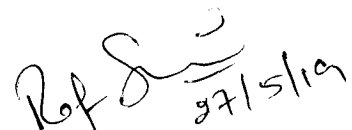
CPPA-G for the resolution of this issue while presenting all the grounds submitted under this review motion. In case of any dispute with the power purchaser on this issue, the petitioner may consider approaching the Authority under the relevant framework.

Order

16. 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 dismissed.

AUTHORITY


(Saif Ullah Chattha)
Member


(Rafique Ahmed Shaikh)
Member


27/5/19
(Rehmatullah Baloch)
Vice Chairman

